



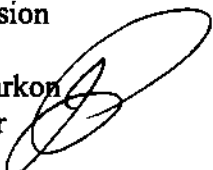
FEDERAL ELECTION COMMISSION  
Washington, DC 20463


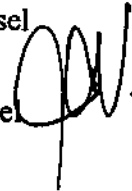




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2002 AUG 19 P 4: 14

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director 

**FROM:** Lawrence H. Norton  
General Counsel   
 Rosemary C. Smith  
Acting Associate General Counsel  
 John C. Vergelli  
Acting Assistant General Counsel   
 Mark Allen  
Attorney   
 Richard Ewell  
Attorney   
 Ruth Heilizer  
Attorney   
 Dawn Odrowski  
Attorney 

AUG 19 2002

**AGENDA ITEM**  
For Meeting of: 8-22-02

**SUBMITTED LATE**

**SUBJECT:** Draft Notice of Proposed Rulemaking on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds.

Attached is a draft Notice of Proposed Rulemaking ("NPRM") addressing issues relating to disclaimers, fraudulent solicitation, civil penalties, and personal use of campaign funds. This draft reflects discussion on these issues during the Regulations Committee meeting on August 14, 2002.

**Recommendation:**

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100, 110, 111, and 113**

3 **[Notice 2002 - >>]**

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

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

8 **SUMMARY:** The Federal Election Commission seeks comments on proposed changes  
9 to its rules relating to disclaimers in political communications, fraudulent  
10 solicitations, civil penalties, and personal use of campaign funds under the  
11 Federal Election Campaign Act of 1971, as amended ("FECA" or "the  
12 Act"). The proposed rules implement the Bipartisan Campaign Reform  
13 Act of 2002 ("BCRA"), which specifies new requirements for disclaimers  
14 accompanying radio, television, and print campaign communications;  
15 expands the scope of FECA's fraudulent misrepresentation prohibition;  
16 increases FECA's civil penalties for violating the prohibition on  
17 contributions made in the name of another; and codifies the "irrespective"  
18 test for permissible use of campaign funds by candidates and Federal  
19 office holders. The Commission had planned to address BCRA-related  
20 rules for inaugural committees in this rulemaking; however, inaugural  
21 committees will now instead be addressed in a future rulemaking.

22 Please note that the draft rules that follow do not represent a final  
23 decision by the Commission on the issues presented by this rulemaking.

1 Further information is provided in the supplementary information that  
2 follows.

3 **DATES:** Comments must be received on or before September 27, 2002.

4 **ADDRESSES:** All comments should be addressed to Mr. John C. Vergelli, Acting  
5 Assistant General Counsel, and must be submitted in either electronic or  
6 written form. Electronic mail comments should be sent to  
7 [BCRAMisc@fec.gov](mailto:BCRAMisc@fec.gov) and must include the full name, electronic mail  
8 address, and postal service address of the commenter. Electronic mail  
9 comments that do not contain the full name, electronic mail address, and  
10 postal service address of the commenter will not be considered. Faxed  
11 comments should be sent to (202) 219-3923, with printed copy follow-up  
12 to ensure legibility. Written comments and printed copies of faxed  
13 comments should be sent to the Federal Election Commission, 999 E  
14 Street, N.W., Washington, D.C., 20463. Commenters are strongly  
15 encouraged to submit comments electronically to ensure timely receipt  
16 and consideration. The Commission will make every effort to post public  
17 comments on its web site within ten business days of the close of the  
18 comment period.

19 **FOR FURTHER**  
20 **INFORMATION**  
21 **CONTACT:**

22 Mr. John C. Vergelli, Acting Assistant General Counsel, or Attorneys,  
23 Ms. Ruth Heilizer (personal use), Ms. Dawn Odrowski (fraudulent  
solicitations), Mr. Mark Allen (civil penalties), Mr. Richard Ewell

1 (disclaimers), 999 E Street, N.W., Washington, D.C., 20463, (202) 694-  
2 1650 or (800) 424-9530.

3 **SUPPLEMENTARY**

4 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-  
5 155, 116 Stat. 81 (March 27, 2002), contains extensive detailed amendments to the Federal  
6 Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, 2 U.S.C. 431 et seq. This  
7 Notice of Proposed Rulemaking ("NPRM") is part of a continuing series of rulemakings the  
8 Commission is publishing over the next several months in order to meet the rulemaking  
9 deadlines set out in BCRA.

10 This NPRM addresses changes to: disclaimer requirements for campaign  
11 communications (2 U.S.C. 441d); fraudulent misrepresentation for purposes of soliciting  
12 contributions or donations (2 U.S.C. 441h); civil penalties for a specific knowing and willful  
13 violation of FECA (2 U.S.C. 437g); permissible uses of campaign funds by candidates and  
14 officeholders (2 U.S.C. 439a); and a technical amendment to the definition of "Act" to include  
15 BCRA amendments to FECA. The changes to the Act addressed in this NPRM are only a few of  
16 many changes made to the Act by BCRA. Other rulemakings have addressed or will address: 1)  
17 non-Federal funds or "soft money" (promulgated on June 22, 2002, 67 Fed. Register 49064 (July  
18 29, 2002)); 2) reorganization of "contribution" and "expenditure" definitions (promulgated on  
19 August 5, 2002, 67 Fed. Register 50582); 3) electioneering communications (Notice of Proposed  
20 Rulemaking, 67 Fed. Register 51131 (August 7, 2002)); 4) coordinated and independent  
21 expenditures;<sup>1</sup> 5) new or amended contribution limitations and prohibitions; 6) the so-called  
22 "millionaires' amendment," which increases contribution limits for Congressional candidates

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<sup>1</sup> This NPRM will also address electioneering communications coordinated with candidate and political party committees.

1 facing self-financed candidates on a sliding scale, based on the amount of personal funds the  
2 opponent contributes to his or her campaign; and 7) consolidated reporting. The consolidated  
3 reporting NPRM will contain the reporting rules proposed in each of the other NPRMs and will  
4 restructure 11 CFR Part 104 to make the reporting rules more user-friendly. Section 402(c) of  
5 BCRA establishes a 270-day deadline for the Commission to promulgate the remaining rules.  
6 The 270-day deadline is December 22, 2002.

7

## 8 **Disclaimers**

### 9 I. Introduction

10 Under the Act, certain communications must include disclaimers identifying who paid for  
11 and, where applicable, who authorized the communication. In BCRA, Congress added new  
12 specificity to these requirements, expanded the disclaimer requirement to reach “any  
13 communication” made by political committees, and required that “electioneering  
14 communications” include disclaimers. See 2 U.S.C. 441d.

15 The Commission proposes to implement these statutory changes by deleting pre-BCRA  
16 11 CFR 110.11 in its entirety, and adopting a new section 110.11. As explained in detail below,  
17 proposed section 110.11 would incorporate many substantive provisions from the pre-BCRA  
18 version of the section. By deleting pre-BCRA section 110.11 and adopting a new section  
19 110.11, the Commission would be able to implement the changes necessitated by BCRA, and to  
20 reorganize 11 CFR 110.11 into a more easily understandable rule.

