



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2004 JUN 17 P 3:23

JUN 17 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Ron B. Katwan
Attorney

AGENDA ITEM
For Meeting of: 6-24-04

SUBJECT: Draft Notice of Proposed Rulemaking on Coordinated and Independent Expenditures by Party Committees (11 CFR 109.35)

Attached is a draft Notice of Proposed Rulemaking that would set out certain changes needed to conform the Commission's regulations in 11 CFR Part 109 to the Supreme Court's invalidation of BCRA Section 213 (2 U.S.C. 441a(d)(4)) in McConnell v. FEC, 540 U.S. ____; 124 S.Ct. 619, 700-704 (2003).

Recommendation:

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

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 109**

3 **[Notice 2004 - >]**

4 **Coordinated and Independent Expenditures by Party Committees**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Federal Election Commission requests comments on the
8 proposed deletion of its current rules that restrict the ability of
9 political party committees to make both independent expenditures
10 and coordinated party expenditures with respect to the same
11 candidate in connection with a general election for Federal office.
12 The current rules also prohibit a political party committee that makes
13 coordinated expenditures with respect to a candidate from
14 transferring funds to, or assigning authority to make coordinated
15 expenditures to, or receive a transfer of funds from, a political party
16 committee that has made or intends to make an independent
17 expenditure with respect to that candidate. These rules were
18 promulgated in order to implement section 213 of the Bipartisan
19 Campaign Reform Act of 2002. However, in McConnell v. FEC, the
20 U.S. Supreme Court held that section 213 is unconstitutional.
21 Therefore, the Commission proposes to remove the rules
22 implementing section 213. No final decision has been made by the
23 Commission on the issues presented in this rulemaking. Further

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

3 **DATES:** Comments must be received on or before [insert date 30 days after
4 the date of publication in the Federal Register]. If the Commission
5 receives sufficient requests to testify, it may hold a hearing on these
6 proposed rules. Commenters wishing to testify at the hearing must
7 so indicate in their written or electronic comments.

8 **ADDRESSES:** All comments should be addressed to Mr. Brad C. Deutsch, Assistant
9 General Counsel, and must be submitted in either electronic or
10 written form. Commenters are strongly encouraged to submit
11 comments electronically to ensure timely receipt and consideration.
12 Electronic mail comments should be sent to
13 choiceprovision@fec.gov and must include the full name, electronic
14 mail address and postal service address of the commenter. Electronic
15 mail comments that do not contain the full name, electronic mail
16 address and postal service address of the commenter will not be
17 considered. If the electronic mail comments include an attachment,
18 the attachment must be in the Adobe Acrobat (.pdf) or Microsoft
19 Word (.doc) format. Faxed comments should be sent to (202) 219-
20 3923, with printed copy follow-up to ensure legibility. Written
21 comments and printed copies of faxed comments should be sent to
22 the Federal Election Commission, 999 E Street, N.W., Washington,
23 D.C. 20463. The Commission will post public comments on its Web

1 site. If the Commission decides a hearing is necessary, the hearing
2 will be held in the Commission’s ninth floor meeting room, 999 E
3 Street N.W., Washington, D.C.

4 **FOR FURTHER**
5 **INFORMATION**
6 **CONTACT:**

Mr. Brad C. Deutsch, Assistant General Counsel, or Mr. Ron B.
7 Katwan, Attorney, 999 E Street N.W., Washington, D.C. 20463,
8 (202) 694-1650 or (800) 424-9530.

9 **SUPPLEMENTARY**
10 **INFORMATION:**

11 Under the Federal Election Campaign Act of 1971 (“FECA” or the “Act”), as
12 amended, 2 U.S.C. 431 et seq., a national committee, State committee, or a subordinate
13 committee of a State committee of a political party may make expenditures in coordination
14 with a Federal candidate for that candidate’s general election campaign up to prescribed
15 limits without these expenditures counting against the party committee’s contribution
16 limits. 2 U.S.C. 441a(d)(1)-(3). While the Act limits coordinated expenditures, political
17 party committees may make unlimited “independent expenditures,” which are not
18 coordinated with a candidate’s campaign. See Colorado Republican Federal Campaign
19 Committee v. FEC, 518 U.S. 604 (1996) (“Colorado I”).¹

¹ The holding of Colorado I is limited to independent expenditures in connection with congressional campaigns. The opinion in Colorado I did not address the issue of whether regulation of independent expenditures is constitutionally permissible in connection with Presidential campaigns. (“Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns.”) 518 U.S. at 612. Thus, the opinion in Colorado I did not reach the issue of whether former 11 CFR 110.7(a)(5) which prohibited independent expenditures by the national committee of a political party in connection with a presidential campaign was constitutional. Subsequently, however, BCRA effectively repealed section 110.7(a)(5)

1 Section 213 of the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-155
2 (Mar. 27, 2002)) (“BCRA”) amended 2 U.S.C. 441a(d), by prohibiting political party
3 committees, under certain conditions, from making both coordinated party expenditures and
4 independent expenditures with respect to the same candidate, and from making transfers
5 and assignments to other political party committees. 2 U.S.C. 441a(d)(4).

