AGENDA DOCUMENT NO. 01-20-A

FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

AGENDA ITEM
For Meeting of: 3-29-01

SUBMITTED LATE

MEMORANDUM TO THE COMMISSION

FROM: **COMMISSIONER DAVID M. MASON**

RE: **NPRM ON INDEPENDENT EXPENDITURE REPORTING**

DATE: **MARCH 28, 2001**

The draft notice of proposed rulemaking on independent expenditure reporting includes a provision to which I object. The draft implements amendments in Pub. L. No. 106-346 to 2 USC § 434(c), which permits fax or e-mail submission of 24-hour reports, requires receipt within the 24-hour period and includes a provision allowing "verified" (instead of the former requirement of "signed") statements by persons other than political committees certifying the independence of their expenditures. The draft also gratuitously adds a verification requirement pertaining to "whether [the expenditures] involved the financing, dissemination, distribution or republication of any campaign materials prepared by a candidate or a candidate's agent or authorized committee," an apparent reference to 11 CFR 109(d)(1), which arguably renders such activity to be a per se coordinated, rather than an independent, expenditure.

Apparently, our independent expenditure reporting form currently includes a "republication" disclaimer, and the staff was seeking to make our regulations consistent with the form. I would prefer to make our forms consistent with the statute and regulations. In either case, I am disappointed that the staff failed to mention the proposed change in the Memorandum to the Commission or in the Summary or Supplemental Information portions of the Notice.

This additional verification is required neither under Pub. L. No. 106-346 nor under the FECA as it stood before these amendments. In addition, such a verification will not assist *our* enforcement efforts against coordinated expenditures. It merely creates an additional regulatory burden that is without statutory support. I do not believe that giving the Justice Department another tool to find criminal liability (i.e., perjury in addition to giving false statements to the government) warrants this additional verification requirement.

Moreover, further examination of the statutory basis for 11 CFR 109(d)(1) has led me to question the validity of this underlying regulation. Section 441a(a)(7)(B)(ii) states that "[f]or purposes of this subsection [441a(a) - *dollar limits on contributions*]," the financing of the dissemination, distribution or republication of a candidate's campaign materials shall be considered to be, not a contribution, but an "*expenditure for purposes of this paragraph*" (second emphasis added).

The apparent purpose of the paragraph to which this subsection refers is to clarify the status of particular contributions and expenditures that potentially could be miscategorized. Subparagraph 7(A) clarifies that contributions to a candidate that are made to any political committee authorized to accept contributions on the candidate's behalf are contributions to the candidate, contrary to the possible misperception that the contribution had been made to the recipient political committee. Subparagraph 7(C) clarifies, somewhat counterintuitively, that contributions to a vice-presidential nominee are contributions to the presidential nominee. Subparagraph 7(B) addresses the status of coordinated expenditures and is subdivided.

Subparagraph (7)(B)(i) restates the familiar equation: coordinated "expenditures" equal contributions. (B)(ii) states that when a person pays to disseminate or republish a candidate's campaign material it is an "expenditure" for the purposes of the paragraph, which, again, because the term "expenditure" occurs only in (B)(i), is to establish that coordinated expenditures equal contributions. (B)(ii), therefore, read along with its companion (B)(i), appears to be clarifying that *where coordination is present*, the financing of the dissemination or republication of a candidate's campaign materials (regardless of content) will be considered a contribution to the candidate. Persons operating independently of a candidate need not be wholly creative in devising their campaign materials, but if they pay for the dissemination of even a part of a candidate's prepared materials, and do so in coordination with a candidate, it is a contribution to the candidate.

If subparagraph (7)(B)(ii) had been intended to treat republication of campaign material as a per se contribution, it could easily have been drafted to do so directly. As it is, use of the term "expenditure" in a subparagraph specifically intended to draw a line between an "expenditure" and a "contribution" cannot be viewed as accidental.

If we are going to review substantive certification requirements, I believe this NPRM would be an appropriate vehicle to scrap our certification requirement under 11 CFR 114.10(e) for qualified nonprofit corporations, i.e., *MCFL* entities. Again, there is no statutory authority for requiring this certification and it does nothing to enhance our enforcement efforts. In addition, because the qualifying criteria are more restrictive than post-*MCFL* could have required (2nd, 4th and 8th Circuit cases), the certification imposes an unnecessary and possibly unconstitutional burden on certain entities. Entities residing in the aforementioned circuits, while qualifying for MCFL status under the criteria deemed relevant there, must nonetheless certify that they also meet our more stringent requirements.

In various places the statute requires designations in writing (§§ 432(e)(1) and 433(d)(1)), signatures (§ 434(c)(1)), certifications (§ 434(c)(2)), notices (§ 441b(b)(3)) and disclaimers (§ 441d(a)) (See also 9003 and 9033 requiring "agreements" and "certifications"). We would not usually argue that we have authority to require additional notices or disclaimers, even if the additional requirements were otherwise consistent with the Act and arguably served some useful purpose. In this case, the campaign material and MCFL certifications do not appear consistent with the Act, nor do they appear to serve any enforcement purpose. Thus, they appear to me to be both pointless and beyond our statutory authority to impose.