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Part III

Federal Election Commission

11 CFR Parts 100, et al.
Coordinated and Independent Expenditures; Proposed Rule

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 102, 104, 105, 109, 110, and 114

[Notice 2002–16]

Coordinated and Independent Expenditures

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules relating to payments for communications that are coordinated with a candidate, a candidate's authorized committee, or a political party committee. The proposed rules would also address independent expenditures and expenditures by political party committees that are made either in coordination with, or independently from, candidates. These regulations would implement several requirements in the Bipartisan Campaign Reform Act of 2002 (''BCRA'') that significantly amend the Federal Election Campaign Act of 1971, as amended (''FECA'' or the ''Act''). Further information is contained in the Supplementary Information that follows. Please note that the Commission has not made a final decision on any of these proposals.

DATES: Comments must be received on or before October 11, 2002. The Commission will hold a hearing on these proposed rules on October 23 and 24, 2002, at 9:30 a.m. Commenters wishing to testify at the hearing must submit written or electronic comments no later than October 11, 2002, and must so indicate in their comments.

ADDRESSES: All comments should be addressed to Mr. John Vergelli, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Electronic mail comments should be sent to *BCRAcoord@fec.gov* and must include the full name, electronic mail address, and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address, and postal service address of the commenter will not be considered. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its website within ten (10) business days of the close of the comment period. The hearing will be held in the Commission's ninth floor meeting room, 999 E St. NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. John Vergelli, Acting Assistant General Counsel, or Attorneys Mark Allen (coordinated party expenditures), Richard Ewell (coordinated communications paid for by other political committees and other persons), Tony Buckley (electioneering communications), or Cheryl Fowle (reporting requirements), 999 E Street NW., Washington, DC 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, as amended (''FECA'' or the ''Act''), 2 U.S.C. 431 *et seq.* This is one of a series of Notices of Proposed Rulemakings (''NPRM'') the Commission is publishing over the next several months in order to meet the rulemaking deadlines set out in BCRA. The deadline for the promulgation of these rules is 270 days after the date of enactment of BCRA, or December 22, 2002.

This NPRM primarily addresses communications that are made independently from, or in coordination with, a candidate, an authorized committee of a candidate, or a political party committee. The proposed regulations would set forth the meaning of ''coordination.'' They would also set forth statutory requirements for political party committees with respect to the permitted timing of independent and coordinated expenditures, and transfers and assignments.

Introduction

I. Statutory Overview

FECA limits the amount of contributions to Federal candidates, their authorized committees, and other political committees. 2 U.S.C. 441a(a). Under FECA and the Commission's regulations, these contributions may take the form of money or ''anything of value'' (the latter would be an ''in-kind contribution'' provided to a candidate or political committee. *See* 11 CFR 100.52(d)(1). Candidates must disclose all contributions they receive. 2 U.S.C. 434(b)(2). Since the recipient does not actually receive a cash payment from an in-kind contribution, the recipient must report the value of an in-kind contribution as both a contribution received and an expenditure made so that the receipt of the contribution will be reported without overstating the cash-on-hand in the committee's treasury. *See* 11 CFR 104.13.

II. Overview of BCRA Changes to FECA and Commission Regulations

In BCRA, Congress revised FECA's definition of ''independent expenditure.'' 2 U.S.C. 431(17). The revision added a reference to political party committees and their agents and reworked other aspects of the former language. Corresponding revisions would be made to the regulations in 11 CFR 100.16.

Congress repealed the Commission's pre-BCRA regulations regarding ''coordinated general public political communications'' (at pre-BCRA 11 CFR 100.23) and directed the Commission to adopt new regulations on ''coordinated communications'' in their place. Pub. L. 107–155, sec. 214(b), (c) (March 27, 2002). The Commission proposes a new section 11 CFR 109.21 to implement the Congressional mandate.

In addition, the proposed rules would implement several new restrictions found in BCRA on the timing of independent and coordinated expenditures made by committees of political parties. 2 U.S.C. 441a(d)(4). Those regulations would be in new 11 CFR part 109, subpart D. Similarly, Congress established new restrictions on transfers between committees of a political party. 2 U.S.C. 441a(d)(4). Those changes, as well as amendments to the rules on the assignment of coordinated party expenditure authority in pre-BCRA 11 CFR 110.7, would also be reflected in new 11 CFR part 109, subpart D.

Finally, Congress established new reporting obligations for independent expenditures. 2 U.S.C. 434(a)(5) and (g). *See* proposed 11 CFR 100.19, 104.4, 104.5, 105.2, and 109.10.

Definition of Independent Expenditure

The Commission proposes several changes to the definition of ''independent expenditure'' in 11 CFR 100.16 in light of several Congressional changes to the statutory definition of the same term at 2 U.S.C. 431(17). Most significantly, the statutory definition of ''independent expenditure'' was modified to exclude coordination with a political party committee or its agents (in addition to the pre-BCRA exclusion of coordination with candidates). *Ibid.*

Proposed section 100.16 would contain two paragraphs. Proposed paragraph (a) would include the revised pre-BCRA section 100.16. The first sentence of proposed paragraph (a)

would be changed by adding a reference to political party committees and their agents, tracking BCRA's changes in 2 U.S.C. 431(17).

In BCRA, Congress deleted the term ''consultation'' from the list of activities that compromise the independence of expenditures. *See* 2 U.S.C. 431(17)(B). Proposed paragraph (a), however, would retain the term because it remains, post-BCRA, in other related provisions of the Act. Expenditures that are made in ''cooperation, consultation, or concert with, or at the request or suggestion of'' candidates, political committees, and agents thereof are contributions. *See* 2 U.S.C. 441a(a)(7)(B)(i) (emphasis added). Most importantly, the term ''consultation'' is used in a closely related provision added by BCRA itself. *See* 2 U.S.C. 441a(7)(B)(ii) as amended by Pub. L. 107–155, sec. 214(a) (expenditures made in ''cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party''). Thus, the proposed rules would retain the term ''consultation'' as an element in the regulatory definition of ''independent expenditure.''

Similarly, the Commission notes that while Congress referred to expenditures ''not made in concert or cooperation with . . . a political party committee *or its agents*'' in 2 U.S.C. 431(17) (emphasis added), it did not refer to agents of a party committee in 2 U.S.C. 441a(7)(B)(ii) when describing coordination with a party committee. The Commission would include agents of political party committees as persons who might take actions that would cause a communication to be coordinated with that party committee.

In BCRA, Congress repealed the pre-BCRA regulatory definition of ''coordinated general public political communication.'' *See* 11 CFR 100.23, repealed by Pub. L. 107–155, section 214(b) (March 27, 2002). Therefore, proposed paragraph (a) of section 100.16 would delete the term ''coordinated general public political communication,'' and replace it with references to ''coordinated communications'' from proposed section 109.21 and ''party coordinated communications'' from proposed section 109.37.

The Commission would move to proposed paragraph (b) of section 100.16, without other changes, the rule that expenditures made by a candidate's authorized committee on behalf of that candidate would never qualify as an independent expenditure. This rule, which is found at pre-BCRA 11 CFR 109.1(e), clarifies the basic definition of ''independent expenditure.''

Proposed Reorganization of 11 CFR Part 109

The Commission proposes to reorganize 11 CFR part 109 into four subparts. Subpart A would explain the scope of part 109 and define a key term. Subpart B would address reporting of independent expenditures. Subpart C would address coordination between a candidate or a political party and a person making a communication. Subpart D would set forth provisions applicable only to political party committees, including some pertaining to independent expenditures and support of candidates through coordinated party expenditures. *See* 2 U.S.C. 441a(d). The special authority for coordinated expenditures by political party committees, previously set forth in pre-BCRA 11 CFR 110.7, would be relocated to proposed 11 CFR 109.32 and other sections in subpart D.

Proposed Subpart A of Part 109: Scope and Definitions

Proposed new section 109.1 would introduce the scope of part 109. A definition found in pre-BCRA section 109.1 would be revised and moved to proposed section 109.3. The Commission would move the reporting requirements of pre-BCRA 11 CFR 109.2 to proposed 11 CFR 109.10, reserving section 109.2 to avoid potential confusion regarding this move.

Proposed 11 CFR 109.3 would define the term ''agent'' for use throughout part 109. This definition of ''agent'' would be based on the same concept that the Commission used in framing the definition of ''agent'' in the non-Federal funds or ''Soft Money'' rulemaking completed earlier this year. Final Rules and Explanation and Justification, ''Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money,'' 67 FR 49081 (July 29, 2002). The definition identifies the principal and enumerates particular activities in which the agent may engage on behalf of the principal. In order to preclude confusion with other regulatory definitions of ''agent'' (*e.g.*, 11 CFR 300.2(b)), this definition would be explicitly limited to 11 CFR part 109. The definition would differ in several respects from its pre-BCRA form in 11 CFR 109.1(b)(5). The proposed definition would encompass political party committees because the Act, as amended by BCRA, specifically covers, in the context of coordination, payments made by a person on behalf of political party committees. *See* 2 U.S.C. 441a(a)(7)(B)(ii).

The proposed revised definition of ''agent'' would focus on whether a purported agent has ''actual authority, either express or implied,'' to engage in one or more specified activities on behalf of specified principals. The specified activities would vary slightly depending on whether the agent engages in those activities on behalf of a national, State, district, or local committee of a party committee, or on behalf of a Federal candidate or officeholder. *See* proposed 11 CFR 109.3(a) and (b), respectively. The activities specified in the proposed rule would closely parallel activities associated with coordinated communications, as described in proposed 11 CFR 109.21(b), and would include requesting or suggesting that a communication be created, produced, or distributed, making or authorizing certain campaign-related communications, and material involvement in decisions regarding specific aspects of communications. See proposed 11 CFR 109.3(a)(1) through (5) and (b)(1) through (5). Thus, a person would be an agent when (1) expressly authorized by a specific principal to engage in specific activities; (2) engages in those activities on behalf of that specific principal; and (3) those activities would result in a coordinated communication if done directly by the candidate or a political party official.

The Commission seeks comments on whether the scope of the definition of ''agent'' should explicitly state that a person must be ''acting within the scope of his or her authority as an agent'' while engaged in the action in question (*e.g.*, making a request, participating in a substantial discussion) before he or she is considered an agent. Should the person be required to convey information that was only available to that person because of his or her role as an agent for the candidate or political party committee? Should a person be considered an agent if he or she bases his or her recommendations to a third party on information that was gained only due to that person's role as an agent for the campaign? The Commission also seeks comments on whether, and if so, under what circumstances, a person who is authorized by a candidate or political party committee to solicit or receive contributions or other transfers of funds, and who holds a formal or honorary position or title with the candidate's campaign or a political party committee, should be considered *per se* to be an agent of that candidate, an authorized committee of that candidate, or political party committee.

The Commission's pre-BCRA regulations include a special definition of ''person'' for part 109. 11 CFR

109.1(b)(1). The Commission has not included this separate definition of the term ''person'' in this Notice of Proposed Rulemaking because the term is already defined in pre-BCRA 11 CFR 100.10. Furthermore, the Commission is concerned that a separate definition of ''person'' in part 109 might be confusing or misinterpreted to permit labor organizations, corporations not qualified under 11 CFR 114.10(c), or other entities or individuals to pay for coordinated communications or to make independent expenditures where these entities and individuals are otherwise prohibited from making contributions or expenditures under the Act and Commission regulations. *See, e.g.*, 11 CFR 110.4 and 114.2. While the Commission would propose to specifically address these prohibitions in proposed 11 CFR 109.22, below, the Commission seeks comment on whether, and if so, how, the term ''person'' should be defined separately for the purposes of part 109.

Proposed Subpart B of Part 109: Independent Expenditures; Other Reporting Rules; Disclaimers

Under the Act, independent expenditures must be reported as follows: Political committees must report all independent expenditures on their regularly scheduled reports. In contrast, persons other than political committees must report independent expenditures that aggregate in excess of $250 in a calendar year. 2 U.S.C. 434(b)(4)(H)(iii), (c), (d), and (g). Political committees and other persons must file additional reports of independent expenditures (''24-hour reports'') when independent expenditures totaling $1,000 or more are made less than 20 days but more than 24 hours before an election (*i.e.*, primary, general, special, or runoff; *see* 11 CFR 100.2). BCRA moved the 24-hour reporting provisions from 2 U.S.C. 434(c)(2)(C) to 2 U.S.C. 434(g)(1). These reports must be received within 24 hours of the time the independent expenditures aggregate $1,000 or more. 2 U.S.C. 434(g)(1).

BCRA also adds a third type of report for certain independent expenditures. New ''48-hour reports'' are required when independent expenditures made at any time during the campaign, up to and including the 20th day before an election, aggregate $10,000 or more. 2 U.S.C. 434(g)(2). To implement BCRA's new reporting requirements for independent expenditures, the Commission is proposing changes to pre-BCRA 11 CFR 100.19, 104.4, 104.5, 105.2, and 109.2, which are discussed below.

I. When Must Reports of Independent Expenditures be Filed?

A. 11 CFR 100.19 File, Filed, or Filing (2 U.S.C. 434(a))

The Commission's regulations at 11 CFR 100.19 define *file, filed,* and *filing.* Paragraph (a) of section 100.19 would be unaffected by this rulemaking. Proposed paragraph (b) of section 100.19 would retain the pre-BCRA general rule that a document is considered timely filed if it is: (1) Delivered to the appropriate filing office (either the Commission or the Secretary of the Senate), or (2) sent by registered or certified mail and postmarked by 11:59 p.m. Eastern Standard/Daylight Time of the prescribed filing date—except for pre-election reports. The proposed revisions to paragraph (b) of section 100.19 would clarify that paragraph (b) is the general rule, but does not apply to reports addressed by paragraph (c) through proposed new paragraph (f). In pre-BCRA paragraph (b), the Commission notes that this general rule does not apply to 24-hour reports of independent expenditures, although the other exceptions are not mentioned.

Those exceptions would be as follows: Paragraph (c) for electronic filing—''filed'' means received by the Commission at or before 11:59 p.m. Eastern Standard/Daylight Time on the filing date; paragraph (d) for 24-hour and 48-hour reports of independent expenditures—''filed'' means received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following (24-hour reports) or the second day following (48-hour reports) the date on which the spending threshold is reached in accordance with 11 CFR 104.4(f); paragraph (e) for 48-hour notices of last-minute contributions—''filed'' means received by the Commission or the Secretary of the Senate within 48 hours of the receipt of a ''last-minute'' contribution of $1,000 or more.

Paragraph (c) of section 100.19 would remain unchanged.

Proposed revisions to paragraph (d) of section 100.19 would also require that the new 48-hour reports of independent expenditures, like the 24-hour reports, must be *received* rather than *filed* by the filing deadline. The proposed 48-hour reporting provision would allow filers to submit their reports using facsimile machines or electronic mail, as long as they are not required under 11 CFR 104.18 to file electronically. Under pre-BCRA paragraph (d) of section 100.19, 24-hour reports of independent expenditures are only considered timely filed if they are received by the Commission or Secretary of the Senate within 24 hours of the time the expenditure is made.[1] Thus, sending 24-hour reports by mail is not a viable option because it is unlikely that these reports will be received by the Commission within 24 hours of the making of the expenditure. *See Final Rules and Explanation and Justification for 11 CFR 100.19,* 67 FR 12834 (March 20, 2002.) Pre-BCRA paragraph (d) also states that 24-hour reports may be filed by facsimile machine or electronic mail, in addition to other permissible means of filing (*e.g.*, hand delivery or overnight courier). Because the reasons behind the handling of 24-hour reports apply equally to the essentially similar 48-hour reports, the Commission is proposing this parallel rule.

Additional proposed changes to 11 CFR 100.19 are being addressed by the Commission in a separate rulemaking. *See ''Electioneering Communications'' Notice of Proposed Rulemaking,* 67 FR 51131 (Aug. 7, 2002).

B. 11 CFR 104.5 Filing Dates (2 U.S.C. 434(a)(2))

Proposed paragraph (g) of 11 CFR 104.5 would move the pre-BCRA contents of paragraph (g) to proposed paragraph (g)(2) with revisions, and would add a new paragraph (g)(1), which would require that 48-hour reports of independent expenditures must be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Pre-BCRA paragraph (g) of 11 CFR 104.5 states that 24-hour reports of independent expenditures must be received by the appropriate officers no later than 24 hours after such independent expenditure is made.

