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2000 NOV -2 P 2 06



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

NOV -2 2000

**AGENDA ITEM**

For Meeting of: 11-09-00

MEMORANDUM

**TO:** The Commission

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

**FROM:** Lawrence M. Neble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Rosemary C. Smith  
Assistant General Counsel

Rita A. Reimer  
Attorney

**SUBJECT:** Final Rules and Explanation and Justification on General Public Political Communications Coordinated with Candidates, and Independent Expenditures

As directed by the Regulations Committee, the Office of General Counsel is circulating the attached draft final rules and accompanying Explanation and Justification on general public political communications coordinated with candidates, and independent expenditures.

Please note that we plan to publish this document in the *Federal Register* in the usual manner after it is approved by the Commission. However, there will not be time for the rules to lie before Congress for the 30 legislative day review period required by 2 U.S.C. § 438(d) prior to the adjournment of the 106<sup>th</sup> Congress. We will accordingly

send these rules to Congress and the General Accounting Office on the first day of the 107<sup>th</sup> Congress, in January 2001.

A Commission vote is required to:

1. Approve the attached final rules and Explanation and Justification for publication in the *Federal Register*; and
2. Direct the Office of General counsel to transmit the regulations and the Explanation and Justification to Congress ursuant to 2.C. 438(d).

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100, 109 and 110**

3 **[Notice 2000 - ]**

4 **General Public Political Communications Coordinated with Candidates;**

5 **Independent Expenditures**

6 **AGENCY:**

Federal Election Commission.

7 **ACTION:**

Final rule; transmittal of regulations to Congress.

8 **SUMMARY:**

9 The Federal Election Commission is adopting new rules to  
10 address coordinated communications that include clearly  
11 identified candidates, and that are paid for by persons other  
12 than candidates, candidates' authorized committees, and  
13 party committees. The rules address expenditures for  
14 communications made at the request or suggestion of a  
15 candidate, authorized committee or party committee; as well  
16 as those where any such person has exercised control or  
17 decision-making authority over the communication, or has  
18 engaged in substantial discussion or negotiation with those  
19 involved in creating, producing, distributing or paying for the  
20 communication. The Commission is also revising the  
21 definition of "independent expenditure," to conform with this  
22 new definition. Further changes to the rules on coordination  
23 between political party committees and their candidates are  
24 awaiting the outcome of a pending Supreme Court case.  
25 Additional information is provided in the supplementary  
information that follows.

26 **DATES:**

27 Further action, including the announcement of an effective  
date, will be taken after these regulations have been before

1 Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).  
2 A document announcing the effective date will be published  
3 in the Federal Register.

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

Ms. Rosemary C. Smith, Assistant General Counsel, or Ms.  
7 Rita A. Reimer, Attorney, 999 E Street, N.W., Washington,  
8 D.C. 20463, (202) 694-1650 or (800) 424-9530 (toll free).

9 **SUPPLEMENTARY**

10 **INFORMATION:** The Commission is issuing final rules at 11 CFR 100.23 that address  
11 coordinated communications that include clearly identified candidates, that are paid for by  
12 persons other than candidates, candidates' authorized committees, and party committees.  
13 The rules address communications made at the request or suggestion of a candidate,  
14 authorized committee or party committee; as well as those where a candidate, authorized  
15 committee, or party committee has exercised control or decision-making authority over the  
16 communication, or has engaged in substantial discussion or negotiation with those  
17 involved in creating, producing, distributing or paying for the communication. Other than  
18 the requirement that covered communications include a clearly identified candidate, the  
19 new rules contain no content standard. The Commission is also revising its rules at 11  
20 CFR 100.16 and 109.1, which define "independent expenditure," to conform with this new  
21 definition; and making conforming amendments to 11 CFR 110.14, the section of the  
22 Commission's rules that deals with contributions to and expenditures by delegates and  
23 delegate committees.

1 Section 438(d) of Title 2, United States Code, requires that any rules or regulations  
2 prescribed by the Commission to carry out the provisions of Title 2 of the United States  
3 Code be transmitted to the Speaker of the House of Representatives and the President of  
4 the Senate 30 legislative days before they are finally promulgated. Because these rules  
5 were approved by the Commission on >, 2000, after the 106<sup>th</sup> Congress had adjourned, the  
6 Commission plans to transmit them to Congress on the first day of the 107<sup>th</sup> Congress,  
7 which will occur in January 2001. A Notice announcing the effective date of these rules  
8 will be published in the Federal Register.

### 9 **Explanation and Justification**

10 The Federal Election Campaign Act, 2 U.S.C. 431 et seq. ("FECA" or the "Act")  
11 prohibits corporations and labor organizations from using general treasury funds to make  
12 contributions to a candidate for federal office. 2 U.S.C. 441b(a). It also imposes limits on  
13 the amount of money or in-kind contributions that other persons may contribute to federal  
14 campaigns. 2 U.S.C. 441a(a). Individuals and persons other than corporations, labor  
15 organizations, government contractors and foreign nationals can make independent  
16 expenditures in connection with federal campaigns. 11 CFR 110.4(a) and 115.2.  
17 Independent expenditures must be made without cooperation or consultation with any  
18 candidate, or any authorized committee or agent of a candidate; and they shall not be made  
19 in concert with, or at the request or suggestion of, any candidate, or any authorized  
20 committee or agent of a candidate. 2 U.S.C. 431(17).

21 Expenditures that are coordinated with a candidate or campaign are considered  
22 in-kind contributions. Buckley v. Valeo, 424 U.S. 1, 46-47 (1976) (footnote omitted)  
23 ("Buckley"); Federal Election Commission v. The Christian Coalition, 52 F.Supp.2d 45,

1 85 (D.D.C. 1999) ("Christian Coalition"). As such, they are subject to the limits and  
2 prohibitions set out in the Act. The Act defines "contribution" at 2 U.S.C. 431(8) to  
3 include any gift, subscription, loan, advance, or deposit of money or anything of value  
4 made by any person for the purpose of influencing any election for federal office.

5 The Commission is promulgating new rules at 11 CFR 100.23 that define the term  
6 coordinated general public political communication. They generally follow the standard  
7 articulated by the United States District Court for the District of Columbia in the Christian  
8 Coalition decision, supra. This decision sets out at length the standards to be used to  
9 determine whether expenditures for communications by unauthorized committees,  
10 advocacy groups and individuals are coordinated with candidates or qualify as independent  
11 expenditures.

#### 12 A. History of the Rulemaking

13 This rulemaking was originally initiated to implement the Supreme Court's  
14 plurality opinion in Colorado Republican Federal Campaign Committee v. Federal Election  
15 Commission, 518 U.S. 604 (1996) (Colorado I) concerning the application of section  
16 441a(d) of the FECA. In that decision, the Court concluded that political parties are  
17 capable of making independent expenditures on behalf of their candidates for federal  
18 office, and that it would violate the First Amendment to subject such independent  
19 expenditures to the section 441a(d) expenditure limits. Id. at 2315.

20 Section 441a(d) permits national, state, and local committees of political parties to  
21 make limited general election campaign expenditures on behalf of their candidates, which  
22 are in addition to the amount they may contribute directly to those candidates.