### 21 II. Applicability and Definitions

22 Proposed paragraph (a)(1) would set out the applicability of the section, and would define  
23 certain terms used in the section. Proposed paragraph (a)(1) would explain that the disclaimer

1 requirements of this section would apply only to communications through any broadcast, cable,  
2 or satellite transmission, newspaper, magazine, outdoor advertising facility, mailing, or any other  
3 type of general public political advertising. This wording would generally follow 2 U.S.C.  
4 441d(a), with one change from the statutory language. Whereas the statute refers only to “any  
5 broadcasting station,” the regulation would cover “any broadcast, cable, or satellite  
6 transmission.” This change is based on Congress’ intent, apparent in 2 U.S.C. 441d(d), to  
7 regulate communications in the mass media of radio and television, and the Commission’s  
8 judgment that it would be unsupportable to regulate a television communication that was  
9 broadcast, while not regulating the same communication merely because it was carried on cable  
10 or satellite.

11         The Commission seeks comment on whether the term communication, as used in this  
12 section, should have the same scope as the term public communication. See 2 U.S.C. 431(22)  
13 and 11 CFR 100.26. The two terms differ in some respects. A “public communication,” as  
14 defined in 2 U.S.C. 431(22), includes a telephone bank to the general public, whereas telephone  
15 banks are not mentioned in section 441d(a). A “public communication” includes a mass mailing,  
16 which is defined as more than 500 pieces of substantially similar mail. 2 U.S.C. 431(22), (23).  
17 Section 441d(a) refers to a “mailing,” without any adjective. (See below for a discussion of the  
18 proposed definition of “mailing” for purposes of the disclaimer requirements.)

19         The Commission notes, however, that the definitions of “public communication”  
20 (2 U.S.C. 431(22)) and “communication” (2 U.S.C. 441d(a)) have a fundamental similarity in  
21 that both use virtually identical phrases, “or any other type [form] of general public political  
22 advertising,” to summarize the respective definitions. (Section 431(22) uses the word “form,”  
23 while section 441d(a) uses the word “type;” the Commission discerns no substantive differences

1 arising from the choice of synonyms.) Also, conforming the definitions would appear to  
2 promote consistent use of terminology throughout the regulations.

3 Proposed paragraphs (a)(1)(i) through (iv) would enumerate the particular types of such  
4 communications to which the disclaimer requirements would apply. Throughout proposed  
5 section 110.11, the word "type" would be used, rather than "form," as in the pre-BCRA version  
6 of the regulation. This change would have no substantive effect and would be done only to  
7 conform the regulation to the language of the statute. See 2 U.S.C. 441d.

8 In BCRA, Congress provided that "any communication" for which a political committee  
9 makes a disbursement must include a disclaimer, expanding the scope of the disclaimer  
10 requirement for political committee communications. 2 U.S.C. 441d(a). Proposed paragraph  
11 (a)(1)(i) would read, "[a]ll such communications for which a political committee makes a  
12 disbursement," with the qualifier "such" intended to clarify that only communications by a  
13 political committee through one or more of the media enumerated in the first sentence of  
14 proposed paragraph (a)(1) must have a disclaimer.

15 Proposed paragraph (a)(1)(ii) would require that "[a]ll such communications by any  
16 person that expressly advocate the election or defeat of a clearly identified candidate" must  
17 include a disclaimer. 2 U.S.C. 441d(a). The proposed rule would not substantively change the  
18 disclaimer requirement for express advocacy communications from the pre-BCRA version of the  
19 regulation.

20 Proposed paragraph (a)(1)(iii) would require "[a]ll such communications by any person"  
21 that solicit a contribution to include a disclaimer. 2 U.S.C. 441d(a). The proposed rule would  
22 not change the disclaimer requirement for solicitations from the pre-BCRA version of the rule.

23 Congress amended 2 U.S.C. 441d(a) to require that "electioneering communications"

1 include disclaimers. The Commission proposes new paragraph (a)(1)(iv), which would require  
2 that “[a]ll electioneering communications” include a disclaimer.

3 Proposed paragraph (a)(2) would define two terms used in the section. In a separate  
4 rulemaking, the Commission has proposed a definition of the term “electioneering  
5 communication,” as that term is used in BCRA. Proposed 11 CFR 100.29(a), see  
6 “Electioneering Communications,” 67 Fed. Register 51131 (Aug. 7, 2002). Proposed paragraph  
7 (a)(2)(i) would state that electioneering communication has the same meaning as set forth at  
8 proposed 11 CFR 100.29.

9 In BCRA, Congress amended 2 U.S.C. 441d(a)(1) by removing the adjective “direct”  
10 from the pre-BCRA term “direct mailing.” The Commission proposes to define mailing, for  
11 purposes of this section, by redesignating the definition of direct mailing in pre-BCRA  
12 110.11(a)(3) to proposed paragraph (a)(2)(ii), deleting the adjective “direct,” and simplifying the  
13 syntax of the pre-BCRA definition. For purposes of the disclaimer requirements, mailing would  
14 mean more than 100 pieces of substantially similar mail. Thus, the definition of mailing, post-  
15 BCRA, would substantively correspond to the definition of direct mailing, pre-BCRA. Given  
16 that Congress defined “mass mailing” in BCRA as more than 500 pieces of mail, see 2 U.S.C.  
17 431(23), and given that a “mailing” is presumably less than a “mass mailing,” the continued use  
18 of a threshold of 100 pieces of mail, which is, of course, fewer than 500 pieces, seems  
19 appropriately matched to the statutory language.

### 20 III. General Content Requirements

21 Proposed paragraph (b) would set out the general content requirements for disclaimers,  
22 depending on who paid for the communication and, where applicable, who authorized the  
23 communication. Pre-BCRA paragraphs (a)(1)(i) and (ii) of section 110.11, which apply to



1 communications authorized and paid for by a candidate and communications authorized by a  
2 candidate but paid for by another person, respectively, would be redesignated as to proposed  
3 paragraphs (b)(1) and (2), respectively, without substantive revision.

4 Proposed paragraph (b)(3) would apply to a communication, including any solicitation,  
5 that is not paid for or authorized by a candidate. The provisions of pre-BCRA 11 CFR  
6 110.11(a)(1)(iii) would be replaced with proposed paragraph (b)(3), with one substantive change.  
7 In BCRA, Congress provided that a covered communication not authorized by a candidate, his or  
8 her authorized committees or agents must have a disclaimer that includes the “permanent street  
9 address, telephone number, or World Wide Web address” of the person who paid for the  
10 communication. 2 U.S.C. 441d(a)(3). Similar language would be added in proposed paragraph  
11 (b)(3).

12 The Commission proposes not to continue pre-BCRA 11 CFR 110.11(a)(1)(iv) in  
13 proposed section 110.11. This paragraph, pre-BCRA, applies to “solicitations directed to the  
14 general public on behalf of a political committee which is not an authorized committee of a  
15 candidate.” Pre-BCRA paragraph (a)(1)(iv) thus appears to be redundant with proposed  
16 paragraph (b)(3), see above, which would apply to communications, including solicitations, not  
17 authorized by a candidate. Given this apparent redundancy, the pre-BCRA provision would not  
18 be included in the proposed section.