II. Where Must Reports be Filed? 11 CFR 105.2 Place of Filing; Senate Candidates, their Principal Campaign Committees, and Committees Supporting Only Senate Candidates (2 U.S.C. 434(g)(3))

The Commission's pre-BCRA regulations require that 24-hour reports of independent expenditures supporting or opposing Senate candidates be filed with the Secretary of the Senate. *See* pre-BCRA 11 CFR 104.4(c), 109.2(b). In BCRA, Congress establishes the

[1] Note that BCRA, as passed on February 14, 2002, in the House and on March 20, 2002, in the Senate, would have required 24-hour reports to be *filed* rather than *received* within 24 hours of the time the independent expenditure was made. In technical corrections to BCRA, Congress amended section 212 of BCRA by reinstating the *received* requirement. H. Con. Res. 361.

Commission as the place of filing for both 24- and 48-hour reports of independent expenditures, regardless of the office being sought by the clearly identified candidate. 2 U.S.C. 434(g)(3)(A). The proposed revisions to section 105.2 would place the text of pre-BCRA 11 CFR 105.2 in proposed paragraph (a), adding the heading, ''General Rule.'' New proposed paragraph (b) of 11 CFR 105.2 would be headed, ''Exceptions,'' and would state that 24-and 48-hour reports of independent expenditures, and electioneering communications, *see* 11 CFR 104.19, must be filed with the Commission even if the candidate supported or opposed is running for the Senate. 2 U.S.C. 434(f).

III. 11 CFR 104.4 Independent Expenditures by Political Committees (2 U.S.C. 434(b), (g))

The Commission has established reporting requirements for political committees making independent expenditures in accordance with 2 U.S.C. 434(b) and (g). *See* pre-BCRA 11 CFR 104.4. Paragraph (a) of section 104.4 would be unaffected, other than the addition of a new heading, a grammatical correction and an updated cross-reference.

Proposed new paragraph (b) would address reports of independent expenditures made at any point in the campaign up to and including the 20th day before an election. Proposed paragraph (b)(1) would address independent expenditures aggregating *less than $10,000* with respect to a given election during the calendar year, up to and including the 20th day before an election. This calendar year aggregation would be based on 2 U.S.C. 434(b)(4), which requires calendar year aggregation for reports of independent expenditures by political committees. The Commission requests comments on whether a different time period, such as an election cycle, should be employed instead of the calendar year period.

Under this calendar year approach, political committees would report the independent expenditures on Schedule E of FEC Form 3X, filed no later than the regular reporting date under 11 CFR 104.5. The Commission would interpret 2 U.S.C. 434(g), added to the Act by BCRA, to require aggregation toward the various thresholds for independent expenditure reporting to be done on a per election basis within the calendar year. For example, if a political committee made $5,000 in independent expenditures with respect to a Senate race, and $5,000 in independent expenditures with respect to a House race, and both of these events occurred before the twentieth day before the election, that political committee would not be required to file 48-hour reports, but would be required to disclose the independent expenditures in its regularly scheduled reports. If the political committee makes $5,000 in independent expenditures with respect to a clearly identified candidate in the primary, and an additional $5,000 in independent expenditures with respect to the same candidate in the general election, no 48-hour reports would be required; but again the committee would be required to disclose the independent expenditures in its regularly scheduled reports.

Paragraph (b)(2) would address independent expenditures aggregating *$10,000 or more* during the calendar year up to and including the 20th day before an election. These reports would also be filed on Schedule E of FEC Form 3X. However, these reports would be required to be received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication which constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Further, political committees would have to file an additional 48-hour report each time subsequent independent expenditures reach the $10,000 threshold with respect to the same election to which the first report related.

The Commission proposes revisions to renumbered paragraph (c) (i.e., pre-BCRA 11 CFR 104.4(b)) stating that 24-hour reports must be *received* by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which the $1,000 threshold is reached during the final twenty days before the election. Further, proposed revisions to this paragraph would specifically state that additional 24-hour reports must be filed each time during the 24-hour reporting period that subsequent independent expenditures reach or exceed the $1,000 threshold with respect to the same election to which the previous report related.

Proposed paragraph (d) would contain the report verification information currently found in pre-BCRA paragraph (b) of section 104.4. There would be non-substantive grammatical changes to conform this paragraph to other changes in the overall section.

Proposed paragraph (e) would largely restate pre-BCRA paragraph (c) of section 104.4. The most significant proposed change to this paragraph would be to make the Commission and not the Secretary of the Senate the place of filing for 24- and 48-hour reports of independent expenditures relating to Senate candidates. 2 U.S.C. 434(g)(3). *See* the discussion of 11 CFR 105.2, above.

Proposed paragraph (f) of 11 CFR 104.4 would address aggregation of independent expenditures for reporting purposes. The provisions of pre-BCRA 11 CFR 109.1(f) would be redesignated and revised to explain when and how political committees and other persons making independent expenditures must aggregate independent expenditures for purposes of determining whether 48-hour and 24-hour reports must be filed. Note that this proposed aggregation rule would apply to independent expenditures by political committees, as well as other persons; proposed 11 CFR 109.10 (c) and (d) would cross-refer to this paragraph. Proposed paragraph (f) would establish that every date on which a communication that constitutes an independent expenditure is ''publicly distributed'' or otherwise publicly disseminated serves as the date that every person must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amounts ($1,000 for 24-hour reports or $10,000 for 48-hour reports). The term ''publicly distributed'' would have the same meaning as in proposed 11 CFR 100.29(b)(6), which the Commission has proposed as part of a separate rulemaking. *See ''Electioneering Communications'' Notice of Proposed Rulemaking,* 67 FR 51131 (Aug. 7, 2002). Thus, proposed paragraph (f) would set the same date as the starting date from which a person would have one or two days, where applicable, to file a 24-hour or 48-hour report on independent expenditures.

In addition, Congress changed the reporting requirements by adding the phrase ''or contracts to make'' to the statute. 2 U.S.C. 434(g)(1), (2). BCRA ties 24-hour and 48-hour reporting of independent expenditures to the time when a person ''makes or contracts to make independent expenditures * * *'' aggregating at or above the $1,000 and $10,000 thresholds, respectively. 2 U.S.C. 434(g)(4). Therefore, under proposed 11 CFR 104.4(f), each person would be required to include as of the proposed trigger date, in the calculation of the aggregate amount of independent expenditures both disbursements for independent expenditures *and* all contracts obligating funds for disbursement for independent expenditures. Under this approach and the proposed timing requirements described above, once a communication

that constitutes an independent expenditure is publicly distributed or disseminated as explained above, the person who paid for, or who contracted to pay for, the communication would be able to determine whether the communication satisfied the ''express advocacy'' requirement of the definition of an independent expenditure (*See* 11 CFR 100.16) and would be therefore be able to determine whether the disbursement for that communication constituted an independent expenditure. A person reaching or exceeding the applicable reporting threshold would be responsible for submitting a report by 11:59 p.m. Eastern Standard/Daylight Time of the day after, for 24-hour reporting, or two days after, for 48-hour reporting, the date of the public distribution or dissemination of that communication.

The Commission seeks comment on its proposed interpretation of BCRA's ''makes or contracts to make'' language and the triggering mechanism for 24-hour and 48-hour reports. Specifically, the Commission seeks comment on an alternative interpretation that would make the actual disbursement or the execution of the contract to make the disbursement for an independent expenditure, rather than the public distribution or dissemination of the resulting communication, the triggering mechanism for the reporting requirements once the disbursements and obligations equal or exceed the respective thresholds. This change would require earlier reporting than is currently required or proposed (i.e., when the communication is publicly disseminated). The policy reasons for adopting this alternative interpretation would be similar to those described in the NPRM on reporting of electioneering communications. *See ''Electioneering Communications'' Notice of Proposed Rulemaking,* 67 FR 51131 (Aug. 7, 2002).

IV. Proposed 11 CFR 109.10 How Do Persons Other Than Political Committees Report Independent Expenditures (2 U.S.C. 434(c), (d), and (g))?

Proposed new section 109.10 would set forth the revised reporting requirements of pre-BCRA section 109.2. Under proposed new section 109.10, persons other than political committees would have to report their independent expenditures on either FEC Form 5 or in a signed statement containing certain information regarding the person who made the independent expenditure and the nature of the expenditure itself.

Proposed paragraph (a) of 11 CFR 109.10 would provide a cross-reference to 11 CFR 104.4 for political committees, under which they must report independent expenditures. Paragraph (a) of pre-BCRA 11 CFR 109.2 would be moved to proposed paragraphs (b) and (c) of section 109.10.

Proposed paragraph (c) would address reports of independent expenditures aggregating $10,000 or more with respect to a given election from the beginning of the calendar year up to and including the 20th day before an election. This proposed paragraph would require that 48-hour reports of independent expenditures be *received* rather than *filed* by 11:59 pm of the second day after the date on which the $10,000 threshold is reached. *See* discussion of *received* versus *filed* in section 100.19, above. Pre-BCRA paragraph (b) of section 109.2 indicates that 24-hour reports must be received after a disbursement is made for an independent expenditure, but no later than 24 hours after an independent expenditure is ''made'' under pre-BCRA paragraph 109.1(f). *See* the discussion of proposed 11 CFR 104.4(f), above. Under the proposed rules, paragraph (b) of pre-BCRA section 109.2 would be moved to new paragraph (d) of 11 CFR 109.10 and revised to reflect the modification to the aggregation and filing requirements in proposed 11 CFR 100.19(d) and 104.4 that are discussed above.

Proposed revisions to paragraph (d) of 11 CFR 109.10 (pre-BCRA 11 CFR 109.2(b)) would also mirror the changes in 11 CFR 104.4(c) as to when 24-hour reports of independent expenditures aggregating $1,000 or more after the 20th day before the election.

Proposed paragraph (e) of 11 CFR 109.10 (i.e., pre-BCRA 11 CFR 109.2(a)(1) and (c)) would address the contents and verification of statements filed in lieu of FEC Form 5. Proposed paragraph (e) would include one significant change from pre-BCRA 109.2(a)(1) and (c): a person making an independent expenditure would now be required to certify that the expenditure was made independently from a political party committee and its agents, in addition to the pre-BCRA requirement of certification that the expenditure was not coordinated with a candidate, the candidate's authorized committee, or an agent of either of the foregoing. This change reflects the addition of political party committees to the definition of ''independent expenditure'' in 2 U.S.C. 431(17) and the description of coordination in 2 U.S.C. 441a(a)(7)(B)(ii) under BCRA. For the same reasons explained with reference to the definition of ''independent expenditure'' in proposed 11 CFR 100.16, the Commission would continue to include ''consultation'' in the description of activity that would cause an expenditure to lose its independence (i.e., ''in cooperation, *consultation,* or concert with'' a candidate or political party committee) even though the statutory definition in 2 U.S.C. 431(17) does not retain the term.

Section 109.11 Non-Authorization Notice (Disclaimers) (2 U.S.C. 441d)

The Commission would move the disclaimer requirement for independent expenditure communications from pre-BCRA 11 CFR 109.3 to proposed section 109.11. There would be no substantive changes to this section. Proposed changes to 11 CFR 110.11 itself will be forthcoming in a separate rulemaking, in light of BCRA's changes to the statutory disclaimer requirement. *See* 2 U.S.C. 441d.

Proposed Subpart C of Part 109 Coordination

I. Proposed 11 CFR 109.20 What Does ''Coordinated'' Mean?

Congress did not define the term ''coordinated'' directly in FECA or in BCRA, but it did provide that an expenditure is considered to be a contribution to a candidate when it is ''made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of,'' that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Likewise, in BCRA, Congress added a new paragraph to section 441a(a)(7)(B) to require that expenditures ''made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party shall be considered to be contributions made to such party committee.'' 2 U.S.C. 441a(a)(7)(B)(ii). Also, as explained above, an expenditure would not be ''independent'' if it is ''made in cooperation, consultation, or concert, with, or at the request or suggestion of,'' a candidate or a political party committee. *See* proposed 11 CFR 100.16.

Proposed section 109.20 would incorporate the language in 2 U.S.C. 441a(a)(7)(B)(i) and (ii) into the Commission's regulations. While the definition of ''coordinated'' in proposed paragraph 109.20(a) would potentially encompass a variety of payments made by a person on behalf of a candidate or

party committee, the Commission recognizes that the majority of issues regarding coordination involve communications. Therefore, the proposed regulations in 11 CFR 109.21 and 109.37 would specifically address the meaning of the phrase ''made in cooperation, consultation, or concert, with, or at the request or suggestion of'' in the context of communications.

In addition, proposed paragraph 109.20(b) would address expenditures that are not made for communications but that are coordinated with a candidate or political party committee. The Commission proposes to move pre-BCRA 11 CFR 109.1(c), to proposed paragraph (b). This provision would also be revised to make it clear that these other expenditures, when coordinated, are also in-kind contributions (or coordinated party expenditures, if a political party committee so elects) to the candidate or political party committee with whom or with which they are coordinated. The exceptions contained in 11 CFR part 100, subpart C (exceptions to the definition of ''contribution'') and subpart E (exceptions to the definition of ''expenditure'') would continue to apply. The Commission requests comment on whether these non-communication expenditures should be further addressed in a later rulemaking.

II. Background: The Commission's Pre-BCRA Coordination Regulations

Prior to the enactment of BCRA, the Commission initiated a series of rulemakings in response to the Supreme Court's ruling on the appropriate application of the so-called ''coordinated party expenditure'' provisions of FECA. *See Colorado Republican Federal Campaign Committee* v. *Federal Election Commission,* 518 U.S. 604 (1996) (''Colorado I''). For example, the Commission addressed the issue of coordination when it promulgated 11 CFR 100.23 in December 2000. *See Explanation and Justification of General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures,* 65 *Fed. Register* 76138 (Dec. 6, 2000). Section 100.23 defined a new term, ''coordinated general public political communication,'' drawing from judicial guidance in *Federal Election Commission* v. *The Christian Coalition,* 52 F.Supp.2d 45, 85 (D.D.C. 1999) (''*Christian Coalition*''), to determine whether expenditures for communications by unauthorized committees, advocacy groups, and individuals were coordinated with candidates or qualified as independent expenditures. Consistent with *Christian Coalition, id.* at 92, the Commission's regulations stated that such coordination could be found when candidates or their representatives influenced the creation or distribution of the communications by making requests or suggestions regarding, or exercising control or decision-making authority over, or engaging in ''substantial discussion or negotiation'' regarding, various aspects of the communications. 11 CFR 100.23(c)(2). The regulations explained that ''substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.'' 11 CFR 100.23(c)(2)(iii).

III. Proposed 11 CFR 109.21 What is a ''Coordinated Communication''?

In BCRA, Congress expressly repealed 11 CFR 100.23, Pub. L. 107–155, sec. 214(b) (March 27, 2002), and instructed the Commission to promulgate new regulations on ''coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees.'' Pub. L. 107–155, sec. 214(c) (March 27, 2002). Congress also mandated that the new regulations address four specific aspects of coordinated communications: republication of campaign materials; the use of a common vendor; communications directed or made by a former employee of a candidate or political party; and communications made after substantial discussion about the communication with a candidate or party. *See* Pub. L. 107–155, sec. 214(c)(1) through (4) (March 27, 2002).

A. Basic Elements of a ''Coordinated Communication''

Proposed paragraph (a) of section 109.21 would set forth the three required elements of a ''coordinated communication,'' which would comprise a three-part test. For a communication to be ''coordinated'' under the proposed rule, all three parts of the test would have to be satisfied. While no one of these elements standing alone fully answers the question of whether a communication is for the purpose of influencing a Federal election, *see* 11 CFR 100.52(a), 100.111(a), the Commission proposes that the satisfaction of all of the three specific tests set out in the proposed regulation justifies the conclusion that payments for the coordinated communication are for the purpose of influencing a Federal election.

The first part of the three-part test, in proposed paragraph (a)(1), would be that the communication would have to be paid for by someone other than a candidate, an authorized committee, or a political party committee. However, a person's status as a candidate would not exempt him or her from the coordination regulations with respect to payments he or she makes on behalf of a different candidate. Under proposed paragraph (a)(2), the second part of the three-part test would be a ''content standard'' regarding the subject matter of the communication. The content standards would be addressed in detail in proposed paragraph (c) of this section. Under proposed paragraph (a)(3), the final part of the test would be a ''conduct standard'' regarding the interactions between the person paying for the communication and the candidate or political party committee. The conduct standards would be addressed in detail in proposed paragraph (d).

B. Treatment of Coordinated Communications as In-Kind Contributions

Proposed paragraph (b) of section 109.21 would provide that a payment for a coordinated communication would be made ''for the purpose of influencing'' an election for Federal office, a phrase used by Congress in the definition of both ''expenditure'' and ''contribution.'' 2 U.S.C. 431(8)(A) and (9)(A). Thus, the Commission would make a determination that satisfying the content and conduct standards of proposed 11 CFR 109.21 would, in turn, satisfy the statutory requirements for an expenditure and a contribution.