23 2 U.S.C. 441a(d). These section 441a(d) expenditures are commonly referred to as

1 “coordinated party expenditures.” Prior to the Colorado case, it was presumed that party  
2 committees could not make expenditures independent of their candidates.

3 The Commission notes that not all coordinated expenditures constitute  
4 communications. In fact, party committees may use their coordinated expenditure limits to  
5 pay for many other types of expenses incurred by candidates, including staff costs, polling  
6 and other services.

7 Following the Colorado I Supreme Court decision, the Democratic Senatorial  
8 Campaign Committee and the Democratic Congressional Campaign Committee filed a  
9 Petition for Rulemaking urging the Commission to (1) repeal or amend 11 CFR  
10 110.7(b)(4) to the extent that that paragraph prohibited national committees of political  
11 parties from making independent expenditures for congressional candidates; (2) repeal or  
12 amend 11 CFR Part 109 with respect to which expenditures qualify as “independent;” and  
13 (3) issue new rules to provide meaningful guidance regarding independent expenditures by  
14 the national committees of political parties. Although the Petition for Rulemaking urged  
15 changes only in the rules applicable to national committees of political parties, the  
16 Commission’s rulemaking also sought comment on proposed changes to the provisions  
17 governing state and local party committees, as well as coordination by outside groups with  
18 either candidates or party committees.

19 In response to the Colorado I decision, the Commission promulgated a Final Rule  
20 on August 7, 1996 which repealed paragraph (b)(4) of section 110.7. See 61 F.R. 40961  
21 (Aug. 7, 1996). That paragraph had provided that party committees could not make  
22 independent expenditures in connection with federal campaigns. On the same date, the  
23 Commission also published a Notice of Availability (“NOA”) seeking comment on the

1 remainder of the Petitioners' requests. See 61 F.R. 41036 (Aug. 7, 1996). No statements  
2 supporting or opposing the petition were received by the close of the comment period.

3 On May 5, 1997 the Commission published an NPRM in which it sought comments  
4 on proposed revisions to these regulations. 62 FR 24367 (May 5, 1997). Comments in  
5 response to this NPRM were received from Common Cause; the Democratic National  
6 Committee ("DNC"); the Democratic Senatorial Campaign Committee ("DSCC") and the  
7 Democratic Congressional Campaign Committee ("DCCC") (joint comment); the Internal  
8 Revenue Service ("IRS"); the National Republican Congressional Committee ("NRCC");  
9 the National Republican Senatorial Committee ("NRSC"); the National Right to Life  
10 Committee; the Republican National Committee ("RNC"); and the United States Chamber  
11 of Commerce. On June 18, 1997, the Commission held a public hearing on this Notice, at  
12 which witnesses testified on behalf of Common Cause, the DNC, the DSCC and the  
13 DCCC, the National Right to Life Committee, the NRSC, and the RNC.

14 The IRS found no conflict with the Internal Revenue Code or that agency's  
15 regulations with regard to any Notice considered in the course of this rulemaking. All  
16 other comments received in connection with this rulemaking will be discussed infra.

17 The Commission subsequently decided to hold the 1997 rulemaking in abeyance  
18 until it received further direction from the courts. The coordinated spending limits were  
19 invalidated on constitutional grounds by the district court in Colorado Republican Federal  
20 Campaign Committee v. Federal Election Commission, 41 F.Supp.2d 1197 (D. Colo.  
21 1999) (Colorado II), on remand from the Colorado I Supreme Court decision. In May  
22 2000, that decision was affirmed by the Court of Appeals for the Tenth Circuit. 213 F.3d



1 1221 (10<sup>th</sup> Cir. 2000). The Supreme Court has now agreed to review this decision. 2000  
2 WL 1201886 (U.S. Oct. 10, 2000) (No. 00-191).

3 On December 16, 1998, the Commission published a new NPRM putting forth  
4 proposed amendments to its rules governing publicly financed presidential primary and  
5 general election candidates. 63 FR 69524 (Dec. 16, 1998). Issues concerning coordination  
6 between party committees and their presidential candidates, which had been raised in the  
7 earlier NPRM, were addressed in the public funding rulemaking. For example, the 1998  
8 NPRM put forward narrative proposals regarding a content-based standard for coordinated  
9 communications made to the general public. It also sought comment on coordination  
10 between the national committees of political parties and their presidential candidates with  
11 respect to poll results, media production, consultants, and employees whose services are  
12 intended to benefit the parties' eventual presidential nominees.

13 The Commission received seven written comments on coordinated expenditures in  
14 response to the 1998 NPRM. Commenters included the Brennan Center for Justice at New  
15 York University School of Law ("Brennan Center"); Common Cause and Democracy 21  
16 (joint comment); the DNC; the James Madison Center for Free Speech; Perot '96; the  
17 RNC; and the law firm of Ryan, Phillips, Utrecht, & MacKinnon, and Patricia Fiori, Esq.  
18 (joint comment). The Commission subsequently reopened the comment period and held a  
19 public hearing on March 24, 1999, at which witnesses representing the DNC; the James  
20 Madison Center for Free Speech; the RNC; and Ryan, Phillips, Utrecht & MacKinnon  
21 presented testimony on coordination issues.

22 On November 3, 1999, the Commission promulgated new paragraph (d) of section  
23 110.7, addressing pre-nomination coordinated expenditures. 64 FR 59606 (Nov. 3, 1999).

1 The new paragraph states that party committees may make coordinated expenditures in  
2 connection with the general election campaign before their candidates have been  
3 nominated. It further states that all pre-nomination coordinated expenditures are subject to  
4 the section 441a(d) coordinated expenditure limitations, whether or not the candidate with  
5 whom they are coordinated receives the party's nomination. Please note that new  
6 paragraph 110.7(d) applies to all federal elections. For additional information, see  
7 Explanation and Justification for Section 110.7, Party Committee Coordinated  
8 Expenditures and Spending Limits (2 U.S.C. 441a(d)), 64 FR 42579, 42580-81 (Aug. 5,  
9 1999).

10 The Commission published the document that serves as the primary basis for these  
11 final rules, a Supplemental Notice of Proposed Rulemaking ("SNPRM") addressing  
12 general public political communications coordinated with candidates, on December 9,  
13 1999. 64 FR 68951 (Dec. 9, 1999). The Commission received 15 comments in response  
14 to the SNPRM, from the Alliance for Justice; the American Federation of Labor-Congress  
15 of Industrial Organizations ("AFL-CIO"); the Brennan Center; The Coalition; Common  
16 Cause and Democracy 21 (joint comment); the DNC; the DSCC and DCCC (joint  
17 comment); the First Amendment Project of the Americans Back in Charge Foundation; the  
18 IRS; the James Madison Center for Free Speech; J. B. Mixon, Jr.; the National Education  
19 Association; the NRSC; the RNC; and United States Senators Russell D. Feingold, John  
20 McCain, Carl Levin and Richard J. Durbin (joint comment). In addition, the Commission  
21 held a public hearing on the SNPRM on February 16, 2000, at which nine witnesses  
22 testified on behalf of the Alliance for Justice, the AFL-CIO, the Americans Back in Charge

1 Foundation, the Brennan Center, The Coalition, the DNC, the DSCC and DCCC, the James  
2 Madison Center for Free Speech, and the RNC.