#### 19 IV. Disclaimer Specifications

##### 20 A. Specifications for All Disclaimers

21 In BCRA, Congress created a number of specific requirements for disclaimers to be  
22 included in communications covered by the statute. These statutory requirements vary,  
23 depending on whether the communication was printed or broadcast through radio or television,

1 and on whether a candidate or another person paid for the communication. 2 U.S.C. 441d(c), (d).  
2 Proposed paragraph (c) would combine the disclaimer requirements in pre-BCRA 11 CFR  
3 110.11(a)(5) with the new requirements Congress added in BCRA.

4 Proposed paragraph (c)(1) would set forth a general, “clear and conspicuous” requirement  
5 applicable to all disclaimers, regardless of the medium in which the communication is  
6 transmitted. Proposed paragraph (c)(1) would be a slightly revised version of the “clear and  
7 conspicuous” requirement in pre-BCRA 11 CFR 110.11(a)(5). The final sentence of proposed  
8 paragraph (c)(1) would provide that a disclaimer is not clear and conspicuous if it is difficult to  
9 read or hear, or if its placement is easily overlooked. This would modify the corresponding pre-  
10 BCRA provision, which was focused on print communications only, by generalizing it to apply  
11 to radio and television communications, as well. The Commission seeks comment on this  
12 proposed paragraph.

13 B. Specific Requirements for Printed Communications

14 Several of the specific disclaimer requirements added by BCRA apply only to printed  
15 communications. 2 U.S.C. 441d(c)(1). Proposed paragraph (c)(2) would implement the new  
16 statutory specifications, and would incorporate three of the print-specific provisions of pre-  
17 BCRA section 110.11.

18 Given the specificity of the statutory requirements added by BCRA, proposed paragraphs  
19 (c)(2)(i), (ii), and (iii) would precisely track 2 U.S.C. 441d(c)(1), (2), and (3), respectively.  
20 Proposed paragraph (c)(2)(i) would require that the disclaimer on printed communications be of  
21 sufficient type size to be clearly readable by the recipient. 2 U.S.C. 441d(c)(1). The  
22 Commission seeks comment on whether the term, “sufficient type size,” should be further  
23 addressed, either in a specific definition, or by providing a “safe harbor” for disclaimers of at

1 least a specified size. For example, the disclaimer type size could be related, as a percentage or  
2 fraction, to the communication's core message text. If the core message text in the  
3 communication appears in an 18-point font, the regulation could require that the disclaimer text  
4 must appear in a type font, for example, at least two-thirds the size of 18-point font, or 12-point  
5 font, or could deem it sufficient if it was of such size. Alternatively, the disclaimer type size  
6 could be related, as a percentage or fraction, to the largest type size that appears in the  
7 communication. For example, if the banner text or headline text on a newspaper advertisement  
8 is two inches tall by twelve inches wide, the disclaimer text must be 60% of the banner text or  
9 headline text, or 1.2 inches tall by 7.2 inches wide, or would be deemed sufficient if of at least  
10 that size.

11 Proposed paragraph (c)(2)(ii) would specify that the disclaimer included in printed  
12 communications must be contained within a printed box set apart from the other contents of the  
13 communication. 2 U.S.C. 441d(c)(2). Proposed paragraph (c)(2)(iii) would specify that the text  
14 of the disclaimer must be printed with a reasonable degree of color contrast between the  
15 background and the printed statement. 2 U.S.C. 441d(c)(3). The Commission seeks comment  
16 on whether "reasonable degree of color contrast" should be further defined, and specifically  
17 whether the color contrast requirement should be related to the color contrast of the core message  
18 text.

19 Proposed paragraphs (c)(2)(iv) and (v) would incorporate pre-BCRA provisions specific  
20 to print communications. Proposed paragraph (c)(2)(iv), to which the provisions of pre-BCRA  
21 paragraph (a)(5)(i) would be redesignated without substantive revision, would state that a  
22 disclaimer need not appear on the front cover of a communication, except for communications  
23 that only contain a front face, such as billboards. Proposed paragraph (c)(2)(v), to which the

1 provisions of pre-BCRA paragraph (a)(5)(ii) would be redesignated without substantive change,  
2 would state that a communication that would require a disclaimer if distributed separately, and  
3 that is included in a package of materials, must contain the required disclaimer.

4 C. Specific Requirements for Radio and Television Communications that are  
5 Authorized by Candidates

6 In BCRA, Congress added new requirements for disclaimers in radio and television  
7 communications paid for by candidates or persons authorized by candidates. 2 U.S.C.  
8 441d(d)(1). Proposed paragraph (c)(3) would implement these specific statutory requirements.

9 Proposed paragraph (c)(3)(i) would require that a communication that is paid for or  
10 authorized by a candidate and transmitted through radio must include an audio statement spoken  
11 by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(A). The statement would have to  
12 identify the candidate, and state that the candidate has approved the communication. Id.

13 Proposed paragraph (c)(3)(ii) would require that a communication that is paid for or  
14 authorized by a candidate and transmitted through television have an aural disclaimer spoken by  
15 the candidate himself or herself. 2 U.S.C. 441d(d)(1)(B). The provision would require the  
16 candidate to identify himself or herself, and state that he or she has approved the communication.  
17 In addition, proposed paragraph (c)(3)(ii) would require that a full-screen view or a picture of the  
18 candidate appear while the statement is conveyed. The proposed paragraph would also require  
19 the statement to appear in writing at the conclusion of the communication in a clearly readable  
20 manner, with a reasonable degree of color contrast between the statement and the background for  
21 a period of at least four (4) seconds. See 2 U.S.C. 441d(d)(2)(B)(ii).

22 The pre-BCRA regulations provide that a written disclaimer appearing on the screen of a  
23 television communication “shall be considered clear and conspicuous if [it] appear[s] in letters

1 equal to or greater than four (4) percent of the vertical picture height for not less than four (4)  
2 seconds.” 11 CFR 110.11(a)(5)(iii). The proposed regulations would not continue this “safe  
3 harbor” provision because Congress has added specific statutory requirements that render it  
4 incomplete. Specifically, the statute now requires that the written disclaimer in television  
5 communications appear “with a reasonable degree of color contrast between the background and  
6 written statement.” 2 U.S.C. 441d(d)(1)(B); proposed 11 CFR 110.11(c)(3)(ii), above. Neither  
7 the statute nor these proposed regulations define “reasonable degree of color contrast” in the  
8 same manner that pre-BCRA paragraph (a)(5)(iii) defines the required vertical height of the  
9 written disclaimer. To continue the “safe harbor” approach of pre-BCRA paragraph (a)(5)(iii),  
10 the regulations would have to describe “reasonable degree of color contrast” in the same  
11 empirical manner. The Commission notes that this may be possible; for example, the regulation  
12 might be able to employ the standard “color spaces” used by professional printers and graphic  
13 artists (e.g., CMYK) to describe color contrast empirically. The disadvantage of this approach  
14 would be that it might add significant complexity to the regulation. The Commission seeks  
15 comment on whether a “safe harbor” approach to color contrast should be pursued, and, if so,  
16 how to define it.