Proposed paragraph (b)(1) would state the general rule that a payment for a coordinated communication would constitute an in-kind contribution to the candidate or political party committee with whom or with which it is coordinated, unless excepted under subpart C of 11 CFR part 100. Please note that this section encompasses communications described in 11 CFR 100.29(a)(1) (electioneering communications) in addition to other communications. Congress expressly provided that when these communications are coordinated with a candidate or political party committee, they must be treated like other coordinated communications in that disbursements for these communications are in-kind contributions to the candidate or party committee with whom or which they were coordinated. *See* 2 U.S.C. 441a(a)(7)(C).

Proposed paragraph (b)(2) would create an exception to the general rule of proposed paragraph (b)(1). Under the general rule in proposed paragraph (b)(1), a candidate or a political party committee would be deemed to receive an in-kind contribution, subject to the contribution limits, prohibitions, and reporting requirements of the Act. As explained below, two of the conduct standards, found in proposed paragraphs (d)(4) and (d)(5) of section 109.21, would not focus on the conduct of the candidate, his or her authorized committee, or his or her agents, but would focus on the conduct of the person paying for the communication, a common vendor, or a former employee. To avoid the result where a candidate or political party committee might be held responsible for receiving or accepting an in-kind contribution that did not result from its conduct or the conduct of its agents, the Commission proposes to explicitly provide that the candidate or political party committee would not receive or accept in-kind contributions that result from conduct described in the proposed conduct standards of paragraphs (d)(4) and (d)(5) of section 109.21. This treatment would be generally analogous to the handling of republished campaign materials under the Commission's current regulations. *See* 11 CFR 109.1(d)(1). However, please note that the person paying for a communication that is coordinated because of conduct described in proposed paragraphs (d)(4) or (d)(5) would still be responsible for making an in-kind contribution for purposes of the contribution limitations, prohibitions, and reporting requirements of the Act.

Proposed paragraph (b)(3) of 11 CFR 109.21 would provide that a political committee, other than a political party committee (which would be covered in proposed subpart D), must report payments for coordinated communications as in-kind contributions to the candidate or political party committee with whom or which they are coordinated. Proposed paragraph (b) would also clarify that a political party committee with which a communication is coordinated must report that communication as an in-kind contribution received under 11 CFR 104.13. The recipient political party committee must also report making a corresponding expenditure in the same amount. 11 CFR 104.13.

C. Content Standards

The Commission proposes to include ''content standards'' in the definition of ''coordinated communication.'' Such content standards would serve to limit 11 CFR 109.21 to communications whose subject matter is reasonably related to an election. The purpose of the content standards would not be to definitively decide if the content of the communication is for the purpose of influencing a Federal election. Answering that larger question would be the purpose of the three-part test of which the content standard would be one part.

Proposed paragraph (c) would set out four possible content standards. A communication that satisfies any one of the four would be deemed to satisfy the ''content'' requirement of the proposed regulation.

Under proposed paragraph (c)(1), the first content standard would be whether the communication satisfies the requirements of a communication described in proposed 11 CFR 100.29 or communication that would otherwise be ''electioneering communication.'' Notice of Proposed Rulemaking, ''Electioneering Communications,'' 67 FR 51131 (Aug. 7, 2002).

The second proposed content standard addresses the Congressional requirement that the Commission's new rules on coordinated communications address the ''republication of campaign materials.'' *See* Pub. L. 107–155, sec. 214(c)(1) (March 27, 2002). The Commission proposes to satisfy this mandate by providing, in proposed paragraph (c)(2) of section 109.21 that the republication of candidate materials in a communication would satisfy the content standard if the republication, dissemination, or distribution, in whole or in part, amounts to a contribution under proposed 11 CFR 100.57 (discussed below).

In light of the candidate's initial role in preparing the campaign material that is subsequently incorporated into a different, ''republished'' communication, it is possible that the candidate's involvement in the original preparation of part or all of that content might be construed as triggering one or more of the proposed conduct standards in paragraph (d) of this section. To avoid this result, the Commission would clarify that the candidate's actions in preparing the *original* campaign materials are not to be considered in the conduct analysis of proposed paragraph (d). Instead, the proposed rules in 11 CFR 109.21(d)(6) would only focus on the conduct of the candidate that occurs after the initial preparation of the campaign materials. For example, if a candidate requests or suggests that a supporter pay for the republication of a campaign ad, the resulting communication paid for by the supporter would satisfy both a content standard (republication) and conduct standard (request or suggestion, *see* discussion of proposed 11 CFR 109.21(d)(1) below) and would therefore be a coordinated communication. The Commission also proposes a second sentence in proposed paragraph (a)(3) of section 109.21 indicating that the republication content standard of proposed paragraph (c)(2) is evaluated under the conduct standard in proposed paragraph (d)(6).

The third content standard in proposed paragraph (c)(3) of section 109.21 would state that a communication would also satisfy the content standard if it ''expressly advocates'' the election or defeat of a clearly identified candidate for Federal office.

In addition to electioneering communications described in proposed 11 CFR 100.29, communications that republish campaign materials, and communications that ''expressly advocate'' the election or defeat of a clearly identified candidate, the Commission is considering a number of other possible content standards. In this NPRM, the Commission presents and discusses three other possible content standards, which are labeled Alternatives A through C in the proposed rules. Any, all, or none of these alternatives could be adopted in the final rules.

Each of these alternatives is framed in terms of a ''public communication,'' a term added to the Act by BCRA. 2 U.S.C. 431(22); 11 CFR 100.26. The use of the term ''public communication'' would provide consistency within the regulations and would distinguish covered communications from, for example, private correspondence and internal communications between a corporation or labor organization and its restricted class. In addition, although the term ''public communication'' covers a broad range of communications, it does not cover some forms of communications, such as those transmitted using the Internet and electronic mail. 11 CFR 100.26. The Commission seeks comment on whether it is appropriate to limit the scope of coordinated communications through the use of the term ''public communication,'' or whether it would be adequate for this purpose to require only that the communication be ''made available to the public.'' The Commission also seeks comment on these three alternatives, as well as any other possible standards.

Alternative A

The first alternative, labeled ''Alternative A'' in the proposed rules, would require that the communication

be a public communication, as defined in 11 CFR 100.26, and that it clearly identify a Federal candidate. The terms ''clearly identified'' and ''candidate'' are defined in 11 CFR 100.17 and 100.3, respectively. This alternative would seem to cover the widest range of public communications of all the alternatives.

Alternative B

The second alternative, labeled ''Alternative B'' in the proposed rules, would require that the communication promote or support or attack or oppose a clearly identified candidate. This standard would be modeled on one of the definitions of ''Federal election activity'' added to the Act by BCRA. 2 U.S.C. 431(20)(A)(iii), 11 CFR 100.24. A public communication that refers to a clearly identified Federal candidate, and ''that promotes or supports * * * or attacks or opposes'' the candidate or his or her opponent is one type of Federal election activity. The phrase ''promote or support, or attack or oppose'' is also the key component of the alternative statutory definition of ''electioneering communication.'' *See* 2 U.S.C. 434(f)(3)(A)(ii).

The content standards set out in proposed paragraph (c) would apply to any person who or which pays for a communication, including political party committees. *See* proposed 11 CFR 109.37(a)(2), discussed below, which would cover coordination of communications paid for by political party committees. The Commission seeks comment on whether, in the context of coordination, communications paid for by political party committees should be analyzed under different or additional content standards. For example, should the promote-or-support or attack-or-oppose content standard set out in Alternative B apply only to communications paid for by political party committees, and not to other persons? Should it be the only content standard applicable to communications paid for by political party committees?

Alternative C

The third alternative, labeled ''Alternative C'' in the proposed rules, would represent a new approach. This possible content standard would attempt to focus as much as possible on the face of the public communication or on facts on the public record. This latter point is important. The intent would be to require as little characterization of the meaning or the content of communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible. *See Buckley* v. *Valeo,* 424 U.S. 1, 42–44 (1975). For example, it should not require inquiry into whether the communication ''garners or diminishes support'' for the candidate or was designed to urge the public to elect a certain candidate or party. *Cf.* AO 1984–15 and 1985–14 (the former ''electioneering message'' standard). Alternative C would be applied by asking if certain things are true or false about the face of the public communication or with limited reference to external facts on the public record.

The proposed content standard would consist of a test based on three factors. If the public communication satisfies all three factors of the test, it would be deemed to satisfy the content standard.

The first factor would be proximity in time to a Federal election. Proposed paragraph (c)(4)(i) would require that the public communication must be made 120 days or fewer before either a primary election or a general election in which a Federal candidate appears on the ballot. The 120-day time-frame would be borrowed from 2 U.S.C. 431(20)(A)(i) (*see* 11 CFR 100.24(b)(1)), and it would have several advantages. First, it would be a ''bright-line'' rule. Second, it would focus the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times. The Commission seeks comment on what, if any, regulation should apply more than 120 days from an election in this context.

The second factor would relate to the intended audience of the public communication. Proposed paragraph (c)(4)(ii) would provide that a public communication must be ''directed to voters in the jurisdiction of the clearly identified Federal candidate.'' For example, a public communication that otherwise makes express statements about promoting or attacking Representative X or Senator Y for their stance on the ''X–Y Bill'' would not satisfy this requirement if it were only broadcast in Washington, DC, and not in either member's district or State. For purposes of this paragraph, ''jurisdiction'' would mean a member of Congress' district, the State of a U.S. Senator, and the entire United States for the President and Vice President in the general election or before the national nominating convention.

The third factor, which would be in paragraph (c)(4)(iii), would focus on public communications that are specifically linked to a clearly identified candidate. This factor would look to whether the public communication, on its face, makes express statements about the record or position or views on an issue, or the character, or the qualifications or fitness for office, or party affiliation of a clearly identified candidate. If this factor is satisfied, in a context where the factors in proposed paragraphs (c)(4)(i) and (ii) are also satisfied, the combination of these factors would lead to the conclusion that the public communication satisfies the content standard.

The Commission seeks comment on whether the third factor in Alternative C should be deleted from this proposed content standard. By deleting the third factor, the resulting content standard would resemble the ''electioneering communication'' content standard in proposed paragraph (c)(1), but with a broader time frame (120 days compared with 30 or 60 days) and with a different ''targeting'' requirement. Eliminating the third factor from Alternative C would allow for coordination to be established in the case of a communication that does not refer to a candidate's position on an issue, but rather refers specifically to a candidate along with his or her party's position on the issue or with the stand of another politician on the issue.

The Commission notes that most of the proposed content standards would require that a communication refer to a clearly identified candidate. The Commission seeks comment on whether a person whose interactions with a political party committee satisfy the conduct standard, and who pays for a communication that merely says ''Vote Democratic'' or ''Vote Republican,'' should be deemed to have made a coordinated communication, even though no specific candidate is mentioned. Should proposed 11 CFR 109.21(c) include a content standard that would cover this type of communication?

D. Conduct Standards

Proposed paragraph (d) of section 109.21 would list special types of conduct that would satisfy the ''conduct standard'' of the proposed, three-part coordination formula. Under the proposed rules, if one of these types of conduct is present, and the other requirements described in paragraphs (a) and (c) are satisfied, the communication would not be made ''totally independently'' from the candidate or party committee, *see Buckley,* 424 U.S. at 47, and thus would be coordinated. The Commission emphasizes that the conduct standards in proposed paragraph (d) would only apply if the communication in question also satisfies one or more of the ''content standards'' in proposed paragraph (c) of section 109.21. The introductory sentence of proposed

paragraph (d) would implement a Congressional mandate in BCRA that the coordination regulation not require ''agreement or formal collaboration.'' Pub. L. 107–155, sec. 214(c) (March 27, 2002); *see* more complete discussion below.

1. Request or Suggestion

Under the Act, as amended by BCRA, an expenditure made by any person at the ''request or suggestion'' of a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing is a contribution to the candidate or political party committee. 2 U.S.C. 441a(a)(7)(B)(i), (ii). The first proposed conduct standard, in proposed 11 CFR 109.21(d)(1), would implement this ''request or suggestion'' statutory language, which would have two prongs. Satisfying either prong would satisfy the proposed conduct standard.

The first prong, in proposed paragraph (d)(1)(i), would be satisfied if the person creating, producing, or distributing the communication does so at the request or suggestion of a candidate, authorized committee, political party committee, or agent of any of the foregoing. The *Buckley* court originally drew on the 1974 House and Senate reports accompanying the 1974 Amendments to the Act when it upheld language in that Act that distinguished a communication made ''at the request or suggestion'' of the candidate or political party committee from those that are made ''totally independently from the candidate and his campaign.'' *Buckley,* 424 U.S. at 47 (citing H.R. Rep. No. 93–1239, p. 6 (1974) and S. Rep. No. 93–689, p. 18 (1974)). A ''request or suggestion'' is therefore a form of coordination under the Act, as approved by *Buckley.* A request or suggestion encompasses the most direct form of coordination, given that the candidate or political party committee communicates desires to another person who effectuates them.

The Commission notes that this provision, for example, would not apply to general appeals for support, such as a speech at a campaign rally, but, in appropriate cases, would apply to requests or suggestions to specific individuals or small groups for the creation, production, or distribution of communications.

The second prong of the proposed ''request or suggestion'' conduct standard (proposed paragraph (d)(1)(ii)) would be satisfied if a person paying for the communication suggests the creation, production, or distribution of the communication to the candidate, authorized committee, political party committee, or agent of any of the foregoing, and the candidate or political party committee assents to the suggestion. This second prong of the proposed conduct standard would be intended to prevent circumvention of the statutory ''request or suggestion'' language (2 U.S.C. 441a(a)(7)(B)(i), (ii)) by, for example, the expedient of implicit understandings that a candidate or political party committee never formally requests or suggests a communication, but nonetheless creates the expectation that the suggestion should be made by a person paying for the communication.

The requirement of assent would limit the reach of the proposed regulation. A candidate or a political party committee would have accepted an in-kind contribution only if there is assent to the suggestion; by rejecting the suggestion, the candidate or political party committee may unilaterally avoid any coordination. The Commission requests comments on whether ''express'' assent should be required. Should the rule cover situations where assent is implied, and if so, how?

As discussed above, the *Buckley* Court expressly recognized a request or suggestion by a candidate as a direct form of coordination resulting in a contribution. *Buckley*, 424 U.S. at 47. The Commission seeks comment on whether this unique nature of requests or suggestions by candidates or political party committees indicates that such conduct should be handled differently under the proposed coordination regulations. Specifically, should a request or suggestion for a communication by a candidate or political party committee be viewed as a special case, and as sufficient, in and of itself and without reference to a ''content standard,'' to establish coordination?

2. Materially Involved in Decisions

The second conduct standard proposed 11 CFR 109.21(d)(2), would address situations in which a candidate, authorized committee, or a political party committee is ''materially involved in decisions'' regarding specific aspects of a public communication paid for by someone else. Those specific aspects would be listed in proposed paragraphs (i) through (vi) of paragraph (d)(2): (i) The content of the communication; (ii) the intended audience; (iii) the means and mode of the communication; (iv) the specific media outlet used; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication or duration of a communication on a television, radio, or cable station or by telephone.

In this proposed regulation, ''material'' would have its ordinary legal meaning, which is ''important; more or less necessary; having influence or effect; going to the merits.'' *Black's Law Dict.* (6th ed. 1990) p. 976. Thus, the term ''materially involved in decisions'' would not be intended to encompass all interactions, only those which are important to the communication. In addition to the materiality of the candidate's involvement in decisions regarding the communication under proposed paragraph (d)(3) through (d)(5), the Commission would focus on the materiality of the information conveyed, and its specific use.

A candidate or political party committee would be considered ''materially involved'' in the decisions enumerated in paragraph (d)(2) if either shares material information about campaign plans, projects, activities, or needs with the person making the communication. Likewise, a candidate or political party committee would be ''materially involved in decisions'' if the candidate, political party committee, or agent conveys approval or disapproval of the other person's plans. The Commission notes, however, that as with the ''request or suggest'' standard, the ''materially involved'' standard would not apply to general appeals for support, such as a speech, but specifically to the creation, production, or distribution of communications.

The Commission invites comments on the wording and scope of this standard. In particular, the Commission welcomes comment on whether, and if so, how, the phrases ''materially involved'' and ''decisions'' should be further defined in the rules.