3 B. The Christian Coalition Decision

4 The Christian Coalition case arose out of an FEC enforcement action alleging  
5 coordination between the Christian Coalition and various federal campaigns in connection  
6 with the 1990, 1992, and 1994 elections, resulting in disbursements from the Coalition's  
7 general corporate treasury for voter guides, "get out the vote" activities, direct mailings and  
8 payments to speakers. The Christian Coalition characterized these activities as  
9 independent corporate speech; while the FEC alleged that, because of the varying degrees  
10 of interaction between the Christian Coalition and those candidates and their campaigns,  
11 the activities must be treated as in-kind contributions that violated the Act's contribution  
12 limits and/or prohibitions.

13 In setting out a working definition of "coordination," the Christian Coalition court  
14 explained that "the standard for coordination must be restrictive, limiting the universe of  
15 cases triggering potential enforcement actions to those situations in which the coordination  
16 is extensive enough to make the potential for corruption through legislative quid pro quo  
17 palpable without chilling protected contact between candidates and corporations and  
18 unions." 52 F.Supp.2d at 88-89. The court continued, "First Amendment clarity demands  
19 a definition of 'coordination' that provides the clearest possible guidance to candidates and  
20 constituents, while balancing the Government's compelling interest in preventing  
21 corruption of the electoral process with fundamental First Amendment rights to engage in  
22 political speech and political association." Id. at 91. In its opinion the district court  
23 referred to "expressive expenditures," as opposed to expenditures for other types of

1 campaign support, and defined a “coordinated expressive expenditure” as “one for a  
2 communication made for the purpose of influencing a federal election in which the spender  
3 is responsible for a substantial portion of the speech and for which the spender’s choice of  
4 speech has been arrived at after coordination with the campaign.” Id. at 85, n. 45.

5 The court went on to explain that “an expressive expenditure becomes  
6 ‘coordinated,’ where the candidate or her agents can exercise control over, or where there  
7 has been substantial discussion or negotiation between the campaign and the spender over  
8 a communication’s: (1) contents; (2) timing; (3) location, mode, or intended audience  
9 (e.g., choice between newspaper or radio advertisement); or (4) ‘volume’ (e.g., number of  
10 copies of printed materials or frequency of media spots). ‘Substantial discussion or  
11 negotiation’ is such that the candidate and spender emerge as partners or joint venturers in  
12 the expressive expenditure, but the candidate and spender need not be equal partners.” Id.  
13 at 92. The court acknowledged that “a standard that requires ‘substantial’ anything leaves  
14 room for factual dispute,” but reasoned that the standard reflects a reasonable balance  
15 between possibly chilling some protected speech and the need to protect against the “real  
16 dangers to the integrity of the electoral process” expressive expenditures may present. Id.

17 The district court then applied this standard to the challenged campaign activities.  
18 In most instances the court did not find coordination. For example, the court found no  
19 coordination between the Christian Coalition and the Bush-Quayle campaign in the  
20 preparation of voter guides in connection with the 1992 presidential campaign, explaining  
21 that, while the campaign was generally aware President Bush would compare favorably in  
22 the eyes of the target audience with the other candidates profiled in the guides, the  
23 campaign staff did not seek to discuss the issues that would be profiled or how they would

1 be worded. Nor did they seek to influence the Coalition's decisions as to how many guides  
2 would be produced, and when and where they would be distributed. Id. at 93-95.

3 Similarly, the fact that a Coalition official served as a volunteer in a 1994 House campaign  
4 and also made decisions as to where the Coalition's voter guides would be distributed in  
5 connection with that campaign did not amount to coordination where the official did not  
6 make his decisions based on any discussions or negotiations with the campaign for which  
7 he volunteered. Id. at 95-96. In contrast, the court found coordination where the Coalition  
8 provided a Senate campaign consultant with a commercially valuable mailing list. Id. at  
9 96. The Commission subsequently decided not to appeal the district court's decision.

10 C. Other Court Decisions

11 In Clifton v. Federal Election Commission, 114 F.3d 1309 (1st Cir. 1997), cert.  
12 denied, 118 S.Ct. 1036 (1998) ("Clifton"), the United States Court of Appeals for the First  
13 Circuit ruled that coordination in the context of voter guides "imply[s] some measure of  
14 collaboration beyond a mere inquiry as to the position taken by a candidate on an issue."  
15 114 F.3d at 1311, citing Buckley, 424 U.S. at 46-47 and n. 53 (1976). The court  
16 invalidated those portions of the Commission's voter guide regulations at 11 CFR  
17 114.4(c)(5)(i) and (ii)(C) that limit any contact with candidates to written inquiries and  
18 replies, and generally require all candidates for the same office to receive equal space and  
19 prominence in the guide. Id. at 1317. The court also invalidated the Commission's voting  
20 record rules at 11 CFR 114.4(c)(4) to the extent they limit contact with candidates to

1 written inquiries on candidates' positions. Id.<sup>1</sup> In Federal Election Commission v. Public  
2 Citizen, Inc., 64 F.Supp.2d 1327 (N.D. Ga. 1999), a federal district court followed the  
3 Clifton "collaboration" language in holding that contacts between a public interest group  
4 and a candidate made in connection with an advertising campaign to defeat a candidate for  
5 the House of Representatives were not coordinated for FECA purposes. The Commission  
6 did not appeal that portion of the Public Citizen decision that addresses the coordination  
7 standard.

#### 8 D. General Concerns Raised by Commenters

9 The commenters and witnesses raised several general points in connection with the  
10 SNPRM. Several noted that, except for the discussion of coordinated party expenditures at  
11 2 U.S.C. 441a(d), the FECA does not use the terms "coordinated" or "coordination" in  
12 discussing campaign contributions and expenditures. Nor does the Act's legislative history  
13 provide much guidance. While the Act does define "independent expenditure" at 2 U.S.C.  
14 431(17), supra, which can be read as stating in the negative what a coordinated expenditure  
15 is not, these rules will fill what is largely a vacuum in this area. All of the commenters,  
16 regardless of the positions they espoused, asked the Commission to issue clear rules that  
17 provide the regulated community with sufficient guidance to easily understand which  
18 communications come within the definition.

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<sup>1</sup> On July 20, 1999, the Commission received a Petition for Rulemaking from the James Madison Center for Free Speech, on behalf of the Iowa Right to Life Committee, seeking repeal of the rules at 11 CFR 114.4(c)(4) and (c)(5) to reflect the Clifton decision. The Commission published an NOA on this petition on Aug. 25, 1999. 64 FR 46319 (Aug. 25, 1999). Further action on that petition, which is related to the issues addressed in this rulemaking, will be taken by the Commission after this rulemaking has been concluded.

1 One commenter, citing Buckley, 424 U.S. at 48 (1976), argued that the  
2 Commission was powerless to act in this area, because it had not shown that covered  
3 communications involved actual corruption between those making the communications in  
4 question and the recipient candidates. However, after the SNPRM was published, the  
5 Supreme Court's decision in Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897  
6 (2000) (Shrink Missouri) upheld the constitutionality of State contribution limits, which  
7 the Court said could be based, inter alia, on newspaper accounts that inferred the  
8 impropriety of large contributions. Id. at 907. While some commenters argued that the  
9 holding in Shrink Missouri is limited to non-federal contributions, others stated that, in  
10 their view, this decision vitiates the need for the Commission to find quid pro quo  
11 corruption in a particular case before taking action in this area. The Commission agrees  
12 with this latter view, that the holding in Shrink Missouri is applicable to federal  
13 contribution limits.