17 Proposed paragraph (c)(3)(iii) would set out two examples of spoken disclaimers that, if  
18 used by a candidate, would satisfy the requirements of proposed paragraphs (c)(3)(i) and (ii).  
19 The proposed examples would not be mandatory and would not be an exhaustive list of  
20 acceptable disclaimers. Proposed paragraph (c)(3)(iii) would be intended to provide a clear,  
21 “safe harbor” for candidates attempting to comply with the regulation. The Commission seeks  
22 comment on the use of these or other examples.

23

1            D.      Specific Requirements for Radio and Television Communications Paid for by  
2            Other Persons and Not Authorized by Candidates

3            Congress set forth a scripted audio statement required for disclaimers in communications  
4 transmitted through radio or television and paid for by persons other than candidates or persons  
5 authorized by candidates. 2 U.S.C. 441d(d)(2). The Commission proposes new paragraph  
6 (c)(4), which would, tracking the statute, require the name of the political committee or other  
7 person responsible for the communication and any connected organization to be included in the  
8 communication. "Connected organization" is defined in 11 CFR 100.6. The scripted statement  
9 would be: "XXX is responsible for the content of this advertising." 2 U.S.C. 441d(d)(2).  
10 Furthermore, in the case of a television transmission the proposed rule would require that the  
11 statement be conveyed by a full-screen view of a representative of the political committee  
12 making the statement, or in a voice-over by such representative. The Commission seeks  
13 comment on whether the regulation should specify who may represent the payor for this purpose.  
14 The regulation could, for example, require that the representative be an officer or the treasurer, or  
15 it could allow a paid spokesperson, such as a celebrity or actor. In the case of a television  
16 transmission, the disclaimer statement would also have to appear in writing at the end of the  
17 communication in a clearly readable manner with a reasonable degree of color contrast between  
18 the background and the printed statement for a period of at least four (4) seconds. 2 U.S.C.  
19 441d(d)(2).

20           V.      Coordinated Party Expenditures and Independent Expenditures by Political Party  
21           Committees

22           Proposed paragraph (d) of section 110.11 would cover disclaimers for communications  
23 that constitute coordinated party expenditures and independent expenditures by political party

1 committees. The relevant pre-BCRA provisions of 11 CFR 110.11(a)(2) would be redesignated  
2 as proposed paragraph (d)(1), without substantive change. There would be a minor grammatical  
3 change.

4 Proposed paragraph (d)(2) would cover communications that constitute independent  
5 expenditures by political party committees. See Colorado Republican Federal Campaign  
6 Committee v. FEC, 518 U.S. 604 (1996). It would clarify that the disclaimer provisions apply to  
7 such communications, and that a “non-authorization notice” would be required, as with any other  
8 independent expenditure communication. See pre-BCRA 11 CFR 109.3.

#### 9 VI. Exempt activities

10 The Commission proposes to redesignate the provisions of pre-BCRA 11 CFR  
11 110.11(a)(4), pertaining to communications that qualify as “exempt activities,” as proposed  
12 paragraph (e) of section 110.11. Proposed paragraph (e) would include two minor revisions to  
13 its pre-BCRA predecessor. In the first sentence, the word “expenditure” would be replaced with  
14 the word “communication” to conform this proposed paragraph to the wording of proposed  
15 paragraph (a). This proposed revision would not constitute a substantive change. Also, there  
16 would be a non-substantive revision to the cross-reference to the definitions of “exempt  
17 activities,” which would be updated to reflect changes to part 100 made in a recent  
18 reorganization rulemaking. “Reorganization of Regulations on ‘Contribution’ and  
19 ‘Expenditure,’” 67 Fed. Register 50582 (Aug. 5, 2002). Overall, the relocation and the minor  
20 revisions would not be intended to change the substantive operation of these provisions.

#### 21 VII. Exceptions

22 Exceptions to the disclaimer requirements would be set out in proposed paragraph (f).  
23 The exceptions in pre-BCRA paragraphs (a)(6)(i), (ii), and (iii) would be redesignated as

1 proposed paragraphs (f)(1)(i), (ii), and (iii), respectively, without any other revision.

2 The Commission proposes incorporating the provisions of pre-BCRA 11 CFR  
3 110.11(a)(7), regarding certain communications by a separate segregated fund or its connected  
4 organization, in proposed paragraph (f)(2), because this provision is essentially an exception. In  
5 addition, in proposed paragraph (f)(2), the word “form” would be changed to “type.” This  
6 change would have no substantive effect, and would be done only to conform to the language of  
7 the statute. See 2 U.S.C. 441d(a).

#### 8 VIII. Comparable Rate for Campaign Purposes

9 Proposed paragraph (g) of section 110.11 would continue the pre-BCRA rule pertaining  
10 to comparable rates for print advertising. That is, the contents of pre-BCRA 11 CFR 110.11(b)  
11 would be redesignated as proposed paragraph (g). Other than the addition of a heading for the  
12 paragraph, there would be no revisions to the pre-BCRA rule. Proposed paragraph (g) would, as  
13 does its pre-BCRA predecessor, track 2 U.S.C. 441d(b).

14

#### 15 **Prohibitions on Fraudulent Solicitations**

16 In BCRA, Congress adds a subsection to the fraudulent misrepresentation statute at  
17 2 U.S.C. 441h. The new provision, 2 U.S.C. 441h(b), prohibits a person from fraudulently  
18 misrepresenting that the person is acting for or on behalf of a Federal candidate or political party,  
19 or an employee or agent of either, for the purpose of soliciting contributions or donations. It also  
20 prohibits persons from participating in, or conspiring to participate in, plans, schemes, or designs  
21 to make such fraudulent misrepresentations in soliciting contributions and donations. BCRA  
22 also non-substantively amends the existing fraudulent misrepresentation statute by redesignating  
23 it as subsection (a) of 2 U.S.C. 441h. The Commission proposes to implement the new statutory



1 provision, together with the pre-BCRA fraudulent misrepresentation regulation found at 11 CFR  
2 110.9(b), by combining them in a new section 11 CFR 110.16.

3 The pre-BCRA misrepresentation statute, now codified at 2 U.S.C. 441h(a), is aimed at  
4 fraudulent misrepresentation of campaign authority. For additional background, see Legislative  
5 History of Federal Election Campaign Act Amendments of 1974 at 521. The statute prohibited a  
6 candidate, his or her employee or agent, or an organization under the candidate's control, from  
7 purporting to speak, write, or act for another candidate or party on a matter that damages the  
8 other candidate or party. Section 441h(a) encompasses, for example, a candidate who distributes  
9 letters containing statements damaging to an opponent and fraudulently attributes them to the  
10 opponent.

11 Because the language and purpose of the pre-BCRA misrepresentation statute  
12 encompasses only misrepresentations by a candidate or the candidate's employee or agent, the  
13 Commission has historically been unable to take action in enforcement matters where persons  
14 unassociated with a candidate or candidate committee have solicited funds by purporting to act  
15 on behalf of a specific candidate or party. Candidates have complained that contributions which  
16 contributors believed were going to benefit the candidate were diverted to other purposes,  
17 harming both the candidate and contributor. Consequently, the Commission has frequently  
18 included in its annual legislative recommendations to Congress a recommendation that 2 U.S.C.  
19 441h be amended to specifically prohibit any person from fraudulently misrepresenting a  
20 candidate or political party in solicitations. See Federal Election Commission Annual Reports  
21 for 2000 at 39, for 1999 at 47-48, for 1998 at 52, and 1997 at 47. BCRA's prohibition on  
22 fraudulent solicitations of contributions and donations implements those legislative

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

3 Proposed 11 CFR 110.16(a) would amend the pre-BCRA fraudulent misrepresentation  
4 regulation at 11 CFR 110.9(b) by adding the title “in general,” following BCRA, which added a  
5 similar heading to section (a) of 2 U.S.C. 441h. Technical amendments would also make the  
6 language of proposed paragraph (a) gender-neutral. Finally, proposed paragraph (a)(2) would be  
7 amended to include the word “schemes” to more closely track the statutory language.