3. Substantial Discussion

In BCRA, Congress also directed the Commission to address ''payments for communications made by a person after substantial discussion about the communication with a candidate or political party.'' Pub. L. 107–155, sec. 214(c)(4) (March 27, 2002). Under proposed paragraph (d)(3) of 11 CFR 109.21, a communication would meet the conduct standard if it is created, produced, or distributed after one or more substantial discussions between the person paying for the communication, or the person's agents, and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or their agents. Proposed paragraph (d)(3) would explain that a ''discussion''

would be ''substantial'' if information about the plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication is conveyed to a person paying for the communication. ''Discuss'' would have its plain and ordinary meaning, which the Commission understands to mean an interactive exchange of views or information. ''Material'' would have the meaning explained above in the context of proposed paragraph (d)(2) of section 109.21 (''material involvement''). In other words, the substantiality of the discussion would be measured by the materiality of the information conveyed in the discussion. The Commission seeks comments as to whether additional explanation or examples should be provided to further refine the term ''substantial discussion.''

4. Employment of Common Vendor

In BCRA, Congress required the Commission to address ''the use of a common vendor'' in the context of coordination. Pub. L. 107–155, sec. 214(c)(2) (March 27, 2002). Proposed paragraph (d)(4) of section 109.21 would create a conduct standard to implement this Congressional mandate. It would explain what a common vendor is, and provide that the use of a common vendor in the creation, production, or distribution of a communication satisfies the conduct standard if three conditions are all met.

The first condition, in proposed paragraph (d)(4)(i), would be that the person paying for the communication, or the agent of such a person, must contract with, or employ, a ''commercial vendor'' to create, produce, or distribute the communication. The term ''commercial vendor'' is defined in the Commission's pre-BCRA regulations as ''any person[] providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services.'' 11 CFR 116.1(c). Thus, this standard would only apply to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and would not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture.

The second condition, in proposed paragraph (d)(4)(ii), would be that the commercial vendor must have a previous or current relationship with the candidate or political party committee that puts the commercial vendor in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee. This previous or current relationship would be defined in terms of nine specific services related to campaigning and campaign communications, which would be enumerated in proposed paragraphs (d)(4)(ii)(A) through (I). Note that these services would have to have been rendered during the current election cycle. Such a previous or current relationship, as defined, would put the ''common vendor'' in a position to convey material information about the plans, projects, activities, or needs of the candidate or political party committee to the person paying for the communication.

The proposed regulation refers to the current election cycle as a temporal limit on the operation of the regulation. ''Election cycle'' would have the meaning defined in 11 CFR 100.3. The Commission seeks comment on whether a different time period, such as a fixed two-year period, would more accurately align the proposed rule with existing campaign practices. Or, should the time limit be the ''the current election cycle, but not more than the previous two years of that election cycle''?

The third condition, in proposed paragraph (d)(4)(iii), would require that the commercial vendor make use of or convey material information about, the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the commercial vendor in serving the candidate or political party committee, to the person paying for the communication. This requirement would be intended to encompass situations in which the vendor assumes the role of a conduit of information between a candidate or political party committee and the person making or paying for the communication, as well as situations in which the vendor makes use of the information received from the candidate or political party committee without actually transferring that information to another person.

The Commission seeks comment about whether the conduct standard in proposed paragraph (d)(4) would adequately address the Congressional mandate in section 214(c)(2) of BCRA. The Commission also seeks comment on whether purchasing advertising time slots for television, radio, or other media should be added to the list of common vendor services covered in proposed paragraph (d)(4)(ii).

5. Former Employee/Independent Contractor

In BCRA, Congress required the Commission to address ''persons who previously served as an employee of'' a candidate or political party committee in the context of coordination. Pub. L. 107–155, sec. 214(c)(3) (March 27, 2002). Proposed paragraph (d)(5) of section 109.21 would create a conduct standard to implement this Congressional mandate.

Proposed paragraph (d)(5) would apply to communications paid for by a person who was previously an employee or an independent contractor of a candidate, authorized committee, or political party committee, or by the employer of such a person. Note that this employment or independent contractor relationship would have to exist during the current election cycle, as a temporal limit on the operation of the regulation. ''Election cycle'' would have the meaning defined in 11 CFR 100.3. As discussed above with regard to proposed paragraph (d)(4) on common vendors, the Commission requests comments on whether this time period should be a fixed two-year period, or the same election cycle, but not more than two years.

This proposed conduct standard would expressly extend to a person who had previously served as an ''independent contractor'' of a candidate or political party committee to preclude circumvention of the rule by the expedient of characterizing an ''employee'' as an ''independent contractor'' where the characterization makes no difference in the person's relationship with the candidate or political party committee. This proposed coordination standard would also apply to the employer of a person who was an employee or independent contractor of a candidate, authorized committee, or political party committee. The Commission interprets the Congressional intent behind section 214(c)(3) of BCRA to encompass situations in which former employees, who by virtue of their former employment have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee, may subsequently use that information or convey it to a person paying for a communication.

Proposed paragraph (d)(5) would require that the former employee actually make use of, or convey material information about, the plans, projects, activities, or needs of the candidate or political party committee, or material information used by the former

employee in serving the candidate or political party committee, to the person paying for the communication. As with the proposed conduct standard covering common vendors, this requirement would be intended to encompass both situations in which the former employee assumes the role of a conduit of information and situations in which the former employee makes use of the information but does not share it with the person who is paying for the communication.

The Commission proposes this conduct standard to address what it understands to be Congress' primary concern, which is a situation in which a former employee of a candidate goes to work for a third party that pays for a communication that promotes or supports the former employer/candidate or attacks or opposes the former employer/candidate's opponent. The conduct standard, as proposed, does not require that the former employee act under the continuing direction or control of, at the behest of, or on behalf of, his or her former employer. This is because a former employee who acts under such circumstances is a present agent, and would presumably be regulated as an agent, not as a former employee. To give effect to the statutory language that mandates the Commission's coordination regulations address ''former employees'' (*see* Pub. L. 107–155, sec. 214(c)(3)) the Commission assumes that a ''former employee,'' as that term is used in the statute, must be different from ''agent.''

The Commission seeks comment on whether a requirement of continuing direction or control by the former employer/candidate should be added to the proposed conduct standard. Consider, for example, an employee of a candidate in a contested primary who leaves the employment of that candidate to work for a third-party organization that makes a communication satisfying one or more of the proposed content standards. Under the proposed conduct standard, that third-party organization could be found to make an in-kind contribution. Assuming that the former employee is not acting under the continuing direction or control of, at the behest of, or on behalf of, his or her former employer, it can be argued that the third-party organization is making an independent expenditure or a non-coordinated disbursement for an electioneering communication, albeit with the windfall of the former employee's knowledge. Should the regulation provide that the third-party organization does not make an in-kind contribution in this specific circumstance?

The Commission also seeks comment on a related situation illustrated by the following example. Consider an employee, disgruntled or otherwise, of a candidate in a contested primary who leaves the employment of that candidate to work for a third-party organization that makes a communication satisfying one or more of the proposed content standards. Under the proposed conduct standard, that third-party organization could be found to make an in-kind contribution. But suppose the third-party organization uses information gained by the employee to run ads critical of the former employer or that favor the opponent of the former employer? Assume also that the third-party organization has no contact with the opponent, his campaign or any agent of the opponent. Should the Commission consider those communications to be in-kind contributions to the candidate who is the intended beneficiary? Or, assuming that the communication would otherwise qualify as an independent expenditure or electioneering communication, should the Commission merely consider this third-party communication to be either an independent expenditure or a no-coordinated disbursement for an electioneering communication?

The Commission seeks comment about whether this proposed conduct standard should be extended to volunteers, such as ''fundraising partners,'' who by virtue of their relationship with a candidate or a political party committee, have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee.

E. No Requirement of Agreement or Formal Collaboration

When Congress, in BCRA, required the Commission to promulgate new regulations on coordinated communications, it specifically barred any regulatory requirement of ''agreement or formal collaboration'' to establish coordination. Pub. L. 107–155, sec. 214(c) (March 27, 2002). The proposed regulation at 11 CFR 109.21(e) would explicitly implement that Congressional mandate. Although Congress did not define this term, the Commission notes that earlier versions of BCRA stated that ''collaboration or agreement'' would not be required to show coordination. *See* S. 27, 107th Cong., 1st Sess. (as passed by the Senate and transferred to the House, 478 Cong. Rec. H2547 (May 22, 2001)). The phrase ''agreement or formal collaboration'' reached its final form through a substitute amendment to H.R. 2356 offered by Representative Shays. *See* H. Amdt. 417, 478 Cong. Rec. H393 through H492 (February 13, 2002).

The Commission would therefore attach significance to the addition of the term ''formal'' as it modifies the term ''collaboration.'' Thus, the conduct standards proposed in paragraph (d) of section 109.21 would require some degree of collaboration. However, proposed paragraph (e) would state that this collaboration need not be ''formal,'' in the sense of being planned or systematically approved or executed.

Under proposed paragraph (e), the word ''agreement'' would be explained as well. A finding of coordination under proposed section 109.21 would not require a showing of a mutual understanding or meeting of the minds as to all, or even most, of the material aspects of a communication. Even a minimal amount of agreement would mean the communication would not be made ''totally independently'' from the candidate or party. *See Buckley*, 424 U.S. at 47. In the case of a request or suggestion under proposed paragraph (d)(1) of section 109.21, agreement is not required at all.

F. Should Exceptions Apply to the Content and Conduct Standards?

Proposed 11 CFR 109.21 does not include any exceptions. The Commission seeks comment on whether exceptions to the proposed content or conduct standards should be included in the final rule. For example, should there be an exception to the content standards for communications that refer to the ''popular name'' of a bill or law that includes the name of a Federal candidate who was a sponsor of the bill or law? Should there be an exception to the conduct standards for a candidate's response to an inquiry about his or her position on legislative or policy issues?

IV. Proposed 109.22 Who Is Prohibited From Making Coordinated Communications?

The Commission proposes a separate section to make it clear that any person who is otherwise prohibited from making a contribution or expenditure is also prohibited from making a coordinated communication. The Commission seeks comment on whether it is necessary to include this separate section.

Proposed Subpart D of Part 109—Special Provisions for Political Party Committees

I. Proposed 11 CFR 109.30 How are Political Party Committees Treated for Purposes of Coordinated and Independent Expenditures?

National, State, and subordinate committees of political parties may make expenditures up to prescribed limits in connection with the general election campaigns of Federal candidates without counting such expenditures against the committees' contribution limits. *See* 2 U.S.C. 441a(d). These expenditures are commonly referred to as ''coordinated party expenditures.'' Political party committees, however, need not demonstrate actual coordination with their candidates to avail themselves of this additional spending authority.

In BCRA, Congress sets certain new restrictions on these ''coordinated party expenditures'' and related restrictions on political party committee independent expenditures. There are also certain new restrictions on transfers and assignments of coordinated party expenditure authorizations between party committees. 2 U.S.C. 441a(d)(4)(A) through (C).

The Commission proposes an introduction to subpart D of part 109 that would state how political party committees are treated for purposes of coordinated and independent expenditures. Proposed section 109.30 would first clarify that party committees may make independent expenditures subject to the provisions of proposed sections 109.35 and 109.36. (*See* discussion below.) Second, proposed section 109.30 would explain that political party committees may support candidates with ''coordinated party expenditures,'' a term that would be defined at proposed 11 CFR 109.31, and would state that these coordinated party expenditures are subject to limits that are separate from and in addition to the contribution limits at 11 CFR 110.1 and 110.2.

II. Proposed 11 CFR 109.31 What Is a ''Coordinated Party Expenditure''?

FECA provides a special expenditure authority for coordinated party expenditures that is available only to certain political party committees. 2 U.S.C. 441a(d). The Commission would, in proposed section 109.31, define ''coordinated party expenditures'' to include payments made by a national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, for something of value in connection with the general election campaign of a candidate. Proposed section 109.31 would also introduce the term ''party coordinated communication'' (which would be defined in proposed section 109.37) as an example of something of value for which political party committees may make a coordinated party expenditure.

III. Proposed 11 CFR 109.32 What Are the Coordinated Party Expenditure Limits?

The Commission proposes to move the coordinated party expenditure limits found at pre-BCRA 11 CFR 110.7(a) and (b) to proposed section 11 CFR 109.32. This new section would retain the basic organizational structure of paragraphs (a) and (b) of pre-BCRA section 110.7.

The Commission would set forth in proposed paragraph (a), in amended fashion, the coordinated party expenditure limit for the national committee of a political party for presidential elections that appears at pre-BCRA section 110.7(a). Because political party committees may also make independent expenditures, *Colorado* I, 518 U.S. at 618, the Commission would clarify that the ''expenditures'' referred to in proposed section 109.32 are ''coordinated party expenditures.'' This change also appears in proposed paragraphs (a)(1), (2), (3), and (4) of section 109.32. In addition, proposed paragraph (a)(2), setting out the coordinated party expenditure limit at two cents multiplied by the voting age population of the United States, would state that this limit shall be increased in accordance with 11 CFR 110.17, which would amend pre-BCRA 11 CFR 110.9(c). *See Notice of Proposed Rulemaking, Contribution Limitations and Prohibitions*, 67 FR 54366 (August 22, 2002.) In addition, proposed paragraph (a)(2) of section 109.32 would refer to the term ''voting age population'' at proposed 11 CFR 110.18, discussed below.

Further, proposed 11 CFR 109.32(a)(4), to which pre-BCRA 11 CFR 110.7(a)(6) would be moved, would provide that coordinated party expenditures on behalf of presidential candidates do not count against the candidate's expenditure limitations under 11 CFR 110.8. Proposed paragraph (a)(4) of section 109.32 would also state that the national party committee may make such expenditures and may assign their spending authority to other political party committees to do so under proposed section 109.33, which is discussed below.

Proposed paragraph (b) would set forth, and make minor changes to, the regulations, pre-BCRA, at 11 CFR 110.7(b) addressing coordinated party expenditure limits of the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, for Federal elections other than presidential elections. As in proposed paragraph (a) above, proposed paragraph (b) would specify that the ''expenditures'' referred to in paragraphs (b)(1), (2), and (4) are coordinated party expenditures. In addition, proposed paragraph (b)(2), setting out the coordinated party expenditure limits of two cents multiplied by the voting age population of the United States and dollar figures of $10,000 and $20,000, would be subject to proposed paragraphs (b)(3) and (b)(4) regarding inflation adjustments and the relationship with contribution limits.

IV. Proposed 11 CFR 109.33 May a Political Party Committee Assign Its Coordinated Party Expenditure Authority to Another Political Party Committee?

Proposed 11 CFR 109.33 would continue the pre-BCRA rule permitting assignment of coordinated party expenditure authority between political party committees by consolidating the authorizing provisions found in the pre-BCRA regulations at 11 CFR 110.7(a)(4) and (c). Such assignments, however, would be prohibited under certain circumstances in which the assigning political party committee had made coordinated party expenditures (using part of the spending authority) and the intended assignee political party committee had made or intends to make independent expenditures with respect to the same candidate during an election cycle. *See* 2 U.S.C. 441a(d)(4)(C) and proposed 11 CFR 109.35(c).

Proposed paragraph (a) of section 109.33 would also restate the Commission's longstanding policy that a political party committee with authority to make coordinated party expenditures may assign all or part of that authority to other political party committees, and that this interpretation extends to both national and State committees of political parties. *See Campaign Guide for Political Party Committees* at p.16 (1996). Proposed paragraph (a) of section 109.33 would also state that coordinated party expenditure authority may be assigned only to other political party committees. *See* 2 U.S.C. 441a(d), and pre-BCRA 11 CFR 110.7(a)(4), which indicates that coordinated expenditures may be made ''through any designated agent, including State and subordinate party committees.'' The Commission makes this change to

preclude confusion, and possible circumvention of the restrictions on transfers and assignments between political party committees found in BCRA. 2 U.S.C. 441a(d)(4)(B), (C).

Proposed paragraph (a) would provide that whenever a political party committee authorized to make coordinated party expenditures assigns another political party committee to use part or all of its spending authority, the assignment must be in writing, must specify a dollar amount, and must be made before the assigned party committee actually makes the coordinated party expenditure. *See Campaign Guide for Political Party Committees* at p.16 (1996). This would apply to both national and State party committees.

Proposed paragraph (b) of section 109.33 would continue the pre-BCRA rule in 11 CFR 110.7(c) that, for purposes of the coordinated spending limits, a State committee includes subordinate committees of the State committee. Proposed paragraph (b) of section 109.33 would add district and local political party committees (*see* 11 CFR 100.14(b)) to the extent that they are assigned authority to make coordinated party expenditures by another political party committee.