#### 14 E. Content of Covered Communications

15 Several commenters urged the Commission to limit the definition of general public  
16 political communications to communications that contain "express advocacy" of the  
17 election or defeat of a clearly identified candidate, i.e., those covered by the Commission's  
18 definition of "express advocacy" as defined at 11 CFR 100.22(a). That paragraph requires  
19 the use of individual words or phrases that, in context, can have no other reasonable  
20 meaning than to urge the election or defeat of one or more clearly identified candidate(s).  
21 They argued that express advocacy is constitutionally required even for communications  
22 specifically requested by a candidate to benefit the candidate's campaign. However, no  
23 commenter was able to point to any case where the court limited coordinated

1 communications to those containing express advocacy. Other commenters, citing the  
2 definition of “independent expenditure” at 2 U.S.C. 431(17), supra, argued that any contact  
3 with a candidate or campaign should result in coordination.

4 Several commenters urged the Commission to limit the definition of general public  
5 political communications to communications that refer to clearly identified candidates in  
6 their status as candidates, or otherwise refer to an election. They noted, for example, that  
7 Members of Congress run for office virtually full-time, and argued that communications  
8 that referred to them in passing should not be subject to this standard.

9 The Buckley Court emphasized the necessity of avoiding vague or overbroad  
10 regulation of political speech. 424 U.S. at 42-44, 77-80. In light of these constitutional  
11 concerns, the Commission’s goal in adopting section 100.23 is to establish a test that (1)  
12 provides reasonable certainty as to which communications between a person and a  
13 candidate or a party committee rise to the level of coordination; and (2) properly balances  
14 the Commission’s “interest in unearthing disguised contributions,” Clifton, 114 F.3d at  
15 1315, with the right of the citizenry to engage in discussions about public issues with  
16 candidates. Buckley, 424 U.S. at 14.

17 The Commission is addressing the constitutional concerns raised in Buckley by  
18 creating a safe harbor for issue discussion. Paragraph 100.23(d) makes it clear that a  
19 candidate’s or political party’s response to an inquiry regarding the candidate’s or party’s  
20 position on legislative or public policy issues will not suffice to establish coordination. In  
21 addition, the Commission’s new rules establish a “buffer zone” for protected speech by  
22 requiring that discussions or negotiations regarding certain aspects of a communication  
23 must be “substantial” and result in “collaboration or agreement” in order to rise to the level



1 of coordination. See paragraph 100.23(c)(2)(iii). At a minimum, this new rule is more  
2 protective of First Amendment rights than the standard it is replacing.

3 The Commission is not adopting any content standard as a part of these rules at this  
4 time. There were significant disagreements among commenters over what content  
5 standard, if any, should be adopted. There is a substantial argument that any of the content  
6 standards suggested could be under-inclusive in the context of coordination. Some  
7 advertising by campaigns, for instance, does not include express advocacy and does not  
8 refer specifically to candidates as candidates or state that they are running for election.  
9 Allowing candidates, campaigns and political parties to ask corporations, labor unions or  
10 other persons to sponsor that kind of advertising without limit or disclosure could “give  
11 short shrift to the government’s compelling interest in preventing real and perceived  
12 corruption that can flow from large campaign contributions.” Christian Coalition, 52  
13 F.Supp.2d at 88.

14 The argument that a communication must constitute express advocacy in order to  
15 fall within the definition of “expenditure,” 2 U.S.C. 431(9), in all circumstances (and thus  
16 be controlling for purposes of defining a “coordinated expenditure”) is not being addressed  
17 in this rulemaking. See Republican National Committee v. Federal Election Commission,  
18 1:98CV1207 (June 25, 1998 D. D.C.) (slip op.), aff’d, No. 98-5263 (D.C. Cir. Nov. 6,  
19 1998). The term “expenditure” includes any purchase, payment, distribution, loan,  
20 advance, deposit, or gift of money or anything of value, made by any person for the  
21 purpose of influencing any election for Federal office. Exceptions to this definition are set  
22 forth at section 431(9)(B).

1 A content element in the definition of coordination may be more useful in the  
2 context of political party communications coordinated with candidates, a topic which will  
3 be addressed in a subsequent phase of this rulemaking. In the party-candidate context the  
4 principal question could become how an expenditure is reported rather than how it is  
5 financed or whether it is reported at all. The Commission may revisit the issue of a content  
6 standard for all coordinated communications when it considers candidate-party  
7 coordination.

#### 8 Section 100.16 Definition of "independent expenditure"

9 The Commission is amending the definition of independent expenditure in this  
10 section to track more closely the statutory definition of independent expenditure. See  
11 2 U.S.C. 431(17). It is also adding a conforming amendment, to indicate that the meaning  
12 of the phrase "made with the cooperation of, or in consultation with, or in concert with, or  
13 at the request or suggestion of, a candidate or any agent or authorized committee of such  
14 candidate," is now governed by 11 CFR 100.23, discussed infra, instead of former 11 CFR  
15 109.1(b)(4), which has been repealed. Finally, a new cross reference to 11 CFR 109.1  
16 alerts readers to the additional information on independent expenditures contained in that  
17 section.

#### 18 Section 100.23 Coordinated General Public Political Communications

19 The Commission is adding a new section, 11 CFR 100.23, to its rules, to address  
20 coordinated communications made in connection with federal elections that are paid for by  
21 persons other than candidates, candidates' authorized committees, and party committees.  
22 The Commission believes it is appropriate to place this language in a separate section of  
23 the rules to properly alert the regulated community of this standard.

1 New section 100.23 generally follows the language of the Christian Coalition  
2 decision, discussed above. The Commission is, however, using the phrase “expenditures  
3 for general public political communications” in place of “expressive expenditure,” the  
4 term used by the Christian Coalition court, because “expenditures for general public  
5 political communications” more precisely describes the types of communications covered  
6 by these rules. See discussion of paragraph 100.23(c)(1), *infra*.

7 There was no consensus among the comments and witnesses as to whether the  
8 Commission should follow the approach set forth in Christian Coalition. Some favored  
9 this overall approach although they urged the Commission to limit coverage to  
10 communications that contained express advocacy. As explained above, the rules do not  
11 address this further limitation. Others opposed this approach, urging retention of a broad  
12 definition of coordination.

13 Although the final rules have been modified somewhat from those proposed in the  
14 SNPRM, the Commission continues to believe that the Christian Coalition court correctly  
15 decided which communications are “coordinated” in this context. While the court  
16 recognized that it was establishing a difficult standard to meet, the Commission believes  
17 the court correctly concluded that a high standard is required to safeguard protected core  
18 First Amendment rights.