8 Proposed 11 CFR 110.16(b) would track the statutory language in BCRA. Proposed  
9 paragraph (b)(1) would prohibit a person from fraudulently misrepresenting that the person  
10 speaks, writes, or otherwise acts for or on behalf of a candidate, political party, or an employee  
11 or agent of either, in soliciting contributions or donations. Proposed paragraph (b)(2) would  
12 prohibit a person from willfully and knowingly participating in, or conspiring to participate in,  
13 any plan, scheme, or design to violate proposed paragraph (b)(1).

14 The Commission emphasizes that section 441h and proposed 11 CFR 110.16 are different  
15 from common law fraud. First, section 441h is part of a Federal statute designed to address  
16 campaign finance abuses, not common law fraud. Congress enacted FECA to protect the public  
17 interest. Unlike common law fraudulent misrepresentation, section 441h gives rise to no tort  
18 action; it is part of an enforcement scheme enacted to promote the integrity of the financing of  
19 Federal elections, and to prevent corruption or the appearance of corruption. See generally  
20 Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).

21 Thus, the Supreme Court has recognized that statutes that address schemes to defraud do  
22 not require proof of the common law requirements of “justifiable reliance” and “damages.”  
23 Neder v. United States, 527 U.S. 1, 24-25 (1999) (“The common law requirements of ‘justifiable

1 reliance' and 'damages,' for example, plainly have no place in federal fraud statutes."... "By  
2 prohibiting the 'scheme to defraud' rather than the completed fraud, the elements of reliance and  
3 damage would clearly be inconsistent with the statutes Congress enacted"), citing United States  
4 v. Stewart, 872 F.2d 957, 960 (10th Cir. 1989).

5 Second, section 441h(a) states that the fraudulent misrepresentation must be "on a matter  
6 which is damaging to [the misrepresented] candidate or political party." If this includes proof of  
7 damage as required by common law fraudulent misrepresentation, then the phrase "on a matter  
8 damaging" is superfluous. Courts construe statutes so "as to avoid rendering superfluous any  
9 parts thereof." Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991); see also  
10 Federal Election Commission v. Arlen Specter '96, 150 F. Supp.2d 797, 806 (2001), quoting  
11 Bennett v. Spear, 520 U.S. 154, 173 (1997). "Damaging" means "causing or able to cause  
12 damage." WEBSTER'S COLLEGIATE DICTIONARY (10<sup>th</sup> ed. 1993).

#### 13 14 **Increase in Civil Penalties**

15 The Commission seeks comments on proposed changes to its rules on civil penalties  
16 under FECA. The proposed rules are based on BCRA, which increases the civil penalties that  
17 may be negotiated by the Commission or imposed by a court for violations of the Act.

18 The Act imposes civil penalties on anyone violating any portion of the Act or certain  
19 related portions of the Federal tax code. The Act's civil penalties, found at 2 U.S.C. 437g(a)(5),  
20 (6), and (12), are organized into two tiers of monetary penalties; one tier of penalties for  
21 violations of the Act, and a second tier of penalties for "knowing and willful" violations of the  
22 Act.

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

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

12 The proposed rule would divide current 11 CFR 111.24(a) into proposed paragraphs  
13 (a)(1), and (a)(2)(i) and (ii). Proposed paragraph (a)(1) would contain the unchanged language  
14 of the current regulation for civil penalties for violations of the Act or the relevant tax code  
15 provisions. Proposed paragraph (a)(2) would address “knowing and willful” violations and  
16 would be further divided into proposed paragraphs (a)(2)(i) and (ii). Proposed paragraph  
17 (a)(2)(i) would contain the unchanged language of the current regulation for civil penalties for  
18 knowing and willful violations of the Act or relevant tax code provisions. Proposed 11 CFR  
19 111.24(a)(2)(ii) would contain proposed language implementing BCRA’s amendments to FECA  
20 increasing civil penalties for knowing and willing violations involving contributions made in the  
21 name of another. The proposed language would explain that in the case of a knowing and willful  
22 violation of the prohibition on contributions in the name of another, the civil penalty would not  
23 be less than an amount that is equal to 300 percent of the amount of the violation, and the civil

1 penalty would not be more than \$50,000 or an amount equal to 1,000 percent of the amount of  
2 the violation, whichever is greater.

#### 3 4 **Personal Use**

5 In BCRA, Congress deleted 2 U.S.C. 439a in its entirety, and replaced it with a new  
6 section 439a. One of BCRA's principal sponsors explained:

7 [BCRA] amends 2 U.S.C. section 439a to specify which candidate expenditures from  
8 campaign funds would be considered an unlawful conversion of a contribution or  
9 donation to personal use. The language continues to allow candidates to use excess  
10 campaign funds for transfers to a national, State or local committee of a political party. It  
11 is the intent of the authors that--as is the case under current law--such transfers be  
12 permitted without limitation. Furthermore, while the provision is intended to codify the  
13 FEC's current regulations on the use of campaign funds for personal expenses, we do not  
14 intend to codify any advisory opinion or other current interpretation of those regulations.

15 148 Cong. Rec. S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold).

16  
17 The Commission notes that certain language from the pre-BCRA version of section 439a  
18 has not been included in the post-BCRA version of section 439a. First, the phrase "in excess of  
19 any amount necessary to defray" campaign expenses has been deleted from the statute. The  
20 Commission's personal use regulations are framed in terms of "excess campaign funds." See  
21 11 CFR 113.1(e) ("Excess campaign funds means amounts received by a candidate as  
22 contributions which he or she determines are in excess of any amount necessary to defray his or  
23 her campaign expenditures"); 11 CFR 113.2 (excess campaign funds and funds donated may be  
24 used to defray any ordinary and necessary expenses incurred in connection with the recipient's

1 duties as a holder of Federal office). The Commission proposes that regulations 11 CFR  
2 113.1(e) and 11 CFR 113.2 remain unchanged because it does not appear that Congress intended  
3 to eliminate the discretion of candidates and Federal officeholders to use these excess campaign  
4 funds “for ordinary and necessary expenses incurred in connection with duties of the individual  
5 as a holder of Federal office.” 2 U.S.C. 439a(a)(2).<sup>2</sup>

6 Also, the post-BCRA version of 2 U.S.C. 439a does not include the language “any other  
7 lawful purpose” in the statutory enumeration of permissible uses of excess campaign funds, as  
8 did the pre-BCRA version of the statute. 11 CFR 113.2(d) provides that “excess campaign  
9 funds” may be “used for any other lawful purpose,” in addition to specific uses permitted in  
10 paragraphs (a), (b), and (c) of that section. The Commission proposes that 11 CFR 113.2(d)  
11 remain intact, as it believes that Congress’s continuing intent is to allow only lawful uses of  
12 campaign funds and donations. The Commission seeks comment on these proposals.