Finally, proposed paragraphs (b)(1) and (2) of section 109.33 would contain the pre-BCRA rule in 11 CFR 110.7(c)(1) and (2) setting out State committees' methods of administering the coordinated party expenditure authority.

The Commission seeks comments on whether to require political party committees to attach copies of written assignments to reports they file with the Commission, or to fax or e-mail them if they are electronic filers.

V. Proposed 11 CFR 109.34 When May a Political Party Committee Make Coordinated Party Expenditures?

Proposed 11 CFR 109.34 would continue the pre-BCRA rule in 11 CFR 110.7(d) permitting a political party committee to make coordinated party expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated expenditures would continue to be subject to the coordinated party expenditure limitations, whether or not the candidate on whose behalf they are made receives the party's nomination.

VI. Proposed 11 CFR 109.35 What are the Restrictions on a Political Party Committee Making Both Independent Expenditures and Coordinated Party Expenditures in Connection with a Candidate's Campaign?

Under BCRA, Congress prohibits political party committees, under certain conditions, from making coordinated party expenditures, independent expenditures, and transfers and assignments to other political party committees. 2 U.S.C. 441a(d)(4). Congress plainly intended to combine certain political party committees into a collective entity or entities for purposes of these prohibitions. 2 U.S.C. 441a(d)(4)(B). The statutory language and legislative history raise a significant threshold question of statutory interpretation: Whether an entire, nationwide political party is to be treated as a single entity or as separate national and State political party entities for the purposes of these restrictions. The Commission would adopt the latter approach in proposed 11 CFR 109.35. This interpretation, in turn, raises additional issues regarding which political party committees are to be included in certain defined groups of political party committees for the purposes of the new restrictions in BCRA.

A. Applicability of Prohibitions

1. Statutory Interpretation

Congress provided that for the purposes of these new prohibitions, sbull ''all political committees established and maintained by a national political party (including all Congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.'' 2 U.S.C. 441a(d)(4)(B).

One reading of this statutory provision would combine all committees established and maintained by a political party at all levels into ''a single political committee'' for the purposes of the prohibitions discussed below. An alternative reading would provide that all committees established and maintained by a national political party, including Congressional campaign committees, would be ''a single political committee,'' while all committees established and maintained by a given State political party, including any subordinate committee of a State committee, would be another ''single political committee.'' The Commission notes that the Senate sponsors of BCRA stated that all national and State committees of a political party are considered to be one entity for the purposes of the prohibitions codified at 2 U.S.C. 441a(d)(4). *See* 148 Cong. Rec. S1993 (daily ed. March 18, 2002) (section-by-section analysis included by Sen. Feingold in the Record); 148 Cong. Rec. S2144 (daily ed. March 20, 2002) (statement of Sen. McCain).

One of the new prohibitions, regarding political party committee transfers and assignments, would appear to imply that political parties are inherently divisible into different groups of political committees. *See* 2 U.S.C. 441a(d)(4)(C). This is because, without more than one group of political party committees, no transfers or assignments *between* political party committee groups could occur. In other words, if there were only a single group, there could be no transfers or assignments and thus this provision would be without effect. *See Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979) (it is an ''elementary canon of construction that a statute should be interpreted so as not to render one part inoperative''). Therefore, to give the transfers and assignments provision effect, the Commission believes that BCRA may contemplate multiple groups of political party committees. *See* 2 U.S.C. 441a(d)(4). The Commission seeks comment on this interpretation of the statute.

2. Proposed Rule

In light of the foregoing statutory interpretation, proposed 11 CFR 109.35 would contemplate multiple political party committee groups. Proposed paragraphs (a)(1) and (a)(2) would apply this interpretation by combining all political committees established and maintained by a national political party into one group and all political committees established and maintained by a given State political party into another group. *See* 2 U.S.C. 441a(d)(4)(B). The Commission would use these ''political party groups'' to implement the prohibitions discussed below.

Under proposed paragraph (a)(1), the national ''political party group'' would combine the national committee of a given political party, all Congressional campaign committees of that political party, and all political committees established, financed, maintained, or controlled by any of the foregoing. The Commission notes that the phrase, sbull I11''established, financed, maintained, or controlled'' would differ from the statutory phrase, ''established and maintained.'' The proposed formulation, however, would be

consistent with, and serve the same purposes as, the analogous anti-proliferation provision in FECA. 2 U.S.C. 441a(a)(5). Under section 441a(a)(5), for the purposes of the contribution limitations, all contributions made by political committees ''established or financed or maintained or controlled'' by the same person or entity shall be considered to have been made by a single political committee. 2 U.S.C. 441a(a)(5).

A State ''political party group'' would combine the State committee of a given political party in a given State, all subordinate committees of that State committee, and all district or local committees of that political party within that State that meet the definition of ''political committee'' under 11 CFR 100.5. *See* proposed 11 CFR 109.35(a)(2). Subordinate committees are expressly mentioned in the statute. 2 U.S.C. 441a(d)(4)(B).

The Commission notes that the prohibitions discussed below would appear to apply to district or local committees because those prohibitions apply to any ''committee of a political party.'' *See* 2 U.S.C. 441a(d)(4)(A) and (C). The regulatory definition of district and local committee includes the requirement that the organization be part of the ''official party structure.'' 11 CFR 100.14(b).

The Commission notes that the phrase ''established, financed, maintained, or controlled'' would differ from the statutory phrase ''established and maintained.'' *See* 2 U.S.C. 441a(d)(4)(B). The proposed rule would be based on the Commission's definitions of ''State committee'' and ''subordinate committee'' at 11 CFR 100.14(a) and (c), which both use the phrase ''established, financed, maintained, or controlled,'' given that both would be included in the proposed State political party group.

The Commission seeks comment on the proposed combinations of committees of a political party into a national political party group and into State political party groups. For example, should the State political party group in a given State include district or local committees in that State only to the extent that the State party exercises functional control over them?

B. Prohibition on Certain Coordinated and Independent Expenditures

Congress provided in BCRA that on or after the date on which a political party nominates a candidate, no ''committee of the political party'' may make: (1) Any coordinated expenditure under 2 U.S.C. 441a(d) with respect to the candidate during the election cycle at any time after ''it'' makes any independent expenditure with respect to the candidate during the election cycle; or (2) any independent expenditure with respect to the candidate during the election cycle at any time after ''it'' makes any coordinated expenditure under 2 U.S.C. 441a(d) with respect to the candidate during the election cycle. 2 U.S.C. 441a(d)(4)(A).

Arguably, the use of the pronoun ''it'' in the statute is ambiguous in that it could be construed to refer either to the entire political party or to only a committee within the party. However, as explained above, the Commission would interpret the statute in terms of national and State ''political party groups.'' In the terms of this proposed interpretation, ''it'' would be construed to mean a given ''political party group.'' Thus, the Commission would interpret the prohibition on making both independent and coordinated expenditures with respect to a given candidate after nomination as applying to the ''political party groups'' defined above, and not to the party as a whole.

The language of proposed paragraph (b) would generally track the statutory language, but would employ new terms in places to clarify its application. Proposed 11 CFR 109.35(b)(1) would prohibit a political committee within a political party group from making any post-nomination coordinated party expenditure under section 109.32 in connection with the general election campaign of a candidate at any time after any committee within that political party group makes any post-nomination independent expenditure with respect to that candidate. 2 U.S.C. 441a(d)(4). Proposed paragraph (b)(2) would prohibit a political committee within a political party group from making any post-nomination independent expenditure with respect to a candidate at any time after any political committee within that political party group makes any post-nomination coordinated expenditure under section 109.32 in connection with the general election campaign of that candidate. As soon as a political committee within a political party group makes an independent expenditure or a coordinated party expenditure with respect to a candidate after nomination, all political committees within that political party group are bound during the remainder of the election cycle to whichever type of expenditure the first political committee makes. 2 U.S.C. 441a(d)(4).

The restrictions in proposed paragraphs (b)(1) and (b)(2) would apply ''during the remainder of the election cycle.'' *See* 2 U.S.C. 441a(d)(4)(A). This would clarify that proposed paragraph (b) would apply to exclusively post-nomination events through the end of the election cycle. The prohibitions would apply to political committees within a political party group upon the first post-nomination independent or coordinated expenditure by a committee within that political party group and would run until the end of the election cycle.

The Commission notes that coordinated party expenditures and independent expenditures made by a political committee within a political party group *before* nomination would have no bearing on the application of proposed paragraph (b).

Under proposed paragraph (d)(2) of section 109.35, the term ''election cycle'' has the meaning in 11 CFR 100.3(b), except that the election cycle ends on the date of the general election runoff, if one is held. For purposes of 11 CFR 109.35, ''election cycle'' would thus begin on the first day following the date of the previous general election for the office or seat which the candidate seeks and ending on the date on which the general election for the office or seat that the individual seeks is held, or on the date of any general election runoff is held. Since proposed paragraph (b) of section 109.35 would only apply after nomination, *see* 2 U.S.C. 441a(d)(4), the ''election cycle'' period for this provision would effectively extend from nomination through the general election or general election runoff. Finally, the Commission notes that the political party of a candidate running in a general election runoff would not be permitted an additional coordinated party expenditure authority with respect to that candidate for the runoff. *See Democratic Senatorial Campaign Committee* v. *FEC*, No. 93–1321 (D.D.C., November 14, 1994.)

In proposed paragraph (d)(1), the Commission would define when independent expenditures that are made by a political party committee are ''with respect to'' a candidate, for purposes of section 109.35. Independent expenditures made ''with respect to'' a candidate would include those independent expenditures expressly advocating the defeat of any other candidate seeking nomination for election, or election, to the Federal office sought by that party's candidate. The Commission's proposed definition would facilitate the appropriate coverage, and help avoid circumvention, of the prohibitions at proposed paragraph (b) of section 109.35 discussed above and proposed paragraph (c) of section 109.35 discussed below. *See* proposed 11 CFR 100.16 (definition of express advocacy

that includes communications expressly advocating the ''election or defeat'' of a clearly identified candidate).

C. Prohibition on Certain Transfers and Assignments

Congress provided in BCRA that a ''committee of a political party'' that makes coordinated party expenditures with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated party expenditures under 2 U.S.C. 441a(d) to, or receive a transfer of funds from, a ''committee of the political party'' that has made or intends to make an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C). Congress apparently intended to prevent a circumvention of the prohibition against making both coordinated and independent expenditures by means of transfers or assignments. On its face, this prohibition applies only to a ''committee of a political party'' that is making coordinated party expenditures with respect to a candidate. Although Congress prohibits transfers in either direction between a party committee making coordinated party expenditures and a political party committee making or intending to make independent expenditures with respect to the same candidate, Congress prohibits assignments of coordinated party expenditure spending authority only from the political party committee making coordinated expenditures to a political party committee making or intending to make independent expenditures, and not in the other direction.

Proposed paragraph (c) of 11 CFR 109.35 would generally track the statutory language in 2 U.S.C. 441a(d)(4)(C), employing the terms defined in proposed section 109.35. It would prohibit transfers of funds and some assignments of authority to make coordinated party expenditures between political committees in different political party groups after the occurrence of two events: (1) A political committee within a political party group makes a coordinated party expenditure in connection with the general election campaign of a candidate, and (2) a political committee within another political party group makes an independent expenditure or declares its intention to do so with respect to the same candidate. After these two events take place, no political committee within one political party group would be able make any transfers to, or receive any transfers from, any political committee within the other political party group during the remainder of the election cycle. Also, after these two events take place, no political committee within a political party group electing to make coordinated party expenditures would be able to assign authority to make coordinated party expenditures in connection with the general election campaign of a candidate to any political committee within the political party group electing to make independent expenditures during the remainder of the election cycle. This proposed provision would not, however, prohibit transfers and assignments between committees *within* a given political party group.

The Commission seeks comment on the approach in proposed 11 CFR 109.35(c). Should the Commission set forth rules requiring party committees to keep track of the expenditure activities of other party committees, within the same or another political party group? *Cf.* proposed section 109.33, pre-BCRA 11 CFR 110.7(c), which places responsibility on the State committee to insure that the coordinated party expenditures of the entire party organization are within the limitations.

In proposed 11 CFR 109.35(c), the Commission would replace the statutory phrase ''during the election cycle'' in the statute with ''during the remainder of the election cycle.'' *See* 2 U.S.C. 441a(d)(4)(C). As noted above, the transfer prohibitions would only go into effect after the occurrence of the two specific events. Thus, the period during which the prohibitions would apply would start after the occurrence of both events and run until the end of the election cycle.

In contrast to the prohibition on a party committee making both independent and coordinated expenditures with respect to a candidate, that is expressly limited to the post-nomination period, the transfers and assignments provision does not include the same restriction and thus could apply prior to nomination as well as after nomination. *See* 2 U.S.C. 441a(d)(4)(A) and (C); proposed 11 CFR 109.34, which would be renumbered from 11 CFR 110.7(d) (party committees may make coordinated expenditures in connection with the general election campaign before their candidates have been nominated); *see also Colorado I* (involved pre-nomination independent expenditures by a State party committee). Indeed, the Commission's proposed rules regarding ''election cycle'' would clarify that the prohibitions in proposed 11 CFR 109.35(c) could take effect prior to nomination. As noted above, ''election cycle'' begins on the first day following the date of the previous general election, and may span a two, four, or six year period depending on the office sought, although in practice it would be unusual for the prohibitions of proposed 11 CFR 109.35(c) to go into effect far before the date of nomination. In addition, such prohibitions would only go into effect. After a committee within one political party group made a coordinated party expenditure with respect to the candidate and a committee within another political party group made or intended to make an independent expenditure with respect to the same candidate. *See* proposed 11 CFR 109.35(c).

Comment is sought on the distinction between the post-nomination application of proposed 11 CFR 109.35(b) and the pre- and post-nomination application of proposed 11 CFR 109.35(c). As an alternative approach, is there an interpretation of the transfers and assignments provision in the statute such that the prohibitions would only apply *after* nomination? *See* 2 U.S.C. 441a(d)(4)(C).

Comment is also sought on whether the prohibitions in proposed paragraph (c) should only go into effect after the occurrence of the two specified expenditures. Is there an interpretation of 2 U.S.C. 441a(d)(4)(C) that would restrict transfers and assignments *prior* to a political party group making coordinated expenditures with respect to a candidate and the other political party group making or intending to make independent expenditures with respect to the candidate?

Finally, the Commission notes that it is not at this time proposing specific rules to implement the statutory language ''intends to make'' an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C). The Commission seeks comment on whether such rules are necessary, and if so, how would they implement the statutory language.

D. Impact of Political Party Committee Activity Carried Out Pursuant to Contribution Limits

2 U.S.C. 441a(d)(4) applies to coordinated party expenditures and to political party committee independent expenditures. Congress did not directly address political party committees' monetary and in-kind contributions to candidates that are subject to the contribution limits under 2 U.S.C. 441a(a) and 441a(h). *See* 2 U.S.C 441a(d)(1) (*''Notwithstanding any other provision of law with respect to . . . limitations on contributions*, [political party committees] may make expenditures in connection with the

general election campaign of candidates for Federal office, subject to the limitations contained [in this subsection]'' [emphasis added]). *See also* proposed 11 CFR 109.30, 109.32.

Political party committees may make in-kind contributions to a candidate in the form of party coordinated communications, as addressed in proposed 11 CFR 109.37. The Commission notes that such coordination between political party committee and candidate may compromise the actual independence of any simultaneous or subsequent independent expenditures the political party committee may attempt with respect to that candidate. *See Buckley* v. *Valeo*, 424 U.S. at 47 (in striking down limits on independent expenditures, the Court described such expenditures as made *''totally* independently of the candidate and his campaign'' [emphasis added]). Comment is sought on this analysis.

E. Transfers under 11 CFR 102.6(a)(1)(ii)

As a result of the enactment of 2 U.S.C. 441a(d)(4) and other provisions from BCRA affecting transfers between political party committees, the Commission proposes to revise 11 CFR 102.6(a)(1)(ii) to clarify the interaction of this section with certain provisions of BCRA. Before BCRA, the Commission permits unlimited transfers between or among national party committees, State party committees and/or any subordinate committees. *See* pre-BCRA 11 CFR 102.6(a)(1)(ii).

First, in BCRA, Congress provided that a national committee of a political party, including a national Congressional campaign committee of a political party, may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(a); *see Explanation and Justification for 11 CFR 300.10(a),* 67 FR 49122 (July 29, 2002).