#### 19 Section 100.23(a) Scope

20 Paragraph (a)(1) of this section states that these new rules apply to general public  
21 political communications paid for by separate segregated funds, nonconnected committees,  
22 individuals, or any other person except candidates, authorized committees, and party

1 committees. Paragraph (a)(2) notes that coordinated party expenditures made on behalf of  
2 a candidate pursuant to 2 U.S.C. 441a(d) are governed by 11 CFR 110.7.

3 In the SNPRM, the Commission sought comments on whether the standard for  
4 coordination proposed in that document should be applied to political party expenditures  
5 for general public political communications that are coordinated with particular candidates.  
6 All party committees that commented on the SNPRM argued that they should not be  
7 covered by these rules. They urged the Commission to wait until Colorado II has been  
8 decided before acting in that area, since that decision could have major ramifications for  
9 any rules that might have been adopted in the meantime.

10 In light of Colorado II, the Commission is not amending the rules in 11 CFR 110.7  
11 governing coordinated expenditures between party committees and candidates at this point.  
12 The Commission expects that additional guidance will be forthcoming in that decision, at  
13 which time it will re-examine this aspect of the rulemaking.

14 Section 100.23(b) Treatment of general public political communications as expenditures  
15 and contributions

16  
17 As explained above, for purposes of the FECA, a coordinated expenditure is  
18 considered both an expenditure by the person making the expenditure and an in-kind  
19 contribution to the recipient candidate or political committee. Consistent with such  
20 treatment, paragraph (b) of section 100.23 states that any expenditure covered by these  
21 rules shall be treated as both an expenditure under 11 CFR 100.8(a) and an in-kind  
22 contribution under 11 CFR 100.7(a)(1)(iii). As such, it is subject to the contribution limits  
23 of 2 U.S.C. 441a and must be reported as both a contribution and an expenditure as  
24 required at 2 U.S.C. 434. Please note that the new rules apply not only to situations in

1 which separate segregated funds and nonconnected committees coordinate their  
2 expenditures with candidates, but also where they coordinate with party committees.

3 Section 100.23(c) Coordination with candidates and party committees

4 This paragraph contains the text of the coordination standard: it addresses what  
5 contact between a campaign and a person paying for a communication made in connection  
6 with that campaign is sufficient to bring that communication within the purview of these  
7 rules. Please note that the standards set forth in paragraphs (2)(i), (2)(ii) and (2)(iii) are  
8 alternatives. Communications that meet the standard established by any one of these  
9 paragraphs are considered general public political communications for purposes of these  
10 rules.

11 The SNPRM proposed alternative language for the introductory text of this  
12 paragraph. Both Alternatives, designated Alternative 1-A and Alternative 1-B, stated that  
13 general public political communications would be considered coordinated if paid for by  
14 any person other than a candidate, the candidate's authorized committee, or a party  
15 committee, provided that the requirements set forth in paragraphs (c)(2)(i), (c)(2)(ii), or  
16 (c)(2)(iii) of this section, *infra*, were met. Alternative 1-B would have added an additional  
17 requirement before a communication be considered coordinated, namely that it be  
18 distributed primarily in the geographic area in which the candidate was running.  
19 Alternative 1-A omitted this geographical restriction.

20 The SNPRM explained that Alternative 1-B was intended to ensure that costs of  
21 national legislative campaigns that refer to clearly-identified candidates, and may be  
22 designed or endorsed by one or more of the named candidates, not be considered  
23 expenditures on behalf of those candidates' campaigns. The Commission noted, however,

1 two concerns with Alternative 1-B: (1) The definition of “coordination” would exclude  
2 media broadcasts to several adjacent states; and (2) the definition of “coordination” would  
3 exclude communications disseminated in one state that solicit funds on behalf of a  
4 candidate running in another state, if contributors are asked to send their contributions  
5 directly to the candidate on whose behalf they are made.

6 One commenter pointed out that a geographic limit has nothing to do with the  
7 concept of coordination. No one addressed the Commission’s concern that Alternative 1-B  
8 would allow persons to solicit contributions to be sent directly to candidates in another  
9 state, without these contributions being considered coordinated. The Commission is  
10 adopting Alternative 1-A, because the geographic restriction does not get at the question of  
11 whether the parties coordinated a communication.

12 Please note that, in the SNPRM, the requirement at paragraph (1) of this section  
13 that covered communications be paid for by any person other than the candidate, the  
14 candidate’s authorized committee, or a party committee, was included as part of the  
15 introductory text. For clarity, the Commission has decided to place this language in a  
16 separate paragraph.

17 Section 100.23(c)(2)(i) The “request or suggestion” or “authorized by” standard

18 The Commission also sought comment on two alternatives of a provision, to be  
19 located in paragraph (c)(2)(i), which addresses communications made at the request or  
20 suggestion of the candidate or campaign, and those authorized by a candidate or campaign.  
21 Alternative 2-A stated that coordination would occur when a communication is created,  
22 produced or distributed at the request or suggestion of, or when authorized by, a candidate,  
23 candidate’s authorized committee, a party committee, or an agent of any of the foregoing.

1 Alternative 2-B would have limited such coordination to those instances where the parties  
2 also discuss the content, timing, location, mode, intended audience, volume of distribution  
3 or frequency of placement of that communication, the result of which is collaboration or  
4 agreement.

5 One commenter urged the Commission to adopt Alternative 2-A, because it is  
6 consistent with the statutory language. Another found even Alternative 2-B to be overly  
7 broad. A party committee argued that the definition was overly broad as applied to party  
8 committees; however, as discussed above, that portion of the rulemaking has been held in  
9 abeyance pending the Supreme Court's decision in Colorado II.

10 The Commission is adopting Alternative 2-A because it is more consistent with the  
11 FECA than Alternative 2-B. Section 441a(a)(7)(B)(i) states that "expenditures made by  
12 any person in cooperation, consultation, or concert, with, or at the request or suggestion of,  
13 a candidate, . . . shall be considered to be a contribution to such candidate." The new rule  
14 also reflects the following language in the Christian Coalition decision: "The fact that the  
15 candidate has requested or suggested that a spender engage in certain speech indicates that  
16 the speech is valuable to the candidate, giving such expenditures sufficient contribution-  
17 like qualities to fall within the Act's prohibition on contributions." 52 F.Supp.2d at 91.  
18 The Commission has accordingly decided to adopt Alternative 2-A, so that a  
19 communication made at the request or suggestion of a candidate will be considered to be  
20 coordinated with that candidate, regardless of whether any of the further contacts that  
21 would have been required by Alternative 2-B took place. The Commission emphasizes  
22 that this regulation encompasses only requests for communications to the general public.  
23 Thus, a general appeal for support would clearly not fall within the scope of this regulation.

1           The SNPRM sought comments on a hypothetical in which, shortly before an  
2 election, a candidate complained to a supporter that no one had publicized various  
3 problems in the personal life of his opponent. The supporter then ran such advertisements.  
4 Most of those who commented on this hypothetical thought this hypothetical should fall  
5 within the "request or suggestion" language. However, some witnesses said that it would  
6 not be considered coordinated under either Alternative 2-A or 2-B, and urged the  
7 Commission to revise the proposed regulation to ensure that such communications would  
8 in fact be considered coordinated. The Commission notes that this hypothetical turns on  
9 the precise language used, which would be needed to determine if in fact the candidate  
10 requested that the supporter run the advertisements in question. If the candidate made no  
11 request or suggestion, the communication would not be coordinated for purposes of these  
12 rules.