13 The pre-BCRA version of 2 U.S.C. 439a contained a general prohibition against the  
14 personal use of campaign funds, but did not specify any particular impermissible uses. The  
15 Commission’s pre-BCRA personal use regulations define certain uses of campaign funds or  
16 donations as per se prohibited personal uses. 11 CFR 113.1(g)(1)(i). In BCRA, Congress  
17 amended 2 U.S.C. 439a to include a non-exhaustive list of prohibited personal uses of campaign  
18 funds. 2 U.S.C. 439a(b). As one of BCRA’s principal sponsors explained, new section 439a  
19 “[c]odifies FEC regulations relating to the personal use of campaign funds by candidates.  
20 Contributions will be considered converted to personal use if they are used for an expense that

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<sup>2</sup> In its 1995 Explanation and Justification of its rules concerning personal uses of campaign funds, the Commission stated that it “reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of campaign funds.” 60 Fed. Register 7867 (February 9, 1995).

1 would exist irrespective of the campaign or duties as an officeholder, including home mortgage  
2 or rent, clothing, vacation expenses, tuition payments, non-campaign-related automobile  
3 expenses, and a variety of other items.” 148 Cong. Rec. S1993-1994 (daily ed. March 18, 2002)  
4 (statement of Sen. Feingold).

5 The Commission notes that several of new 2 U.S.C. 439a’s personal use provisions are  
6 summarized versions of pre-BCRA personal use regulations. For example, the statute now  
7 prohibits the use of campaign contributions and donations for “a clothing purchase” (2 U.S.C.  
8 439a(b)(2)(B)); whereas the corresponding regulation at 11 CFR 113.1(g)(1)(i)(C) prohibits the  
9 personal use of “[c]lothing, other than items of de minimis value that are used in the campaign,  
10 such as campaign ‘T-shirts’ or caps with campaign slogans.” Also, new section 439a does not  
11 incorporate the current 11 CFR 113.1(g)(1)(i) per se personal use rules in their entirety.  
12 Compare 2 U.S.C. 439a(b)(A) through (I) with 11 CFR 113.1(g)(1)(i). Nonetheless, the  
13 Commission interprets new subsection (b) of 2 U.S.C. 439a to provide an even firmer statutory  
14 foundation for the per se rules at 11 CFR 113.1(g)(1)(i) than the pre-BCRA version of section  
15 439a.

16 The Commission proposes three changes to its per se rules. Pre-BCRA, the Commission  
17 considered on a case-by-case basis whether excess campaign funds may be used to pay for  
18 vehicle expenses. 11 CFR 113.1(g)(1)(ii)(D). New section 439a, however, includes “a non-  
19 campaign-related automobile expense” in its list of prohibited uses of excess campaign funds.  
20 2 U.S.C. 439a(b)(2)(C). Therefore, the Commission proposes to remove the “vehicle expenses”  
21 regulation from the “case by case” category of rules and add it to the “per se prohibited”  
22 category of rules. The new per se “vehicle expenses” rule would be proposed 11 CFR  
23 113.1(g)(1)(i)(J).

1 In addition, new section 439a includes “a vacation or other non-campaign-related trip” in  
2 the list of prohibited uses of excess campaign funds. 2 U.S.C. 439a(b)(2)(E). The Commission  
3 accordingly proposes to include an implementing “vacations” and other non-campaign-related  
4 trips provision as 11 CFR 113.1(g)(1)(i)(K). The Commission also proposes to modify current  
5 11 CFR 113.1g(1)(ii)(C), which applies to “travel expenses” and is located in the “case by case”  
6 category of rules, to indicate that “vacations and other non-campaign-related trips” are per se  
7 prohibited.

8 Proposed 11 CFR 113.1(g)(1)(i)(K) tracks the statutory language of new 2 U.S.C. 439a.  
9 However, candidates who are Federal officeholders may take trips that are not campaign-  
10 related, such as factfinding trips, which may nonetheless be part of their duties as Federal  
11 officeholders. The Commission seeks comment on whether Congress intended to ban  
12 completely the use of campaign funds for such trips. Compare 11 CFR 113.1(g)(5), which  
13 states in part that the use of campaign funds for “political or officially connected expenses . . .  
14 [are] not personal use to the extent that the expense is . . . an ordinary and necessary expense  
15 incurred in connection with the duties of a holder of Federal office,” with 2 U.S.C.  
16 439a(b)(2)(E). Additionally, the Commission seeks comment on whether non-vacation, non-  
17 campaign-related travel should be evaluated on a case-by-case basis, under proposed 11 CFR  
18 113.1(g)(1)(ii)(C).

19 The Commission proposes one other change to the per se rules. Proposed 11 CFR  
20 113.1(g)(1)(i)(I) would prohibit candidates from using campaign funds to pay themselves  
21 salaries or otherwise compensate themselves in any way for income lost as a result of  
22 campaigning for Federal office. Neither pre-BCRA section 439a nor new section 439a directly  
23 address this issue, but the Commission believes that the proposed addition of candidate salaries



1 to the list of impermissible personal uses is consistent with the non-exhaustive list Congress  
2 included in amended section 439a(b)(2). The Commission notes that it failed to reach a four-  
3 vote majority on this issue when it considered the personal use rules in 1995 (60 Fed. Register  
4 7867 (February 9, 1995)), but it has since addressed this issue in Advisory Opinion 1999-1.  
5 Comments are sought as to whether this interpretation is appropriate.

6 The Commission notes that Congress codified the regulatory “irrespective” test. 2 U.S.C.  
7 439a(b)(2); see 11 CFR 113.1(g). The Commission originally formulated this test, which states  
8 that “personal use” means the use of excess campaign funds for any expense “that would exist  
9 irrespective of the candidate’s campaign or duties as a Federal officeholder,” because it could not  
10 anticipate and promulgate regulations covering all possible examples of prohibited personal use  
11 of excess campaign funds. Explanation and Justification for 11 CFR 113.1, 60 Fed. Register  
12 7867 (February 9, 1995). Therefore, for uses not specifically identified as impermissible, the  
13 Commission stated that it would determine whether uses were for “expenses that would exist  
14 irrespective of the candidate’s campaign or duties as a Federal officeholder.” Id. BCRA’s  
15 description of the “irrespective” test is virtually identical to the Commission’s description.  
16 Compare 2 U.S.C. 439a(b) with 11 CFR 113.1(g). The Commission will, therefore, continue,  
17 post-BCRA, to apply the “irrespective” test as before.