Second, in the ''Levin Amendment,'' Congress placed restrictions on how State, district, and local party committees raise ''Levin funds'' and prohibited certain transfers between political party committees. *See* 2 U.S.C. 441i(b)(2)(C)(i); *Explanation and Justification for 11 CFR 300.31,* 67 FR 49124 (July 29, 2002).

Third, also in the Levin Amendment, Congress provided that a State, district, or local committee of a political party that spends Federal funds and Levin funds for Federal election activity must raise those funds solely by itself. These committees may not receive or use transferred funds in contravention of such requirements. 2 U.S.C. 441i(b)(2)(B)(iv); *see Explanation and Justification for 11 CFR 300.34(a) and (b),* 67 FR 49127 (July 29, 2002).

Fourth, Congress provided in BCRA that a committee of a political party that makes coordinated party expenditures under 2 U.S.C. 441a(d) in connection with the general election campaign of a candidate shall not, during that election cycle, transfer any funds to, assign authority to make coordinated party expenditures under this subsection to, or receive a transfer from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C); *see* proposed 11 CFR 109.35(c), discussed above.

The Commission proposes the addition of a new opening clause in paragraph (a)(1)(ii) of section 102.6 incorporating these restrictions by reference into the rules regarding the transfer of funds and the use of transferred funds.

VII. Proposed 11 CFR 109.36 Are There Additional Circumstances Under Which a Party Committee Is Prohibited From Making Independent Expenditures?

Prior to the enactment of BCRA, a national committee of a political party was prohibited from making independent expenditures in connection with the general election campaign of a candidate for President. *See* 11 CFR 110.7(a)(5). In *Colorado I,* the Supreme Court held that political party committees may make independent expenditures, but indicated that its decision involved only Congressional races, and did not address issues that might grow out of the public funding of presidential campaigns. 518 U.S. at 611–612. Of course, not all presidential campaigns are publicly-funded, thus raising an additional category of circumstances not addressed by the Court in *Colorado I.*

However, Congress may have effectively repealed the prohibition at 11 CFR 110.7(a)(5). *See* 2 U.S.C. 441a(d)(4). Under a new statutory provision, Congress prohibits political party committees from making both post-nomination independent expenditures and post-nomination coordinated expenditures in support of a candidate. *See* 2 U.S.C. 441a(d)(4)(A). A national party committee could thus make independent expenditures with respect to a candidate after nomination unless the committee had already made post-nomination coordinated expenditures with respect to that candidate. Because this provision appears to equally apply to party committee expenditures in support of presidential or Congressional candidates, a national party committee would appear able to make independent expenditures with respect to a presidential candidate. Thus, Congress appears to have superseded 11 CFR 110.7(a)(5). Finally, this interpretation appears to apply regardless of whether a presidential candidate accepts public funding. The legislative history of BCRA does not appear to address the issue of prohibitions on independent expenditures by national party committees in connection with presidential elections.

Rather than completely delete the prohibition at 11 CFR 110.7(a)(5), however, the Commission proposes to limit its application to certain limited circumstances in which the national committee of a political party serves as the principal campaign committee or authorized committee of its presidential candidate, as permitted under 2 U.S.C. 432(e)(3)(A)(i) and 441a(d)(2). *See* 11 CFR 102.12(c)(1) and 9002.1(c). Such a prohibition would be consistent with proposed 11 CFR 100.16(b) (redesignated from pre-BCRA section 109.1(e)) providing that no expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

Comments are sought on whether the prohibition at pre-BCRA 11 CFR 110.7(a)(5) should be limited to the circumstances identified in proposed 11 CFR 109.36 or whether the prohibition should be removed completely.

VIII. Proposed 11 CFR 109.37 What Is a ''Party Coordinated Communication''?

In BCRA, Congress requires the Commission to promulgate new regulations on ''coordinated communications'' that are paid for by persons other than candidates, authorized committees of candidates, and party committees. Pub. L. 107–155, sec. 214(b), (c); *see* proposed 11 CFR 109.21 above. Although Congress did not specifically direct the Commission to address coordinated communications paid for by political party committees, the Commission proposes to do so to give clear guidance to those affected by BCRA.

Proposed section 109.37 would generally apply the same regulatory analysis to communications paid for by the political party committees that would be applied to communications paid for by other persons. *See* proposed 11 CFR 109.21(a) through (e). This

analysis would determine when communications paid for by a political party committee would be considered to be coordinated with a candidate, a candidate's authorized committee, or their agents. The Commission bases the proposed similarity of coordination standards on two Supreme Court cases, *Colorado I* and *Federal Election Commission* v. *Colorado Republican Federal Campaign Committee,* 533 U.S. 431 (2001) (''Colorado II''). In *Colorado I,* the Supreme Court in a plurality opinion concluded that political parties, like other persons paying for political communications, are capable of making independent expenditures on behalf of their candidates for Federal office, and that it would violate the First Amendment to subject such independent expenditures to the 2 U.S.C. 441a(d) expenditure limits. *Colorado I,* 518 U.S. at 615–616. Subsequently in *Colorado II,* the Supreme Court, in upholding the constitutionality of coordinated party expenditure limits at 2 U.S.C. 441a(d), stated that political parties are in the same position as other persons who have contribution limits potentially affected by coordination. *Colorado II,* 533 U.S. at 455.

Comment is sought on this approach. Should political party committee communications be subject to the same conduct standards at proposed 11 CFR 109.21(d) for coordination with candidates as are communications by other persons? Should the ''content standards'' at proposed 11 CFR 109.21(c) be the same for political party committee communications as for communications by other persons? If not, how should the standards vary? Would such variations be confusing? Are any of the possible content standards set forth at proposed 11 CFR 109.21(c)(4) alternatives (A) through (C) appropriate for political party committees? In light of the relationship between political party committees and candidates, should any of the conduct standards set forth at proposed 11 CFR 109.21(d) be excluded from application to political party committee communications? On the other hand, in light of such relationship, should there be additional or different conduct standards that would only apply to political party committees? Should any exceptions apply to party committee communications? Should the conduct standards set forth at proposed 11 CFR 109.21(d) vary depending on whether the party communication was made prior to nomination or after nomination? Finally, should the ''content'' standard of communications other than electioneering communications vary depending on whether the political party communication was made prior to nomination or after nomination?

Following proposed 11 CFR 109.21(a), proposed section 109.37(a) would define the circumstances in which communications paid for by political party committees would be considered to be coordinated with a candidate, a candidate's authorized committee, or agents thereof. Under proposed 11 CFR 109.37(a)(1) through (3), such communications would be deemed to be ''party coordinated communications'' when they were paid for by a political party committee or its agent, satisfy at least one of the content standards in 11 CFR 109.21(c), and satisfy at least one of the conduct standards in 11 CFR 109.21(d).

For the content standards for party coordinated communications, in proposed paragraph (a)(2) of section 109.37, the Commission would refer to the content standards proposed in 11 CFR 109.21(c). The Commission also proposes a second sentence in proposed paragraph (a)(2) of section 109.37 indicating that the republication content standard of proposed 11 CFR 109.21(c)(2) is evaluated under the conduct standard in proposed 11 CFR 109.21(d)(6). *See* the discussion above of proposed 11 CFR 109.21(c).

For the conduct standards for party coordinated communications, in proposed paragraph (a)(3) of section 109.37, the Commission would refer to the conduct standards proposed in 11 CFR 109.21(d). As in proposed 11 CFR 109.21(d), agreement or formal collaboration would not be necessary for a finding that a communication is coordinated. *See* the discussion above of proposed 11 CFR 109.21(d) and (e). The Commission also proposes a second sentence in proposed paragraph (a)(3) of section 109.37 addressing circumstances in which the in-kind contribution results solely from conduct in 11 CFR 109.21(d)(4) or (d)(5). Under these circumstances, the candidate would not receive or accept an in-kind contribution. *See* the discussion above regarding proposed 11 CFR 109.21(b)(2).

Proposed 11 CFR 109.37(b) would explain the treatment of party coordinated communications. This paragraph would provide that political party committees must treat payments for communications coordinated with candidates as either in-kind contributions or coordinated party expenditures.

The Commission would except from proposed 11 CFR 109.37(b) such payments that are otherwise excepted from the definitions of ''contribution'' and ''expenditure'' found at 11 CFR part 100 subparts C and E. For example, the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card, sample ballot, palm card, or other printed listing(s) of three or more candidates for any public office for which an election is held in the State in which the committee is organized is not a contribution or an expenditure. 11 CFR 100.80 and 100.140. Thus, if such communications were coordinated with candidates, the payments for such communications would not be treated as either in-kind contributions or as coordinated party expenditures.

For such a payment that a political party committee treats as an in-kind contribution, proposed paragraph (b)(1) of section 109.37 would state that it is made for the purpose of influencing a Federal election. *See* the discussion above regarding proposed 11 CFR 109.21(b).

For such a payment that a political party committee treats as a coordinated party expenditure, proposed paragraph (b)(2) of section 109.37 would state that such expenditure is made pursuant to coordinated party expenditure authority under proposed 11 CFR 109.32 in connection with the general election campaign of the candidate with whom it was coordinated.

Finally, proposed paragraphs (b)(1) and (b)(2) of section 109.37 would each refer to the reporting obligations flowing from party coordinated communications under 11 CFR part 104.

Additional Proposed Regulatory Changes

Proposed 11 CFR 100.57 Dissemination, Distribution, or Republication of Candidate Campaign Materials

The FECA categorizes a payment of the dissemination, distribution, or republication of campaign materials created by a candidate as an expenditure made by the person making the payment. *See* 2 U.S.C. 441a(7)(B)(iii) (redesignated from pre-BCRA 2 U.S.C. 441a(7)(B)(ii)). In addition, when such an expenditure is coordinated with a candidate, it is treated as an in-kind contribution received by the candidate with whom the communication was coordinated. *See* 2 U.S.C. 441a(7)(B)(i). Likewise, under BCRA, when such an expenditure is coordinated with a political party committee, it is also a contribution received by the political party committee with which it is coordinated. *See* 2 U.S.C. 441a(7)(B)(ii).

Under the pre-BCRA regulations at 11 CFR 109.1(d)(1), payments for the dissemination, distribution, or republication of the campaign material count against the contribution limits of the person financing the dissemination, distribution, or republication, and political committees and any other person who is otherwise required to report expenditures are required to report the payment in the same manner as other expenditures, regardless of whether coordination occurred. A candidate does not incur any reporting obligations regarding the dissemination, distribution, or republication of campaign material by another person in the absence of coordination.

The Commission's pre-BCRA regulation at 11 CFR 109.1(d)(1) would be moved to the definition of contribution at proposed 11 CFR 100.57 as part of the proposed reorganization of 11 CFR part 109. The Commission would make changes to reflect Congress's determination that dissemination, distribution, or republication of campaign material in coordination with a political party committee, as well as with a candidate, constitutes a contribution. In addition, the dissemination, distribution, or republication of campaign material would be coordinated if the dissemination, distribution, or republication satisfies the conduct standards set forth in proposed 11 CFR 109.21(d)(6). The only other substantive change would be the addition of several exceptions explained below. The Commission seeks comment on the proposed location of the new regulation (that is, whether the dissemination, distribution, or republication of campaign material should be made a part of the definition of ''contribution''), and whether a corresponding provision should be added to the definition of an ''expenditure'' in 11 CFR part 100, subpart D, to maintain a parallel structure with the contribution definition. Alternatively, given that the pre-BCRA statute and BCRA categorize dissemination, distribution, or republication of campaign materials as ''expenditures'', 2 U.S.C. 441a(a)(7)(B)(iii), the Commission seeks comment on whether such dissemination, distribution, or republication should be considered a contribution by the person paying for the materials absent coordination with the campaign. Please note that this alternative is not included in the text of the draft regulations.

In addition, the Commission notes that 2 U.S.C. 441a(a)(7)(B)(iii) refers to ''campaign materials prepared by the candidate, his campaign committees, or their authorized agents,'' but does not include campaign materials prepared by political party committees. The Commission requests comment on whether the latter campaign materials should be included in light of the fact that Congress now considers coordination with a political party committee to result in a contribution. 2 U.S.C. 441a(a)(7)(B)(ii).

In proposed 11 CFR 100.57, the Commission would include new exceptions for different types of republication of campaign material so that they would not constitute contributions. In proposed 11 CFR 100.57(b)(1), the Commission would make it clear that candidates and political party committees are permitted to republish or disseminate their own materials without making a contribution. Proposed paragraph (b)(2) would exempt the use of material when it is used to advocate the defeat of the candidate or party who prepared the material. For example, Person A would not make a contribution to Candidate B if Person A incorporates part of Candidate B's campaign material into its own public communication that advocates the defeat of Candidate B. However, if the same public communication also urged the election of Candidate B's opponent, Candidate C, and incorporated a picture or quote that had been prepared by Candidate C's campaign, then the result would constitute a contribution to Candidate C.

A third exception in paragraph (b)(3) would make it clear that campaign material may be republished as part of a *bona fide* news story as provided in 11 CFR 100.73 or 11 CFR 100.132. In proposed paragraph (b)(4), the Commission would continue to allow a corporation or labor organization to make limited use of candidate materials in communications to its restricted class, as provided in 11 CFR 114.3(c)(1).

Finally, in proposed paragraph (b)(5), the Commission would recognize that a national, State, or subordinate committee of a political party would make a coordinated party expenditure rather than an in-kind contribution when it pays for the dissemination, distribution, or republication of campaign material using coordinated party expenditure authority under 11 CFR 109.32. This proposed rule is somewhat broader than pre-BCRA 11 CFR 109.1(d)(2), which provided that a State or subordinate party committee could engage in such dissemination, distribution, or republication as agents designated by a national committee pursuant to 11 CFR 110.7(a)(4).

The Commission seeks comments on whether any additional exceptions should be added in proposed paragraph (b), such as an exception for the republication of campaign materials in a non-partisan voter guide, and whether the proposed exceptions are appropriate.

Contribution and Expenditure Limitations and Prohibitions

I. Proposed 11 CFR 110.1 and 110.2 Limits on Contributions Made to Political Committees Making Independent Expenditures

The Commission proposes to clarify that the section 110.1 and 110.2 limitations on contributions to political committees making independent expenditures would apply to contributions made by multicandidate committees and other persons to political party committees that make independent expenditures. *See* proposed 11 CFR 110.1(n) and 110.2(k). Paragraphs 110.1(n) and 110.2(k) would apply to contributions by multicandidate committees and contributions by persons other than multicandidate committees, respectively. These two proposed paragraphs would replace pre-BCRA paragraphs (d)(2) of sections 110.1 and 110.2 regarding the application of the contribution limits to contributions to committees that make independent expenditures.

These sections need to be updated because under pre-BCRA paragraphs (d)(2) of each section, the Commission recognized that political committees other than party committees may make independent expenditures, but did not contemplate party committees doing so. *See Colorado I*, 518 U.S. at 618. For example, national party committees may receive contributions aggregating $20,000 per year from individuals, a contribution limit that Congress increased to $25,000 for contributions made on or after January 1, 2003. *See* 2 U.S.C. 441a(a)(1)(B). Consequently, under the proposed new language, the $20,000 ($25,000) contribution limit would continue to apply when the recipient national party committee uses the contribution to make independent expenditures. The Commission notes that 11 CFR 110.1(h) regarding contributions to political committees supporting the same candidate, remains in effect and unchanged except to the extent that the support to candidates by political party committees may now include independent expenditures. The Commission requests comments on proposed new paragraph (n) of section 110.1 and new paragraph (k) of section 110.2.

Additional proposed changes to 11 CFR 110.1 and 110.2 are being addressed in a separate rulemaking on BCRA's increased contribution limits. *See Notice of Proposed Rulemaking*, 67 FR 54366 (August 22, 2002).

II. Proposed 11 CFR 110.7 Removed and Reserved

The pre-BCRA regulations at 11 CFR 110.7 contain the coordinated party expenditure limits and related provisions. As noted above, the Commission proposes to incorporate section 110.7, in amended form, into 11 CFR part 109, subpart D. Specifically, the provisions in section 110.7 would be revised and redesignated as follows: 11 CFR 110.7(a) and (b) to 11 CFR 109.32(a) and (b) and 109.36; section 110.7(c) to section 109.33; and section 110.7(d) to section 109.34.

Presidential Candidate Expenditure Limitations

Proposed 11 CFR 110.8 Presidential Candidate Expenditure Limitations

As in proposed 11 CFR 109.32(a) and (b) discussed above, the Commission would clarify that the expenditure limits for publicly funded Presidential candidates would be increased in accordance with 11 CFR 110.9(c). *See* proposed 11 CFR 110.8(a)(2). To accommodate this proposed new section 110.8(a)(2), the Commission proposes to re-designate pre-BCRA paragraphs (a)(1) and (a)(2) as (a)(1)(i) and (a)(1)(ii), respectively.