13           In determining whether a particular statement by a candidate or committee  
14 constitutes an appeal for an in-kind contribution in the form of a general public political  
15 communication, the Commission will consider both whether the requested action appears  
16 to be for the purpose of influencing a Federal election and the specificity of the request or  
17 suggestion. Such determinations would turn on the same factors addressed specifically in  
18 the "substantial discussion" standard, *infra*, with the principal difference being that a  
19 request or suggestion could be made by a candidate, authorized committee or party  
20 committee without any negotiation or immediate response from an outside group. If such a  
21 request indicated that a communication with specified content would be valuable or  
22 important to a candidate or committee, then payments for the communication would  
23 constitute in-kind contributions.



1 One commenter proposed an additional hypothetical, in which a candidate's  
2 campaign committee chose to target only urban areas with campaign advertisements  
3 because it could not afford to cover the entire State. The director of a rural Political Action  
4 Committee ("PAC") later met the campaign manager and asked whether the campaign  
5 would be running ads in rural areas. Told that it would not be, due to lack of money, the  
6 rural PAC paid for and distributed the ads. The Commission notes that this mailing would  
7 be covered by 11 CFR 109.1(d)(1), part of the Commission's definition of independent  
8 expenditures, which states that the financing or dissemination, distribution, or  
9 republication of any campaign materials prepared by a candidate, campaign committee or  
10 their authorized agent is a contribution by the person making the expenditure, but not an  
11 expenditure by the candidate or committee unless coordination is present. See also 11 CFR  
12 100.7(a)(1)(iii).

13 Section 100.23(c)(2)(ii) The "control or decision-making" standard

14 Paragraph (c)(2)(ii) states that communications are coordinated if the candidate or  
15 the candidate's agent, or a party committee or its agent, has exercised control or decision-  
16 making authority over the content, timing, location, mode, intended audience, volume of  
17 distribution, or frequency of placement of the communication. This standard is based on  
18 the Christian Coalition definition, 52 F.Supp.2d at 92; and it, too, would turn on the  
19 specific actions involved in each case. The commenters did not focus extensively on this  
20 portion of the proposed definition.

21 Section 100.23(c)(2)(iii) The "substantial discussion or negotiation" standard

22 Under 11 CFR 100.23, a general public political communication is considered  
23 coordinated if it is made after substantial discussion or negotiation between the creator,

1 producer or distributor of the communication, or person paying for the communication, and  
2 a candidate, candidate's authorized committee or a party committee, regarding the content,  
3 timing, location, mode, intended audience, volume of distribution or frequency of  
4 placement of that communication, the result of which is collaboration or agreement. The  
5 paragraph further provides that substantial discussion or negotiation can be evidenced by  
6 one or more meetings, conversations or conferences regarding the value or importance of  
7 that communication for a particular election.

8 Some commenters expressed uncertainty about the scope of "substantial," which  
9 admittedly "leaves room for factual dispute." Christian Coalition, 52 F.Supp.2d at 92. By  
10 including the word "substantial," the Commission intends to make clear that whether or not  
11 "discussions or negotiations" satisfy the requirements of paragraph 100.23(c)(2)(iii) will  
12 depend not on their frequency but on their substance. The "substance" must go beyond  
13 protected issue discussion to specific information about how to communicate an issue in a  
14 way that is valuable or important for the campaign. The Commission has concluded that  
15 when the topic of discussion turns from the candidate's views on a political issue to the  
16 candidate's views on how to communicate that issue, there is far greater likelihood of  
17 collaboration. Thus, numerous discussions with a campaign about a complex or  
18 controversial public issue would not be considered "substantial" for the purposes of  
19 paragraph (c)(2)(iii), but a brief discussion as to how to phrase an issue, or as to which  
20 issues to emphasize, could be considered "substantial."

21 The word "substantial" applies not only to discussions about the content of a  
22 communication, but also to discussions about the timing, location, mode, intended  
23 audience, volume of distribution or frequency of placement of a communication. In those

1 circumstances, "substantial" is meant to exclude discussions that do not include enough  
2 specific information for collaboration or agreement to occur. For example, if a person  
3 states that he is planning to pay for a communication "soon," or to run the ad "on TV,"  
4 without further probing from the campaign, this would not be considered "substantial."

5 The Commission recognizes, as did the Christian Coalition court, that use of the  
6 term "substantial" means that determinations involving this standard will likely be fact-  
7 specific. 52 F.Supp.2d at 92. Those seeking additional guidance as to the application of  
8 this standard to specific facts and circumstances are encouraged to make use of the  
9 Commission's advisory opinion process. See 2 U.S.C. 437f and 11 CFR Part 112.

#### 10 Section 100.23(d) Exception

11 Consistent with Buckley, Christian Coalition, and Clifton, paragraph (d) of new  
12 section 100.23 provides that a candidate's or political party's response to an inquiry  
13 regarding the candidate's or the party's position on legislative or public policy issues does  
14 not alone make the communication coordinated.

15 Several commenters urged the Commission to broaden this exception to include,  
16 for example, public policy announcements or communications disseminated as part of a  
17 public policy debate; and legislative lobbying campaigns, including grass roots lobbying.  
18 While the Commission is generally sympathetic to these concerns, it can be difficult to  
19 distinguish between lobbying activities and electoral campaigning. As the Buckley Court  
20 explained, "[T]he distinction between discussion of issues and candidates and advocacy of  
21 election or defeat of candidates may often dissolve in practical application." 424 U.S. at  
22 42. Further, some of these communications may have components that could trigger  
23 application of these rules. Thus the Commission is not enacting the blanket exception

1 recommended by these commenters. However, the Commission stresses that such  
2 contacts, while not receiving a blanket exception, do not necessarily result in coordination.  
3 The test of 11 CFR 100.23 (c) must still be met.

#### 4 Section 100.23(e) Definitions

5 This paragraph defines the terms “general public political communications,”  
6 “clearly identified,” and “agent” for purposes of these rules. The term “general public  
7 political communications” includes those made through a broadcasting station, including a  
8 cable television operator; newspaper; magazine; outdoor advertising facility; mailing or  
9 any electronic medium, including over the Internet or on a web site. Including cable  
10 television broadcasts is consistent with the Commission’s candidate debate regulations at  
11 11 CFR 110.13(a)(2), while including communications made over the Internet reflects the  
12 expanding role of that medium in federal campaigns.

13 The definition is limited to those communications having an intended audience of  
14 over one hundred people. The exclusion of communications with an intended audience of  
15 one hundred people or fewer mirrors the Commission’s disclaimer rules at 11 CFR  
16 110.11(a)(3), which exempt from the disclaimer requirements direct mailings of one  
17 hundred pieces or less.