18 The Commission proposes a recordkeeping requirement for campaign funds used for  
19 expenses that may be partially personal in nature, including vehicle expenses, as set forth in  
20 proposed 11 CFR 113.1(g)(1)(i)(J), and legal expenses, meal expenses, travel expenses, and  
21 charitable expenses, as listed in 11 CFR 113.1(g)(1)(ii) and (g)(2). See proposed 11 CFR  
22 113.1(g)(8). This proposed regulation is based on the analysis in Advisory Opinion 2001-3,  
23 which advised that a member of Congress who proposed to pay for a vehicle with campaign

1 funds and use it for a combination of campaign, official, and personal uses, should keep a log  
2 detailing each use of the car. In such cases of "mixed use," the proposed rule would require that  
3 a candidate or Federal officeholder keep a log or other record to document the dates and  
4 expenses related to personal use. The log or other record would have to be updated whenever an  
5 expense is incurred, either for campaign or officeholder uses or for personal uses. It would have  
6 to be maintained and preserved for three years and signed by the treasurer of the candidate's or  
7 Federal officeholder's committee.

8

9 **Technical Amendment to the Definition of "Act"**

10 Current 11 CFR 100.18 defines "Act" to mean the Federal Election Campaign Act as  
11 amended by the 1974, 1976, and 1980 amendments. The proposed rules would amend this  
12 definition to include the amendments to FECA within the Bipartisan Campaign Reform Act.

13

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

15 **[Regulatory Flexibility Act]**

16 The Commission certifies that the attached proposed rules, if promulgated, will not have  
17 a significant economic impact on a substantial number of small entities. The basis of this  
18 certification is that national, State, and local party committees of the two major political parties  
19 to which the proposed fraudulent solicitation, disclaimers, and civil penalties rules would apply  
20 are not small entities under 5 U.S.C. 601. In addition, the rules for personal use would only  
21 affect individuals, not entities, and the rules for the prohibition on fraudulent solicitation do not  
22 carry an economic impact. Furthermore, the small entities to which the rules would apply would  
23 not be unduly burdened by the proposed new requirements for disclaimers since the proposed

1 requirements only add specificity to the current disclaimer requirements. The proposed increase  
2 in civil penalties would not unduly burden small entities since a small entity would pay a civil  
3 penalty only if the entity engaged in a specific knowing and willful violation of the Act.

4

1 List of Subjects

2 11 CFR Part 100

3 Elections

4 11 CFR Part 110

5 Campaign funds, and political committees and parties.

6 11 CFR Part 111

7 Campaign funds, and political committee and parties.

8 11 CFR Part 113

9 Campaign funds, and political candidates.

10

1 For the reasons set out in the preamble, the Commission proposes to amend chapter 1 of  
2 title II of the Code of Federal Regulations as follows:

3  
4 **Part 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

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

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

7 2. Section 100.18 would be revised to read as follows:

8 **§ 100.18 Act (2 U.S.C. 431(19)).**

9 Act means the Federal Election Campaign Act of 1971 (Pub. L. 92-225), as amended in  
10 1974 (Pub. L. 93-443), 1976 (Pub. L. 94-283), and 1980 (Pub. L. 96-187), and 2002 (Bipartisan  
11 Campaign Reform Act of 2002, Pub. L. 107-155).

12  
13 **Part 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**  
14 **PROHIBITIONS**

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

16 Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d,  
17 441e, 441f, 441g, and, 441h, and 441k.

18 4. Section 110.11 would be revised to read as follows:

19 **§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).**

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

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

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

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

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

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

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

3       (2) ~~Coordinated Party Expenditures.~~

4           (i) ~~For a communication paid for by a party committee pursuant to 2 U.S.C.~~  
5           441a(d), the disclaimer required by paragraph (a)(1) of this section shall  
6           identify the committee that makes the expenditure as the person who paid  
7           for the communication, regardless of whether the committee was acting in  
8           its own capacity or as the designated agent of another committee.

9           (ii) ~~A communication made by a party committee pursuant to 2 U.S.C.~~  
10          441a(d) prior to the date the party's candidate is nominated shall satisfy  
11          the requirements of this section if it clearly states who paid for the  
12          communication.

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

14 (a) Applicability and definitions.

15 (1) Applicability. This section applies only to communications through any  
16 broadcast, cable, or satellite transmission, newspaper, magazine, outdoor  
17 advertising facility, mailing or any other type of general public political  
18 advertising. The following types of such communications must include  
19 disclaimers, as specified in this section:

20 (i) All such communications for which a political committee makes a  
21 disbursement.

22 (ii) All such communications by any person that expressly advocate the  
23 election or defeat of a clearly identified candidate.

1 (iii) All such communications by any person that solicits any contribution.

2 (iv) All electioneering communications by any person.

3 (2) Definitions.

4 (i) Electioneering communication has the same meaning as set forth at  
5 11 CFR 100.29.

6 (ii) As used in this section only, mailing means more than one hundred  
7 substantially similar pieces of mail.

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

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

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

19 (3) If the communication, including any solicitation, is not authorized by a candidate,  
20 authorized committee of a candidate or its agents, the disclaimer must clearly  
21 state the full name and permanent street address, telephone number, or World  
22 Wide Web address of the person who paid for the communication, and that the  
23 communication is not authorized by any candidate or candidate's committee.

1 (c) Disclaimer specifications.

2 (1) Specifications for all disclaimers. A disclaimer required by paragraph (a) of this  
3 section must be presented in a clear and conspicuous manner, to give the reader,  
4 observer, or listener adequate notice of the identity of the person or political  
5 committee that paid for and, where required, that authorized the communication.  
6 A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the  
7 placement is easily overlooked.

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

12 (i) The disclaimer must be of sufficient type size to be clearly readable by the  
13 recipient of the communication.

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

16 (iii) The disclaimer must be printed with a reasonable degree of color contrast  
17 between the background and the printed statement.

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

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

1        (3) Specific requirements for radio and television communications authorized by  
2        candidates. In addition to the general requirements of paragraph (c)(1) of this  
3        section, a communication that is authorized or paid for by a candidate (see  
4        paragraph (b)(1)(i) or (b)(1)(ii) of this section) that is transmitted through radio or  
5        television must comply with the following:

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

9        (ii) A communication transmitted through television must include a statement  
10       that identifies the candidate and states that he or she has approved the  
11       communication. The statement shall be conveyed by an unobscured, full-  
12       screen view of the candidate making the statement, or the candidate in a  
13       voice-over, accompanied by a clearly identifiable photographic or similar  
14       image of the candidate. The statement shall also appear in writing at the  
15       end of the communication in a clearly readable manner with a reasonable  
16       degree of color contrast between the background and the disclaimer  
17       statement, for a period of at least four (4) seconds.

18       (iii) The following are examples of acceptable disclaimers for a  
19       communication covered by paragraph (c)(3) of this section, but they are  
20       not the only allowable disclaimers.

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

1                   (B) “My name is [insert name of candidate]. I am running for [insert  
2                   Federal office sought], and I authorized this message.”

3           (4) Specific requirements for radio and television communications paid for by other  
4           persons and not authorized by a candidate. In addition to the general  
5           requirements of paragraph (c)(1) of this section, a communication not authorized  
6           by a candidate (see paragraphs (b)(1)(iii) or (b)(2) of this section) that is  
7           transmitted through radio or television must comply with the following:

8           (i) A communication transmitted through radio or television must include the  
9           following audio statement, “XXX is responsible for the content of this  
10           advertising,” spoken clearly, with the blank to be filled in with the name  
11           of the political committee or other person paying for the communication,  
12           and the name of the connected organization, if any, of the payor; and

13           (ii) A communication transmitted through television must include the audio  
14           statement required by paragraph (c)(4)(i) of this section. The statement  
15           must be conveyed by an unobscured full-screen view of a representative of  
16           the political committee or other person making the statement, or by a  
17           representative of such political committee or other person in voice-over.  
18           The disclaimer statement must appear in writing at the end of the  
19           communication in a clearly readable manner with a reasonable degree of  
20           color contrast between the background and the printed statement, for a  
21           period of at least four (4) seconds.