In proposed 11 CFR 110.8(a)(3), the Commission would reference the definition of ''voting age population'' at proposed 11 CFR 110.18. The voting age population is a factor in the calculation of expenditure limitations in 11 CFR 110.8(a). Finally, the Commission is proposing additional changes to 11 CFR 110.9(c) in a separate rulemaking. *See Notice of Proposed Rulemaking*, 67 FR 54366 (August 22, 2002). Comment is sought on these proposals.

Voting Age Population

Proposed 11 CFR 110.18 Voting Age Population

The Commission proposes a redesignation of pre-BCRA section 110.9(d) regarding voting age population (''VAP'') to proposed 11 CFR 110.18 as part of a reorganization of section 110.9. This provision is referenced in proposed paragraphs 109.32(a) and (b) (coordinated party expenditure limits) and 110.8(a)(3) (presidential candidate expenditure limits) where the VAP is used as a factor in calculating the limits. Proposed section 110.18 would be revised from pre-BCRA section 110.9(d) only by noting the fact of, rather than the Commission assuring, that the Secretary of Commerce shall each year certify to the Commission and publish in the **Federal Register** an estimate of the VAP pursuant to 2 U.S.C. 441a(e). Proposed changes to the other provisions of section 110.9, including section 110.9(c) as noted above, are included in a separate rulemaking. *See Notice of Proposed Rulemaking*, 67 FR 54366 (August 22, 2002). Comment is sought on this proposal.

Corporate and Labor Organization Activity

Proposed 11 CFR 114.4(c)(5) Voter Guides

Paragraph (c)(5) of section 114.4 pertains to voter guides paid for by corporations and labor organizations. The Commission proposes several changes to this paragraph to conform with other regulatory changes proposed in response to BCRA.

The pre-BCRA version of paragraphs (c)(5)(i) and (ii) of section 114.4 provides that a corporation or labor organization must not, among other things, ''contact'' a candidate in the preparation of a voter guide, except in writing. In this rulemaking, the Commission proposes coordination rules that would allow a person, such as a corporation or labor union, to contact a candidate to inquire about the candidate's positions on the issues without a subsequent communication paid for by that person being deemed coordinated with the candidate (assuming there was no other evidence of coordination). *See* 109.21(f). Accordingly, proposed paragraphs (c)(5)(i) and (ii) of section 114.4 would be amended to delete the prohibition against any contact with a candidate in the preparation of a voter guide.

Pre-BCRA paragraph (c)(5)(ii) of section 114.4 provides that a corporation or a labor union preparing a voter guide may direct questions in writing to a candidate. In the coordination rules proposed in this rulemaking, a person, such as a corporation or labor union, may informally contact a candidate to inquire about the candidate's positions on the issues without a subsequent communication paid for by that person being deemed coordinated with the candidate (assuming there was no other evidence of coordination). *See* 109.21(f). That is, the inquiry would not need be in writing. Accordingly, proposed paragraph (c)(5)(ii) of section 114.4 would be amended to delete the requirement that contact with the candidate be in writing.

The Commission would also make several non-substantive changes to proposed paragraphs (c)(5)(i) and (ii) to conform these provisions to the statutory provisions on which they are based. *Compare* 2 U.S.C. 441a(a)(7)(B) with 11 CFR 114.5(c)(5)(i) and (ii).

The Commission notes that an appeals court in one circuit has invalidated portions of pre-BCRA 11 CFR 114.4(c)(5). *See Clifton* v. *Federal Election Commission*, 927 F.Supp. 493 (D. Me. 1996), *modified in part and remanded in part*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998). Subsequently, in 1999, the Commission received a Petition for Rulemaking asking the Commission to repeal its voter guide regulation. The Commission published a Notice of Availability. *See* 64 FR 46319 (Aug. 25, 1999). The Commission's present rulemaking proposes changes necessitated by BCRA, and the Commission would reserve any additional changes to the voter guide regulations to a future rulemaking. Comment is sought on this approach.

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

[Regulatory Flexibility Act]

The Commission certifies that the attached proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that the national, State, and local party committees of the two major political parties, and other political committees are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. Further, individual citizens operating under these rules are not small entities.

To the extent that any political committee may fall within the definition of ''small entities,'' their numbers are not substantial, particularly the number that would coordinate expenditures with candidates or political party committees in connection with a Federal election.

In addition, the small entities to which the rules would apply would not be unduly burdened by the proposed rules because there is no significant extra cost involved, as independent expenditures must already be reported. Collectively, the differential costs will not exceed 100 million dollars per year. In addition, new reporting requirements would not significantly increase costs, as they only apply to those spending $10,000 or more on independent expenditures, and the actual reporting requirements are the minimum

necessary to comply with the new statute enacted by Congress.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 102

Political committees and parties, reporting and recordkeeping requirements.

11 CFR Part 104

Campaign funds, political committees and parties, reporting and recordkeeping requirements.

11 CFR Part 105

Document filing.

11 CFR Part 109

Elections, reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, political committees and parties.

11 CFR Part 114

Business and industry, elections, labor.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend subchapter A of chapter I of title 11 of the *Code of Federal Regulations* as follows:

PART 100—SCOPE AND DEFINITIONS

1. The authority citation for part 100 would be revised to read as follows:

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

2. Section 100.16 would be revised to read as follows:

§ 100.16 Independent expenditure (2 U.S.C. 431(17)).

(a) The term *independent expenditure* means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is ''made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents'' if it is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

(b) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

3. In § 100.19, paragraphs (b) and (d) would be revised to read as follows:

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

* * * * *

(b) *Timely filed. General rule.* A document other than those addressed in paragraphs (c) through (f) of this section is timely filed upon deposit as registered or certified mail in an established U.S. Post Office and postmarked no later than 11:59 p.m. Eastern Standard/Daylight Time of the day of the filing date, except that pre-election reports so mailed must be postmarked no later than 11:59 p.m. Eastern Standard/Daylight Time of the fifteenth day before the date of the election. Documents sent by first class mail must be received by the close of business on the prescribed filing date to be timely filed.

* * * * *

(d) 48-hour and 24-hour reports of independent expenditures.

(1) *48-hour reports of independent expenditures.* A 48-hour report of independent expenditures under 11 CFR 104.4(b) or 109.10(c) is timely filed when it is received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which independent expenditures aggregate $10,000 or more in accordance with 11 CFR 104.4(f), any time during the calendar year up to and including the 20th day before an election.

(2) *24-hour reports of independent expenditures.* A 24-hour report of independent expenditures under 11 CFR 104.4(c) or 109.2(c) is timely filed when it is received by the Commission no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which independent expenditures aggregate at least $1,000, in accordance with 11 CFR 104.4(f), during the period less than 20 days but more than 24 hours before an election.

(3) *Permissible means of filing.* In addition to other permissible means of filing, a 24-hour report or 48-hour report of independent expenditures may be filed using a facsimile machine or by electronic mail if the filer is not required to file electronically in accordance with 11 CFR 104.18.

* * * * *

§ 100.23 [Removed and reserved]

4. Part 100 would be amended by removing and reserving §100.23:

5. Part 100, subpart B would be revised by adding §100.57 to read as follows:

§ 100.57 Dissemination, distribution, or republication of candidate campaign materials (2 U.S.C. 441a(a)(7)(B)(iii)).

(a) Except as provided in paragraph (b) of this section, a payment for the dissemination, distribution, or republication, in whole or in part, of any broadcast or of any written, graphic, or other form of campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing is a contribution to the candidate or political party committee if the dissemination, distribution, or republication or campaign materials satisfies any of the conduct standards set forth in 11 CFR 109.21(d)(6) with respect to any conduct other than the original preparation of campaign materials. If the dissemination, distribution, or republication of campaign materials is not coordinated with a candidate or political party committee, then the payment for such dissemination, distribution, or republication is a contribution by the person making the payment for the purposes of that person's contribution limits and reporting requirements. The candidate who prepared the campaign material does not receive or accept an in-kind contribution that results solely from the dissemination, distribution, or republication of campaign material originally prepared by that candidate, unless the dissemination, distribution, or republication of the campaign materials is coordinated with that candidate or a political party committee as a result of conduct other than the original preparation of campaign materials.

(b) The following uses of campaign materials do not constitute a contribution to the candidate who originally prepared the materials:

(1) The campaign material is disseminated, distributed, or

republished by the candidate, the candidate's authorized committee, or an agent of either of the foregoing who prepared that material;

(2) The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material;

(3) The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 CFR 100.73 or 11 CFR 100.132;

(4) The campaign material used consists of a brief quote or portions of materials that demonstrate a candidate's

position as part of a corporation's or labor organization's expression of its own views to its restricted class under 11 CFR 114.3(c)(1); or

(5) A national political party committee or a State or subordinate political party committee pays for such dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 CFR 109.32.

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

6. The authority citation for Part 102 would continue to read as follows:

Authority: 2 U.S.C. 432, 433 434(a)(11), 438(a)(8), and 441d.

7. Section 102.6(a)(1)(ii) would be revised to read as follows:

§ 102.6 Transfers of funds; collecting agents.

(a) * * *

(1) * * *

(ii) Subject to the restrictions set forth at 11 CFR 109.35(c), 300.10(a), 300.31, 300.34(a) and (b), transfers of funds may be made without limit on amount between or among a national party committee, a State party committee and/or any subordinate party committee whether or not they are political committees under 11 CFR 100.5 and whether or not such committees are affiliated.

* * * * *

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

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

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

9. Section 104.4 would be revised to read as follows:

§ 104.4 Independent expenditures by political committees (2 U.S.C. 434(b), (d), and (g)).

(a) *Regularly scheduled reporting.* Every political committee that makes independent expenditures must report all such independent expenditures on Schedule E in accordance with 11 CFR 104.3(b)(3)(vii). Every person other than a political committee must report independent expenditures in accordance with 11 CFR 109.10.

(b) *Reports of independent expenditures made at any time up to and including the 20th day before an election.*

(1) *Independent expenditures aggregating less than $10,000 in a calendar year.* Political committees must report on Schedule E of FEC Form 3X at the time of their regular reports in accordance with 11 CFR 104.3, 104.5 and 104.9, all independent expenditures aggregating less than $10,000 with respect to a given election any time during the calendar year up to and including the 20th day before an election.

(2) *Independent expenditures aggregating $10,000 or more in a calendar year.* Political committees must report on Schedule E of FEC Form 3X all independent expenditures aggregating $10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election. Political committees must ensure that the Commission receives these reports no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the political committee must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. *See* 11 CFR 104.4(f) for aggregation. Each 48-hour report must contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. In addition to other permissible means of filing, a political committee may file the 48-hour reports under this section by any of the means permissible under 11 CFR 100.19(d)(3).

(c) *Reports of independent expenditures made less than 20 days, but more than 24 hours before the day of an election.* Political committees must ensure that the Commission receives reports of independent expenditures aggregating $1,000 or more with respect to a given election, after the 20th day, but more than 24 hours, before 12:01 a.m. of the day of the election, no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, the political committee must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. Each 24-hour report shall contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. Political committees may file reports under this section by any of the means permissible under 11 CFR 100.19(d)(3).

(d) *Verification.* Political committees shall verify reports of independent expenditures filed under paragraph (b) or (c) of this section by one of the methods stated in paragraph (d)(1) or (2) of this section. Any report verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(1) For reports filed on paper (*e.g.*, by hand delivery, U.S. Mail or facsimile machine), the treasurer of the political committee that made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by 11 CFR 104.3(b)(3)(vii).

(2) For reports filed by electronic mail, the treasurer of the political committee that made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by 11 CFR 104.3(b)(3)(vii).

(e) *Where to file.* Political committees must file reports of independent expenditures under this section and part 109 as set forth at paragraphs (c)(1) and (2) of this section.

(1) For independent expenditures in support of or in opposition to, a candidate for President or Vice President: with the Commission and the Secretary of State for the State in which the expenditure is made.

(2) For independent expenditures in support of, or in opposition to, a candidate for the Senate or the House of Representatives: with the Commission and the Secretary of State for the State in which the candidate is seeking election.

(f) *Aggregating independent expenditures for reporting purposes.* For purposes of determining whether 24-hour and 48-hour reports must be filed in accordance with paragraphs (b) and (c) of this section and 11 CFR 109.10(c) and (d), aggregations of independent expenditures must be calculated as of the first date during the calendar year on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated, and as of the date that any such communication with respect to the same election is subsequently publicly distributed or otherwise publicly disseminated. Every

person must include in the aggregate total all disbursements for independent expenditures, and all enforceable contracts, either oral or written, obligating funds for disbursements for independent expenditures, made with respect to any communication that has been publicly distributed or otherwise publicly disseminated, during the calendar year, with respect to a given election for Federal office.

10. In §104.5, paragraph (g) would be revised to read as follows:

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

* * * * *

(g) *Reports of independent expenditures.*

(1) *48-hour reports of independent expenditures.* Every person who or which must file a 48-hour report under 11 CFR 104.4(b) must ensure the Commission receives the report no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures by that person relating to the same election as that to which the previous report relates aggregate $10,000 or more, that person must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which the $10,000 threshold is reached or exceeded. *See* 11 CFR 104.4(f) for aggregation.

(2) *24-hour report of independent expenditures.* Every person who or which must file a 24-hour report under 11 CFR 104.4(c) must ensure that the Commission receives the report no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures by that person relating to the same election as that to which the previous report relates aggregate $1,000 or more, that person must ensure that the Commission receives a 24-hour report of the subsequent independent expenditures no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which the $1,000 threshold is reached or exceeded. *See* 11 CFR 104.4(f) for aggregation.

(3) Each 24-hour or 48-hour report of independent expenditures filed under this section shall contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved.

(4) For purposes of this part, a communication that is mailed to its intended audience is publicly disseminated when it is relinquished to the U.S. Postal Service.

* * * * *

PART 105—DOCUMENT FILING (2 U.S.C. 432(g))

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

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

12. Section 105.2 would be revised to read as follows:

§ 105.2 Place of filing; Senate candidates, their principal campaign committees, and committees supporting only Senate candidates (2 U.S.C. 432(g)(2), 434(g)(3)).

(a) *General Rule.* Except as provided in paragraph (b) of this section, all designations, statements, reports, and notices as well as any modification(s) or amendment(s) thereto, required to be filed under 11 CFR parts 101, 102, and 104 by a candidate for nomination or election to the office of United States Senator, by his or her principal campaign committee or by any other political committee(s) that supports only candidates for nomination for election or election to the Senate of the United States shall be filed in original form with, and received by, the Secretary of the Senate, as custodian for the Federal Election Commission.

(b) *Exceptions.* The following statements and reports must be filed with the Commission and not with the Secretary of the Senate, even if the communication refers to a Senatorial candidate:

(1) 48-hour statements of electioneering communications; and

(2) 24-hour and 48-hour reports of independent expenditures.

13. Part 109 would be revised to read as follows:

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 441a, Pub. L. 107–155 sec. 214(c) (March 27, 2002)).

Sec.

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Authority: 2 U.S.C. 431(17), 434(c), 441a; Pub. L. 155–107 214(c).

Subpart A—Scope and Definitions

§ 109.1 When will this part apply?

This part applies to expenditures that are made independently from a candidate, an authorized committee, a political party committee, or their agents, and to those payments that are made in coordination with a candidate, a political party committee, or their agents. The regulations in this part explain the differences between the two kinds of payments and state how each type of payment must be reported and who must report it. In addition, subpart D of part 109 describes procedures and limits that apply only to payments, transfers, and assignments made by political party committees.

§ 109.2 [Reserved]

§ 109.3 Definitions.

For the purposes of 11 CFR part 109 only, *agent* means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:

(a) In the case of a national, State, district, or local committee of a political party, any one or more of the activities listed in paragraphs (a)(1) through (a)(5) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize any communication described in 11 CFR 100.29(a)(1), or to make or authorize a public communication that meets the content standard set forth in 11 CFR 109.21(c).

(3) To create, produce, or distribute any communication at the request or suggestion of a candidate.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience;

(iii) The specific media outlet used;

(iv) The timing or frequency of the communication;

(v) The size or prominence of a printed communication or duration of a communication on a television, radio, or cable station or by telephone; or,

(vi) The script of a telephone message.

(5) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a candidate.

(b) In the case of an individual who is a Federal candidate or an individual holding Federal office, any one or more of the activities listed in paragraphs (b)(1) through (b)(5) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize any communication described in 11 CFR 100.29(a)(1), or to make or authorize a public communication that meets the content criteria set forth in 11 CFR 109.21(c).