18 The term “general public political communication” is similar to the term “general  
19 public political advertising,” which appears in three places in the Act and in several  
20 sections of the regulations. The latter term has similar and generally consistent meanings  
21 in the Act and the Commission’s rules. For example, the definitions of “contribution” and  
22 “expenditure” at 2 U.S.C. 431(8)(B)(v) and 431(9)(B)(iv) respectively refer to  
23 “broadcasting stations, newspapers, magazines, or similar types of general public political

1 advertising.” Section 441d(a) of the Act, which addresses communications that require a  
2 disclaimer, includes the same list and adds outdoor advertising facilities and direct  
3 mailings. The corresponding rules are found at 11 CFR 100.7(b)(9) (definition of  
4 “contribution”), 100.8(b)(10) (definition of “expenditure”), and 110.11(a)(1)  
5 (communications requiring disclaimers). The Commission therefore believes this term is  
6 preferable to “expressive communications,” the term used in the Christian Coalition  
7 decision.

8         The Commission sought comments on a hypothetical in which a Savings and Loan  
9 League runs public service announcements intended to reinforce the public’s confidence in  
10 the safety of deposits in savings and loan institutions. The announcements, which are run  
11 in January of an election year, feature a U.S. Senator who is a candidate for reelection. The  
12 commenters who discussed this hypothetical argued that the announcements should not be  
13 considered coordinated with the candidate’s Senate campaign, both because of the timing  
14 of the announcements, early in an election year, and because they had no electoral content.  
15 Although the Commission is not including a specific time period prior to an election in the  
16 text of the new rules, timing is an element of coordination in 11 CFR 100.23(c)(2)(ii) and  
17 (iii). The Christian Coalition decision supports the idea that the timing of a  
18 communication is one aspect of whether it is coordinated with a campaign. Christian  
19 Coalition, 52 F.Supp. 3d at 92. However, as discussed above, the Commission does not  
20 believe that the lack of electoral content is controlling.

21         This is another situation that would turn on the specific facts. See discussion of  
22 the first hypothetical discussed in connection with paragraph (c)(2)(i), supra.

1 Section 100.23(e)(2) Definition of “clearly identified”

2       The new rules at 11 CFR 100.23(b) limit their coverage to communications that  
3 include a “clearly identified candidate.” Paragraph (e)(2) of section 100.23 explains that  
4 the term “clearly identified candidate” has the same meaning as that in 11 CFR 100.17,  
5 which is based on 2 U.S.C. 431(18). Thus, it includes communications where the  
6 candidate’s name, nickname, photograph, or drawing appears, or the identity of the  
7 candidate is otherwise apparent through an unambiguous reference such as “the President,”  
8 “your Congressman,” or “the incumbent,” or through an unambiguous reference to his or  
9 her status as a candidate such as “the Democratic Presidential nominee” or “the Republican  
10 candidate for Senate in the State of Georgia.”

11 Section 100.23(e)(3) Definition of “agent”

12       This paragraph notes that the definition of “agent” for purposes of these new rules  
13 is identical to that found at 11 CFR 109.1(b)(5), part of the rules defining independent  
14 expenditures. The term “agent” in this context means any person who has actual oral or  
15 written authority, either express or implied, to make or to authorize the making of  
16 expenditures on behalf of a candidate; or any person who has been placed in a position  
17 within the campaign organization where it would reasonably appear that in the ordinary  
18 course of campaign-related activities he or she may authorize expenditures. The  
19 Commission is including this cross reference in 11 CFR 100.23 to clarify that the term has  
20 the same meaning in the context of coordinated general public political communications.

21 Section 109.1 Independent Expenditures

22       In its 1997 NPRM, the Commission sought comment on several proposed revisions  
23 to this section, which defines the term “independent expenditure.” The commenters and

1 witnesses who addressed this issue at the Commission's 1997 public hearing had  
2 wide-ranging views this issue. However, those events took place prior to the Christian  
3 Coalition decision, which the Commission has determined should serve as the basis for this  
4 definition.

5 The Commission is amending the definition of "independent expenditure" in  
6 paragraph (a) to track more closely the statutory definition of independent expenditure.  
7 See 2 U.S.C. 431(17). In addition, in section 109.1(a), the Commission has included a  
8 cross-reference to 11 CFR 100.23, to indicate that the meaning of the phrase "made with  
9 the cooperation of, or in consultation with, or in concert with, or at the request or  
10 suggestion of, a candidate or any agent of authorized committee of such candidate," is now  
11 clarified by section 100.23, instead of by former paragraph (b)(4) of section 109.1. The  
12 Commission is deleting paragraph (b)(4) because the standards for coordination set forth in  
13 that in that section were overbroad. See Christian Coalition, 52 F.Supp. at 90.

14 Former section 109.1(b)(4) explained what was meant by the phrase, "made with  
15 the cooperation or with the prior consent of, or in consultation with, or at the request or  
16 suggestion of, a candidate, or any agent, or authorized committee of the candidate." It  
17 indicated that this covered "any arrangement, coordination, or direction by the candidate or  
18 his or her agent prior to the publication, distribution, display, or broadcast of the  
19 communication." This phrase has been clarified, consistent with the Christian Coalition  
20 decision, and moved to new 11 CFR 100.23(e)(2).

21 Former paragraph (b)(4) also addressed contacts between the campaign and the  
22 person making the expenditure. For example, it included, at former paragraph (b)(4)(i)(A),  
23 a presumption that coordination applied to expenditures "based on information about the

1 candidate's plans, projects, or needs provided to the expending person by the candidate, or  
2 by the candidate's agents, with a view toward having an expenditure made." The Christian  
3 Coalition court, likening this regulation to an "insider trading" standard, held it to be  
4 overbroad. 52 F.Supp. 2d at 89-91. The Commission is accordingly revising this  
5 paragraph to explain that a communication is "made with the cooperation of, or in  
6 consultation with, or at the request or suggestion of, a candidate or any agent or authorized  
7 committee of such candidate" if it is a coordinated general public political communication  
8 under 11 CFR 100.23.

9 Section 110.14 Contributions to and expenditures by delegates and delegate committees.

10 This section of the Commission's rules sets forth the prohibitions, limitations and  
11 reporting requirements under the Act applicable to all levels of a delegate selection  
12 process. Paragraphs (f)(2)(i), (f)(2)(ii), (f)(3)(iii), (i)(2)(i), (i)(2)(ii), and (i)(3)(iii) address  
13 independent expenditures and in-kind contributions. The Commission is making  
14 conforming amendments to these paragraphs to reflect new 11 CFR 100.23 and revised 11  
15 CFR 109.1.

16 Advisory Opinions Superseded

17 The Commission has in the past issued Advisory Opinions ("AO") that employed a  
18 broader definition of "coordination" than is contained in these new rules. Many of these  
19 AOs addressed the "insider trading" situation in which a campaign employee later became  
20 involved, or sought to become involved, with an entity that wished to make independent  
21 expenditures. This prohibition was found to be overly broad by the Christian Coalition  
22 court. See discussion of revised 11 CFR 109.1(b)(4), supra, which has been rewritten to  
23 reflect that aspect of the decision. The following AOs are superseded, to the extent they



1 conflict with these new rules: AOs 1999-17, 1998-22, 1996-1, 1993-18, 1982-20, 1980-  
2 116, 1979-80.

3 **Certification of No Effect Pursuant to 5 U.S.C. 605(b)**  
4 **[Regulatory Flexibility Act]**

5  
6 The Commission certifies that these rules will not have a significant economic  
7 impact on a substantial number of small entities. The basis for this certification is that the  
8 rules follow court decisions that expand the definition of certain coordinated  
9 communications made in support of or in opposition to clearly identified federal  
10 candidates. The rules also permit, but do not require, small entities to make independent  
11 expenditures. Therefore, there will be no significant economic impact on a substantial  
12 number of small entities.