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

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

7           (ii) A communication made by a political party committee pursuant to  
8                                   2 U.S.C. 441a(d) prior to the date the party's candidate is nominated shall  
9                                   satisfy the requirements of this section if it clearly states who paid for the  
10                                  communication.

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

16          (e) Exempt activities. For purposes of paragraph (a) of this section only, the term  
17                                  communication includes a communication by a candidate or party committee that qualifies as an  
18                                  exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149. Such communications,  
19                                  unless excepted under paragraph (f)(1) of this section, must clearly state who paid for the  
20                                  communication, but do not have to include an authorization statement.

21          (f) Exceptions.

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

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

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

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

8           (2) Whenever a separate segregated fund or its connected organization solicits  
9           contributions to the fund from those persons it may solicit under the applicable  
10           provisions of 11 CFR part 114, or makes a communication to those persons, such  
11           communication shall not be considered a type of general public political  
12           advertising and need not contain the disclaimer set forth in paragraphs (a) through  
13           (c) of this section.

14           (g) Comparable rate for campaign purposes.

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

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

23           5. Section 110.16 would be revised to read as follows:

1 **§ 110.16 Prohibitions on Fraudulent Misrepresentations.**

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

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

9 (2) Knowingly and willfully participate in or conspire to  
10 participate in any plan, scheme, or design to violate paragraph (a)(1) of  
11 this section.

12 **(b) Fraudulent Solicitation of Funds.** No person shall—

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

16 (2) Knowingly and willfully participate in or conspire to participate in any  
17 plan, scheme, or design to violate paragraph (b)(1) of this section.

18

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

20 6. The authority citation for part 111 would continue to read as follows:

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

22 7. In section 111.24, paragraph (a) would be amended to read as follows:

23 **§ 111.24 Civil penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.).**



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

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

8 (2) Knowing and willful violations.

9 (i) In the case of a knowing and willful violation of the Act or chapters 95 or  
10 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of  
11 \$11,000 or an amount equal to 200% of any contribution or expenditure  
12 involved in the violation.

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

18 \* \* \* \* \*

19 **Part 113 – EXCESS CAMPAIGN FUNDS AND FUNDS DONATED TO SUPPORT**  
20 **FEDERAL OFFICE HOLDERS ACTIVITIES (2 U.S.C. 439a)**

21 8. The authority citation for part 113 would continue to read as follows:

22 Authority: 2 U.S.C. 439a.

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

1 § 113.1 Definitions (2 U.S.C. 439a).

2 When used in this part –

3 \* \* \* \* \*

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

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

9 (A) Household food items or supplies;

10 (B) Funeral, cremation or burial expenses;

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

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

16 (E) Mortgage, rent or utility payments--

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

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

23 (F) Admission to a sporting event, concert, theater or other form of

1 entertainment, unless part of a specific campaign or officeholder  
2 activity;

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

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

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

14 (J) Vehicle expenses, unless they are a de minimis amount. If a  
15 committee uses campaign funds to pay expenses associated with a  
16 vehicle that is used for both personal activities beyond a de  
17 minimis amount and campaign or officeholder related activities,  
18 the portion of the vehicle expenses associated with the personal  
19 activities is personal use, unless the person(s) using the vehicle for  
20 personal activities reimburse(s) the campaign account within thirty  
21 days for the expenses associated with the personal activities; and

22 (K) A vacation or other non-campaign-related trip.

1 (ii) The Commission will determine, on a case by case basis, whether other  
2 uses of funds in a campaign account fulfill a commitment, obligation or  
3 expense that would exist irrespective of the candidate's campaign or duties  
4 as a Federal officeholder, and therefore are personal use. Examples of  
5 such other uses include:

6 (A) Legal expenses;

7 (B) Meal expenses; and

8 (C) Travel expenses, except for a vacation or other non-campaign-  
9 related trip under paragraph (g)(1)(i)(K) of this section, including

10 subsistence expenses incurred during travel. If a committee uses

11 campaign funds to pay expenses associated with travel that

12 involves both personal activities and campaign or officeholder

13 related activities, the incremental expenses that result from the

14 personal activities are personal use, unless the person(s) benefiting

15 from this use reimburse(s) the campaign account within thirty days

16 for the amount of the incremental expenses; ~~and~~

17 ~~(D) Vehicle expenses, unless they are a de minimis amount. If a~~

18 ~~committee uses campaign funds to pay expenses associated with a~~

19 ~~vehicle that is used for both personal activities beyond a de~~

20 ~~minimis amount and campaign or officeholder related activities,~~

21 ~~the portion of the vehicle expenses associated with the personal~~

22 ~~activities is personal use, unless the person(s) using the vehicle for~~

~~personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities.~~

- (2) Charitable donations. Donations of campaign funds or assets to an organization described in section 170(c) of Title 26 of the United States Code are not personal use, unless the candidate receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to his or her personal benefit.
- (3) Transfers of campaign assets. The transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value. Any depreciation that takes place before the transfer must be allocated between the committee and the purchaser based on the useful life of the asset.
- (4) Gifts. Gifts of nominal value and donations of a nominal amount made on a special occasion such as a holiday, graduation, marriage, retirement, or death are not personal use, unless made to a member of the candidate's family.
- (5) Political or officially connected expenses. The use of campaign funds for an expense that would be a political expense under the rules of the United States House of Representatives or an officially connected expense under the rules of the United States Senate is not personal use to the extent that the expense is an expenditure under ~~11 CFR 100.8~~ subpart D of part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office. Any use of funds that would be personal use under 11 CFR 113.1(g)(1) will not be considered an expenditure under ~~11 CFR 100.8~~ subpart D of part 100

1 or an ordinary and necessary expense incurred in connection with the duties of a  
2 holder of Federal office.

3 (6) Third party payments. Notwithstanding that the use of funds for a particular  
4 expense would be a personal use under this section, payment of that expense by  
5 any person other than the candidate or the campaign committee shall be a  
6 contribution under ~~11 CFR 100.7~~ subpart B of part 100 to the candidate unless the  
7 payment would have been made irrespective of the candidacy. Examples of  
8 payments considered to be irrespective of the candidacy include, but are not  
9 limited to, situations where--

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

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

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

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

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

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

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

- 7 (i) The spouse of the candidate;  
8 (ii) Any child, step-child, parent, grandparent, sibling, half-sibling or  
9 step-sibling of the candidate or the candidate's spouse;  
10 (iii) The spouse of any child, step-child, parent, grandparent, sibling,  
11 half-sibling or step-sibling of the candidate; and  
12 (iv) A person who has a committed relationship with the candidate,  
13 such as sharing a household and having mutual responsibility for  
14 each other's personal welfare or living expenses.

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

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Karl J. Sandstrom  
Vice-Chairman  
Federal Election Commission

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