(3) To request or suggest that any other person create, produce, or distribute any communication.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience;

(iii) The specific media outlet used;

(iv) The timing or frequency of the communication;

(v) The size or prominence of a printed communication or duration of a communication on a television, radio, or cable station or by telephone; or,

(vi) The script of a telephone message.

(5) To provide material or information to assist another person in the creation, production, or distribution of any communication.

Subpart B—Independent Expenditures

§ 109.10 How do political committees and other persons report independent expenditures?

(a) Political committees, including political party committees, must report independent expenditures under 11 CFR 104.4.

(b) Every person, other than a political committee, who makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement, or report on FEC Form 5 with the Commission or Secretary of the Senate containing the information required by paragraph (e) of this section. Every person filing a report or statement under this section shall do so at the end of the reporting period during which any such independent expenditures that aggregate in excess of $250 is made and in any reporting period thereafter in which additional independent expenditures are made.

(c) Every person, other than a political committee, who makes independent expenditures aggregating $10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election, must report the independent expenditures on FEC Form 5, or by signed statement if the person is not otherwise required to file electronically under 11 CFR 104.18. (*See* 11 CFR 104.4(f) for aggregation). The person making the independent expenditures aggregating $10,000 or more must ensure that the Commission receives the report or statement no later than 11:59 p.m. Eastern Standard/Daylight Time of the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. Each 48-hour report must contain the information required by paragraph (e)(1) of this section.

(d) Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement no later than 11:59 p.m. Eastern Standard/Daylight Time of the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. *See* 11 CFR 104.4(f) for aggregation. Such report or statement shall contain the information required by paragraph (e) of this section.

(e) *Verified statements.*

(1) *Contents of verified statement.* If a signed statement is submitted, the statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) *Verification of independent expenditure statements and reports.* Every person shall verify reports of independent expenditures filed pursuant to the requirements of this section by one of the methods stated in paragraph (2)(i) or (ii) of this section. Any report verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports filed on paper (*e.g.*, by hand delivery, U.S. Mail or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by

typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.

§ 109.11 When is a ''non-authorization notice'' (disclaimer) required?

Whenever any person makes an independent expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such person shall comply with the requirements of 11 CFR 110.11.

Subpart C—Coordination

§ 109.20 What does ''coordinated'' mean?

(a) *Coordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.

(b) Any expenditure that is coordinated within the meaning of paragraph (a) of this section, but is not made for a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37, is an in-kind contribution or a coordinated party expenditure with respect to the candidate or political party committee with whom or with which it was coordinated, unless otherwise exempted under 11 CFR part 100, subparts C or E.

§ 109.21 What is a ''coordinated communication''?

(a) *Definition.* A communication is coordinated with a candidate, an authorized committee, or their agents, or a political party committee or its agents when the communication:

(1) Is paid for by a person other than that candidate, or an authorized committee, a political party committee, or agent of any of the foregoing;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section. For a communication that satisfies the content standard in paragraph (c)(2) of this section, the conduct standard in paragraph (d)(6) of this section must be satisfied for the communication to be deemed coordinated.

(b) *Treatment as an in-kind contribution; Reporting.*

(1) *General rule.* A payment for a communication that is coordinated with a candidate or political party committee is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate or political party committee with whom or which it was coordinated, unless excepted under 11 CFR part 100, subpart C.

(2) *In-kind contributions resulting from conduct described in paragraphs (d)(4) or (d)(5) of this section.* Notwithstanding paragraph (b)(1) of this section, the candidate, authorized committee, or political party committee with whom or which a communication is coordinated does not receive or accept an in-kind contribution that results from conduct described in paragraphs (d)(4) or (d)(5) of this section, unless the candidate, authorized committee, or political party committee engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.

(3) *Reporting of coordinated communications.* A political committee, other than a political party committee, that makes a coordinated communication must report the payments for the communication as a contribution made to the candidate or political party committee with whom or which it was coordinated and as an expenditure in accordance with 11 CFR 104.3(b)(1)(v). A political party committee with which a communication paid for by another person is coordinated must report the usual and normal value of the communication as an in-kind contribution received and as an expenditure in accordance with 11 CFR 104.13.

(c) *Content standards.* Any one of the following types of content satisfies the content standard of this section:

(1) The communication would otherwise be considered an electioneering communication under 11 CFR 100.29; or

(2) The communication disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 100.57(b); or

(3) The public communication expressly advocates the election or defeat of a clearly identified candidate for Federal office; or

Alternative A for Paragraph (c)(4)

(4) The communication is a public communication, as defined in 11 CFR 100.26, that refers to a clearly identified candidate for Federal office.

Alternative B for Paragraph (c)(4)

(4) The communication is a public communication, as defined in 11 CFR 100.26, that promotes or supports or attacks or opposes a clearly identified candidate for Federal office.

Alternative C for Paragraph (c)(4)

(4) The communication is a public communication, as defined in 11 CFR 100.26, and each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

(i) The public communication is made 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate;

(ii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate; and

(iii) The public communication makes express statements about the record or position or views on an issue, or the character, or the qualifications or fitness for office, or party affiliation, of a clearly identified Federal candidate.

(d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) *Request or suggestion.*

(i) The communication is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee, political party committee, or agent of any of the foregoing; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, assents to the suggestion.

(2) *Material involvement.* A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion.* The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who

is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. A discussion is substantial within the meaning of this paragraph if information about the plans, projects, activities, or needs of the candidate or political party committee is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor.* All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor to create, produce, or distribute the communication;

(ii) That commercial vendor, including any employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, in the current election cycle:

(A) Development of media strategy;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media advice; and

(iii) That commercial vendor makes use of or conveys to the person paying for the communication:

(A) Material information about the plans, projects, activities, or needs of the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing; or

(B) Material information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing.

(5) *Former employee or independent contractor.* Both of the following statements in paragraph (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, during the current election cycle; and,

(ii) That former employee or independent contractor makes use of or conveys to the person paying for the communication:

(A) Material information about the plans, projects, activities, or needs of the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing; or

(B) Material information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing.

(6) *Conduct pertaining to communications that disseminate, distribute, or republish campaign material prepared by a candidate.* A communication that satisfies the content requirement of paragraph (c)(2) of this section shall only be considered to satisfy one or more of the conduct standards of this section if the candidate or authorized committee that initially prepared the campaign material engages in any of the conduct described in paragraphs (d)(1) through (d)(3) of this section with respect to the subsequent dissemination, distribution, or republication of the campaign materials.

(e) *Agreement or formal collaboration.* Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing, is not required for a communication to be considered a coordinated communication. *Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. Formal collaboration means planned, or systematically organized, work on the communication.

§ 109.22 Who is prohibited from making coordinated communications?

Any person who is otherwise prohibited from making contributions or expenditures under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication.

Subpart D—Special Provisions for Political Party Committees

§ 109.30 How are political party committees treated for purposes of coordinated and independent expenditures?

Political party committees may make independent expenditures subject to the provisions in this subpart. *See* 11 CFR 109.35 and 109.36. Political party committees may also make coordinated party expenditures in connection with the general election campaign of a candidate, subject to the limits and other provisions in this subpart. *See* 11 CFR 109.31 through 11 CFR 109.35.

§ 109.31 What is a ''coordinated party expenditure''?

Coordinated party expenditures include payments made by a national committee of a political party, including a national Congressional campaign committee, or a State committee of a political party, including any subordinate committee of a State committee, under 2 U.S.C. 441a(d) for anything of value in connection with the general election campaign of a candidate, including party coordinated communications defined at 11 CFR 109.37.

§ 109.32 What are the coordinated party expenditure limits?

(a) *Coordinated party expenditures in presidential elections.*

(1) The national committee of a political party may make coordinated party expenditures in connection with the general election campaign of the party's candidate for President of the United States affiliated with the party.

(2) The coordinated party expenditures shall not exceed an amount equal to two cents multiplied by the voting age population of the United States. *See* 11 CFR 110.18. This limitation shall be increased in accordance with 11 CFR 110.17.

(3) Any coordinated party expenditure under paragraph (a) of this section shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2.

(4) Any coordinated party expenditures made by the national committee of a political party pursuant to paragraph (a) of this section, or made by any other party committee designated by a national committee of a political party under 11 CFR 109.33, on behalf of that party's presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b) *Coordinated party expenditures in other Federal elections.*

(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make coordinated party expenditures in connection with the general election campaign of the party's candidate for Federal office in that State.

(2) The coordinated party expenditures shall not exceed:

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State (*see* 11 CFR 110.18); or

(B) Twenty thousand dollars.

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) The limitations in paragraph (b)(2) of this section shall be increased in accordance with 11 CFR 110.17(c).

(4) Any coordinated party expenditure under paragraph (b) of this section shall be in addition to any contribution by a political party committee to the candidate permissible under 11 CFR 110.1 or 110.2.

§ 109.33 May a political party committee assign its coordinated party expenditure limit to another political party committee?

(a) Except as provided in 11 CFR 109.35(c), the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may assign its authority to make coordinated party expenditures authorized in 11 CFR 109.32 to another political party committee, provided that before the coordinated party expenditure is made, the national or State committee specifies in writing to the assigned political party committee the amount the assigned political party committee may spend.

(b) For purposes of the coordinated party expenditure limits, State committee includes a subordinate committee of a State committee and includes a district or local committee. State committees and subordinate State committees and district or local committees combined shall not exceed the coordinated party expenditure limits set forth in 11 CFR 109.32. The State committee shall administer the limitation in one of the following ways:

(1) The State committee shall be responsible for insuring that the coordinated party expenditures of the entire party organization are within the coordinated party expenditure limits, including receiving reports from any subordinate committee of a State committee or district or local committee making coordinated party expenditures under 11 CFR 109.32, and filing consolidated reports showing all coordinated party expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission, that permits control over coordinated party expenditures.

§ 109.34 When may a political party committee make coordinated party expenditures?

A political party committee authorized to make coordinated party expenditures may make such expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated party expenditures shall be subject to the coordinated party expenditure limitations of this subpart, whether or not the candidate on whose behalf they are made receives the party's nomination.

§ 109.35 What are the restrictions on a political party committee making both independent expenditures and coordinated party expenditures in connection with the general election of a candidate?

(a) *Applicability.* For the purposes of this subpart:

(1) The national committee of a given political party, all Congressional campaign committees of that political party, and all political committees established, financed, maintained, or controlled by any of the foregoing, together comprise a *political party group*.

(2) The State committee of a given political party in a given State, all subordinate committees of that State committee, and all district or local committees of that political party within that State that meet the definition of political committee under 11 CFR 100.5, together comprise a *political party group. See* 11 CFR 100.14.

(b) *Restrictions on certain expenditures.* On or after the date on which a political party nominates a candidate for election to Federal office, no political committee within a given political party group may do any of the following during the remainder of the election cycle:

(1) Make any coordinated party expenditure under 11 CFR 109.32 in connection with the general election campaign of that candidate at any time after any political committee within that political party group makes any independent expenditure with respect to that candidate; or

(2) Make any independent expenditure with respect to that candidate at any time after any political committee within that political party group makes any coordinated party expenditure under 11 CFR 109.32 in connection with the general election campaign of that candidate.

(c) *Restrictions on certain transfers and assignments.* On or after the date that a political committee within a political party group makes any coordinated party expenditure under 11 CFR 109.32 in connection with the general election campaign of a candidate, no political committee within that same political party group may do any of the following during the remainder of the election cycle:

(1) Transfer any funds to, or receive a transfer of any funds from, any political committee within another political party group if any political committee within that other political party group has made or intends to make an independent expenditure with respect to that candidate; or

(2) Assign all or any portion of its authority to make coordinated party expenditures under 11 CFR 109.32 in connection with the general election campaign of that candidate to any political committee within another political party group if any political committee within that other political party group has made or intends to make an independent expenditure with respect to that candidate. *See* 11 CFR 109.33.

(d) *Definitions.* For the purposes of this section:

(1) An independent expenditure made by a political party committee *with respect to* a candidate includes independent expenditures expressly advocating the election of that party's candidate, as well as independent expenditures expressly advocating the

defeat of any other candidate seeking nomination for election, or election, to the Federal office sought by that party's candidate.

(2) *Election cycle* has the meaning in 11 CFR 100.3(b), except that the election cycle ends on the date of the general election runoff, if any.

§ 109.36 Are there additional circumstances under which a political party committee is prohibited from making independent expenditures?

The national committee of a political party must not make independent expenditures in connection with the general election campaign of a candidate for President of the United States if the national committee of a political party is designated as the authorized committee of its presidential candidate pursuant to 11 CFR 9002.1(c).

§ 109.37 What is a ''party coordinated communication''?

(a) *Definition.* A political party communication is coordinated with a candidate, a candidate's authorized committee, or their agents, when the communication satisfies the conditions set forth in paragraphs (a)(1), (a)(2), and (a)(3) of this section.

(1) The communication is paid for by a political party committee or its agent.

(2) The communication satisfies at least one of the content standards in 11 CFR 109.21(c). For a communication that satisfies the content standard in 11 CFR 109.21(c)(2), the conduct standard in 11 CFR 109.21(d)(6) must be satisfied before the communication shall be deemed coordinated.

(3) The communication satisfies at least one of the conduct standards in 11 CFR 109.21(d). Notwithstanding paragraph (b)(1) of this section, the candidate with whom a party coordinated communication is coordinated does not receive or accept an in-kind contribution that results from conduct described in 11 CFR 109.21(d)(4) or (d)(5), unless the candidate or authorized committee engages in conduct described in 11 CFR 109.21 (d)(1) through (d)(3).

(b) *Treatment of a party coordinated communication.* A payment by a political party committee for a communication that is coordinated with a candidate, and that is not otherwise exempted under 11 CFR part 100, subpart C or E, must be treated by the political party committee making the payment as either:

(1) An in-kind contribution for the purpose of influencing a Federal election under 11 CFR 100.52(d) to the candidate with whom it was coordinated, which must be reported under 11 CFR part 104; or

(2) A coordinated party expenditure pursuant to coordinated party expenditure authority under 11 CFR 109.32 in connection with the general election campaign of the candidate with whom it was coordinated, which must be reported under 11 CFR part 104.

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

14. The authority citation for part 110 would be revised to read as follows:

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

15. In §110.1, paragraph (d) would be revised and paragraph (n) would be added to read as follows:

§ 110.1 Contributions by persons other than multicandidate political committees. (2 U.S.C. 441a(a)(2)).

* * * * *

(d) *Contributions to other political committees.* No person shall make contributions to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

* * * * *

(n) Contributions to committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to political committees making independent expenditures under 11 CFR part 109.

16. In §110.2, paragraph (d) would be revised and paragraph (k) would be added to read as follows:

§ 110.2 Contributions by multicandidate political committees.

* * * * *

(d) *Contributions to other political committees.* No multicandidate political committee shall make contributions to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

* * * * *

(k) Contributions to multicandidate political committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to multicandidate political committees making independent expenditures under 11 CFR part 109.

§ 110.7 [Removed and reserved]

17. Section 110.7 would be removed and reserved.

18. In §110.8, paragraph (a) would be amended as follows:

(a) The introductory text would be redesignated as paragraph (a)(1);

(b) Paragraph (a)(1) would be redesignated as paragraph (a)(1)(i);

(c) Paragraph (a)(2) would be redesignated as paragraph (a)(1)(ii);

(d) A new paragraph (a)(2) would be added to read as follows; and

(e) A paragraph (a)(3) would be added to read as follows:

§ 110.8 Presidential candidate expenditure limitations.

(a) * * *

(2) The expenditure limitations in paragraph (a)(1) of this section shall be increased in accordance with 11 CFR 110.9(c).

(3) Voting age population is defined at 11 CFR 110.18.

* * * * *

19. In part 110 §110.18 would be added to read as follows:

§ 110.18 Voting age population.

There is annually published by the Department of Commerce in the **Federal Register** an estimate of the voting age population based on an estimate of the voting age population of the United States, of each State, and of each Congressional district. The term *voting age population* means resident population, 18 years of age or older.

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

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

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

21. In section 114.4, paragraphs (c)(5)(i) and (c)(5)(ii)(A) would be revised to read as follows:

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

* * *

(c) *Communications by a corporation or labor organization to the general public.*

* * *

(5) *Voter guides.*

* * *

(i) The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.

(ii) (A) The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates'

committees or agents regarding the preparation, contents and distribution of the voter guide;

* * * * *

Dated: September 13, 2002.

Scott E. Thomas,

Commissioner, Federal Election Commission.

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