6 In 2002, the Commission promulgated rules at 11 CFR 109.35 to implement section
7 213. Coordinated and Independent Expenditures; Final Rules, 68 Fed. Register 421, 422
8 (January 3, 2003).

9 Subsequently, in McConnell v. FEC, 540 U.S. ____; 124 S.Ct. 619, 700-704 (2003),
10 the Supreme Court found section 213 unconstitutional. The Court held that by requiring
11 political parties to choose between coordinated and independent expenditures during the
12 post-nomination, pre-election period, section 213 placed an unconstitutional burden on the
13 parties’ right to make unlimited independent expenditures. 124 S.Ct. at 700-704.

14 Accordingly, the Commission now proposes to remove its regulations at 11 CFR 109.35
15 implementing BCRA section 213 and to delete from other regulations cross-references to
16 the rules that would be removed.

17 I. Proposed 11 CFR 102.6—Transfer of funds; collecting agents.

18 The Commission proposes to revise section 102.6 by deleting the cross-reference to
19 current section 109.35, which the Commission proposes to remove.

and the Commission replaced the section with 11 CFR 109.36, which prohibits independent expenditures by the national committee of a political party in connection with a presidential campaign only in certain circumstances in which the national committee of a political party serves as the principal campaign committee or authorized committee of its Presidential candidate. See Coordinated and Independent Expenditures; Final Rules, 68 Fed. Register 421, 447-48 (January 3, 2003).

1 II. Proposed 11 CFR 106.8—Allocation of expenses for political party committee
2 phone banks that refer to clearly identified Federal candidate.

3 The Commission proposes to revise section 106.8 by deleting the cross-reference to
4 current section 109.35, which the Commission proposes to remove.

5 III. Proposed 11 CFR 109.30—How are political party committees treated for purposes
6 of coordinated and independent expenditures?

7 The Commission proposes to revise section 109.30 by deleting the cross-references
8 to current section 109.35, which the Commission proposes to remove.

9 IV. Proposed 11 CFR 109.33—May a political party committee assign its coordinated
10 party expenditure authority to another political party committee?

11 The Commission proposes to revise section 109.33 by deleting the cross-reference
12 to current section 109.35, which the Commission proposes to remove.

13 V. Proposed 11 CFR 109.35—What are the restrictions on a political party committee
14 making both independent expenditures and coordinated party expenditures in connection
15 with the general election of a candidate?

16 The Commission proposes to remove and reserve current section 109.35, because,
17 as explained above, the statutory foundation for this section, 2 U.S.C. 441a(d)(4), has been
18 invalidated by the Supreme Court.

19 VI. Proposed 11 CFR 109.36—Are there additional circumstances under which a
20 political party committee is prohibited from making independent expenditures?

21 The Commission proposes to revise section 109.36 by deleting the word
22 “additional” in the heading of section 109.36, because, if section 109.35 is removed, the

1 circumstances described in section 109.36 will be the only circumstances under which a
2 political party committee is prohibited from making independent expenditures.

3

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

5 **[Regulatory Flexibility Act]**

6

7 The attached proposed rules, if promulgated, would not have a significant economic
8 impact on a substantial number of small entities. The basis of this certification is that the
9 national, State, and local party committees of the two major political parties are not small
10 entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or
11 small governmental jurisdictions.

12 To the extent that political party committees may fall within the definition of "small
13 entities," their number is not substantial. In addition, the proposed rules would remove, not
14 add, restrictions applicable to political party committees.

15 **List of Subjects**

16 11 CFR Part 102

17 Political committees and parties, reporting and recordkeeping requirements.

18 11 CFR Part 106

19 Political candidates, campaign funds, political committees and parties.

20 11 CFR Part 109

21 Coordinated expenditures, independent expenditures, political committees and
22 parties.

23

1 For the reasons set out in the preamble, the Federal Election Commission proposes
2 to amend Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as
3 follows:

4 **PART 102 – REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY**
5 **POLITICAL COMMITTEES (2 U.S.C. 433)**

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

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

8 2. Section 102.6 would be amended by revising paragraph (a)(1)(ii) to read as follows:

9 **§ 102.6 Transfers of funds; collecting agents.**

10 (a) * * *

11 (1) * * *

12 (ii) Subject to the restrictions set forth at 11 CFR ~~109.35(e)~~, 300.10(a),
13 300.31 and 300.34(a) and (b), transfers of funds may be made
14 without limit on amount between or among a national party
15 committee, a State party committee and/or any subordinate party
16 committee whether or not they are political committees under 11
17 CFR 100.5 and whether or not such committees are affiliated.