13 **List of Subjects**

14 11 CFR Part 100

15 Elections.

16 11 CFR Part 109

17 Elections, reporting and recordkeeping requirements.

18 11 CFR 110

19 Campaign funds, political committees and parties.

1 For the reasons set out in the preamble, Subchapter A, Chapter I of title 11 of the  
2 Code of Federal Regulations is amended to read as follows:

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

4 1. The authority citation for Part 100 continues to read as follows:

5 Authority: 2 U.S.C. 431, 434(a)(11), and 438(a)(8).

6 2. Section 100.16 is revised to read as follows:

7 **§ 100.16 Independent expenditure (2 U.S.C. 431(17))**

8 The term independent expenditure means an expenditure by a person for a  
9 communication expressly advocating the election or defeat of a clearly identified candidate  
10 that is not made with the cooperation of or in consultation with, or in concert with, or at the  
11 request or suggestion of, a candidate or any agent or authorized committee of such  
12 candidate. A communication is “made with the cooperation of, or in consultation with, or  
13 in concert with, or at the request or suggestion of, a candidate or any agent or authorized  
14 committee of such candidate” if it is a coordinated general public political communication  
15 under 11 CFR 100.23. See 11 CFR 109.1.

16 3. Section 100.23 is added to read as follows:

17 **§ 100.23 Coordinated General Public Political Communications.**

18 (a) Scope.

19 (1) This section applies to expenditures for general public political  
20 communications paid for by persons other than candidates, authorized  
21 committees, and party committees.

22 (2) Coordinated party expenditures made on behalf of a candidate pursuant to  
23 2 U.S.C. 441a(d) are governed by 11 CFR 110.7.

24 (b) Treatment of expenditures for general public political communications as  
25 expenditures and contributions. Any expenditure for general public political  
26 communication that includes a clearly identified candidate and is coordinated with that  
27 candidate, an opposing candidate or a party committee supporting or opposing that

1 candidate is both an expenditure under 11 CFR 100.8(a) and an in-kind contribution under  
2 11 CFR 100.7(a)(1)(iii).

3 (c) Coordination with candidates and party committees. An expenditure for a general  
4 public political communication is considered to be coordinated with a candidate or party  
5 committee if the communication –

6 (1) Is paid for by any person other than the candidate, the candidate's  
7 authorized committee, or a party committee, and

8 (2) Is created, produced or distributed

9 (i) At the request or suggestion of, or is authorized by, the candidate,  
10 the candidate's authorized committee, a party committee, or the  
11 agent of any of the foregoing;

12 (ii) After the candidate or the candidate's agent, or a party committee or  
13 its agent, has exercised control or decision-making authority over the  
14 content, timing, location, mode, intended audience, volume of  
15 distribution, or frequency of placement of that communication; or

16 (iii) After substantial discussion or negotiation between the creator,  
17 producer or distributor of the communication, or the person paying  
18 for the communication, and the candidate, the candidate's authorized  
19 committee or a party committee, regarding the content, timing,  
20 location, mode, intended audience, volume of distribution or  
21 frequency of placement of that communication, the result of which is  
22 collaboration or agreement. Substantial discussion or negotiation  
23 may be evidenced by one or more meetings, conversations or  
24 conferences regarding the value or importance of that specific  
25 communication for a particular election.

(d) Exception. A candidate's or political party's response to an inquiry regarding the candidate's or party's position on legislative or public policy issues does not alone make the communication coordinated.

(e) Definitions. For purposes of this section:

(1) General public political communications include those made through a broadcasting station (including a cable television operator), newspaper, magazine, outdoor advertising facility, mailing or any electronic medium, including the Internet or on a web site, with an intended audience of over one hundred people.

(2) Clearly identified has the same meaning as set forth in 11 CFR 100.17.

(3) Agent has the same meaning as set forth in 11 CFR 109.1(b)(5).

**Part 109 – INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(e))**

4. The authority citation for part 109 continues to read as follows:

Authority: 2 U.S.C. 431(17), 434(e), 438(a)(8), 441d.

5. Section 109.1 is amended by revising paragraphs (a), (b)(4) and (d)(1) to read as follows:

**§ 109.1 Definitions (2 U.S.C. 431(17)).**

(a) Independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made with the cooperation of, or in consultation with, or in concert with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate.

(b) \* \* \*

(4) A communication is "made with the cooperation of, or in consultation with, or in concert with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate" if it is a coordinated general public political communication under 11 CFR 100.23.

\* \* \* \* \*

(d) (1) The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities by the person making the expenditure but shall not be considered an expenditure by the candidate or his authorized committees unless the dissemination, distribution, or republication of campaign materials is a coordinated general public political communication under 11 CFR 100.23

\* \* \* \* \*

**Part 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

6. The authority citation for part 110 continues to read as follows:

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

7. Section 110.14 is amended by revising the introductory text to paragraphs (f)(2)(i) and (f)(2)(ii); paragraph (f)(3)(iii); the introductory text to paragraphs (i)(2)(i) and (i)(2)(ii); and paragraph (i)(3)(iii) to read as follows:

**§ 110.14 Contributions to and expenditures by delegates and delegate committees.**

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(i) Such expenditures are independent expenditures under 11 CFR part 109 if they are made for a communication expressly advocating the election or defeat of a clearly identified Federal candidate that is not a coordinated general public political communication under 11 CFR 100.23.

1 \* \* \* \* \*

2 (ii) Such expenditures are independent expenditures under 11 CFR part  
3 109 if they are made for a communication expressly advocating the  
4 election or defeat of a clearly identified Federal candidate that is not  
5 a coordinated general public political communication under 11 CFR  
6 100.23.

7 \* \* \* \* \*

8 (3) \* \* \*

9 (ii) Such expenditures are not chargeable to the presidential candidate's  
10 expenditure limitation under 11 CFR 110.8 unless they were  
11 coordinated general public political communications under 11 CFR  
12 100.23.

13 \* \* \* \* \*

14 (i) \* \* \*  
15 \* \* \*  
16 (2) \* \* \*

17 (i) Such expenditures are in-kind contributions to a Federal candidate if  
18 they are coordinated general public political communications under  
19 11 CFR 100.23.

20 \* \* \* \* \*

21 (ii) Such expenditures are independent expenditures under 11 CFR part  
22 109 if they are made for a communication expressly advocating the  
23 election or defeat of a clearly identified Federal candidate that is not  
24 a coordinated general public political communication under 11 CFR  
25 100.23.

26 \* \* \* \* \*

27 (3) \* \* \*

1 (iii) Such expenditures are not chargeable to the presidential candidate's  
2 expenditure limitation under 11 CFR 110.8 unless they were  
3 coordinated general public political communications under 11 CFR  
4 100.23.

5 \* \* \* \* \*

10  
11 \_\_\_\_\_  
12 Darryl R. Wold  
13 Chairman  
14 Federal Election Commission

15 **Dated:** \_\_\_\_\_  
16 **Billing Code 6715-01-P**

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