18 * * * * *

19
20 **PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

21 3. The authority citation for Part 106 would continue to read as follows:

22 **Authority:** 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

23 4. Section 106.8 would be amended by revising paragraph (b)(2)(ii) to read as follows:

1 § 106.8 Allocation of expenses for political party committee phone banks that refer to
2 a clearly identified Federal candidate.

3 * * * * *

4 (b) * * *

5 (2) * * *

6 (ii) A coordinated expenditure or an independent expenditure, subject to
7 the limitations, restrictions, and requirements of 11 CFR 109.10,
8 109.32, and ~~109.33 and 109.35~~; or

9 * * * * *

10

11 **PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C.**
12 **431(17), 441a(a) and (d), AND PUB. L. 107-155 SEC. 214(c))**

13 5. The authority citation for Part 109 would continue to read as follows:

14 **Authority:** 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L.
15 107-155, 116 Stat. 81.

16 6. Section 109.30 would be amended by revising the section to read as follows:

17 **§ 109.30 How are political party committees treated for purposes of coordinated and**
18 **independent expenditures?**

19
20 Political party committees may make independent expenditures subject to the
21 provisions in this subpart. See 11 CFR ~~109.35 and 109.36~~. Political party committees may
22 also make coordinated party expenditures in connection with the general election campaign
23 of a candidate, subject to the limits and other provisions in this subpart. See 11 CFR 109.32
24 through 11 CFR 109.34~~109.35~~.

1 7. Section 109.33 would be amended by revising paragraph (a) to read as follows:

2 **§ 109.33 May a political party committee assign its coordinated party expenditure**
3 **authority to another political party committee?**

4
5 (a) Assignment. ~~Except as provided in 11 CFR 109.35(e),~~ The national committee of a
6 political party and a State committee of a political party, including any subordinate
7 committee of a State committee, may assign its authority to make coordinated party
8 expenditures authorized by 11 CFR 109.32 to another political party committee. Such an
9 assignment must be made in writing, must state the amount of the authority assigned, and
10 must be received by the assignee committee before any coordinated party expenditure is
11 made pursuant to the assignment.

12 * * * * *

13 8. Section 109.35 would be removed and reserved.

14 ~~**§ 109.35 What are the restrictions on a political party committee making both**~~
15 ~~**independent expenditures and coordinated party expenditures in connection with the**~~
16 ~~**general election of a candidate?**~~

17 (a) ~~Applicability. For the purposes of this section, all political committees established~~
18 ~~and maintained by a national political party (including all congressional campaign~~
19 ~~committees) and all political committees established and maintained by a State political~~
20 ~~party (including any subordinate committee of a State committee) shall be considered to be~~
21 ~~a single political committee.~~

22 (b) ~~Restrictions on certain coordinated and independent expenditures. On or after the~~
23 ~~date on which a political party nominates a candidate for election to Federal office, no~~
24 ~~committee of the political party may make:~~

1 ~~(1) Any coordinated party expenditure under 11 CFR 109.32 with respect to the~~
2 ~~candidate during the election cycle at any time after it makes any~~
3 ~~independent expenditure with respect to the candidate during the election~~
4 ~~cycle; or~~

5 ~~(2) Any independent expenditure with respect to the candidate during the~~
6 ~~election cycle at any time after it makes any coordinated expenditure under~~
7 ~~11 CFR 109.32 with respect to the candidate during the election cycle.~~

8 ~~(c) Restrictions on certain transfers and assignments. A committee of a political party~~
9 ~~that makes coordinated expenditures under 11 CFR 109.32 with respect to a candidate shall~~
10 ~~not, during the election cycle, transfer any funds to, assign authority to make coordinated~~
11 ~~expenditures under 11 CFR 109.32 to, or receive a transfer of funds from, a committee of~~
12 ~~the political party that has made or intends to make an independent expenditure with respect~~
13 ~~to the candidate.~~

14 § 109.35 [Removed and reserved]

15 9. Section 109.36 would be amended by revising the heading to read as follows:

16 **§ 109.36 Are there additional circumstances under which a political party committee**
17 **is prohibited from making independent expenditures?**

18 * * * * *

19

20

21

22

23

Bradley A. Smith
Chairman
Federal Election Commission

24 DATED _____
25 BILLING CODE: 6715-01-P