



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2002 SEP 26 A 9 05

AGENDA ITEM

For Meeting of: 9-26-02

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Vice Chairman Karl J. Sandstrom *KS*

DATE: 09/25/2002

SUBJECT: Amendments to Agenda Document 02-68 – Electioneering
Communication Final Rules

Attached please find proposed amendments to Agenda Document 02-68, which I would like to include as an agenda document for the September 26, 2002 open session.

Page 22, line 6: delete "Thus, if any" and replace with "In some States,"

Page 22, lines 9 - 14: Delete after the phrase "Vice President" through the end of line 14, insert a period and then add the following:

In such cases, the Commission would likely consider the caucus or convention that selects or apportions delegates to a national nominating convention to be the triggering event for purposes of the 30-day period in 11 CFR 100.29(a)(2). In light of the variations in party procedures among the States, and in order to avoid confusion over which event in a political party's nominating process in a particular State will trigger the 30-day electioneering communication period for candidates for President or Vice President who seek that political party's nomination, the Commission will publish on its website a list of the one event for each political party in each State that triggers the 30-day period for candidates for President or Vice President who seek that political party's nomination.

Page 23, line 19: Delete "In contrast, one" and replace with "One"

Page 23, line 23: Delete the phrase "Because BCRA refers to primary or preference" and replace with the following:

The Commission agrees, and has added language to proposed section 100.29(a)(2) to clarify that a primary, preference election, convention or caucus held by a political party (including those which result from a special election or a run-off election) triggers a 30-day period that is only applicable to candidates who seek the nomination of that political party. Thus, for example, the date on which the Libertarian Party's candidate for Senate is nominated would have no bearing on communications that refer to a clearly identified candidate who seeks the Democratic Party's nomination for the same Senate seat, unless a candidate were to seek the nomination of both parties.

Page 24, lines 1-3: Delete in their entirety.

Page 24, lines 16-21: Delete, starting with the word "Because" on line 16 and ending with and including "primary election." on line 21.

Page 24, lines 22-23: Delete the phrase "this situation is unlikely to occur" and replace with "the Commission decided it was not necessary to address the issue at this time."

Page 25, line 21: Delete "also" and replace with "likely"

Page 25, line 22: Delete "." and replace with "; the Commission will provide guidance on its website on a State-by-State, party-by-party basis.

Page 82, line 15: Add the following between "candidate" and ";": ", and the candidate referenced is seeking the nomination of that political party".

100.29 Electioneering Communication

(c) Electioneering Communication does not include any communication that:

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by any religious, educational, or charitable organization operating under section 501(c)(3) of the Internal Revenue Code of 1986.

100.29 Electioneering Communication

(c) Electioneering communication does not include any communication that:

(6) Is not described in 2 U.S.C. 431(20)(A)(iii) and promotes a book, movie, play, magazine, television program, or radio program, provided that the communication is within the ordinary course of business of the person that pays for such communication.

100.29 Electioneering Communication

(c) Electioneering communication does not include any communication that:

(7) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office.

100.29 Electioneering Communication

(c) Electioneering communication does not include any communication that:

(8) Is not described in 2 U.S.C. 431(20)(A)(iii) and promotes or opposes a qualified ballot measure, initiative or referendum, and the communication complies with any applicable State disclosure law.

100.29 Electioneering Communication

(c) Electioneering communication does not include any communication that:

(9) Is not described in 2 U.S.C. 431(20)(A)(iii) and advertises a product or service in the ordinary course of business of the person who pays for the communication.

On page 57, line 22: Delete “also”. Delete text “two possible scenarios: 1)”.

On page 58, lines 3-14: Delete text beginning with at “; and 2) whether” through line 14, “communications, and”.

On page 58, line 3, after “from doing so” insert a period then add the following:

Several commenters offered interpretations of section 441b(c)(3)(A), which treats an electioneering communication as made by a prohibited entity if the prohibited entity “directly or indirectly disburses any amount” for the cost of the communication. One commenter interpreted this to mean that a permitted entity may not receive any funds or financial support from a prohibited entity if the permitted entity intends to make electioneering communications. Another commenter stated that Congress expressly determined that corporate and union funds may not be used by any person to make electioneering communications, but that Congress stopped short of prohibiting “affiliated” organizations from using funds from individuals to make electioneering communications. That commenter also stated that it would be inappropriate for the Commission to consider unilaterally imposing restrictions that are not required by statutory language, particularly when Congress expressly included provisions addressing closely related entities elsewhere. See, e.g., 2 U.S.C. 323(d).

Other commenters, including the sponsors, did not specifically refer to the affiliation question, but stated that corporations and unions must be prohibited from setting up, operating, or controlling unincorporated accounts that are not federal political committees. However, the sponsors and other commenters agreed that BCRA does not prohibit corporations or unions from using their separate segregated funds to pay for electioneering communications, even though corporate treasury funds may be used for establishment, administration, and solicitation of contributions to these separate segregated funds. See 11 CFR 114.5(b). The sponsors noted

On page 59, lines 1-2: Delete the following: “In contrast, three commenters argued in favor of allowing these types of affiliated organizations to make electioneering communications. Two of these ”, and replace with “Several”.

On page 59, line 3: Delete phrase “such affiliation.” and replace with “an organization that is prohibited from making an electioneering communication from affiliating with an organization that can.”

On page 59, line 6: Delete phrase “The third” and replace with “One”

One page 59, line 16: Between words “that” and “the”, add “section 441b(c)(3)(A) and its” and replace “supports” with “support”.

On page 59, line 17: Between words “that” and “a”, add “the general treasury funds of”, and between words “not” and “establish”, add “be used to”.

On page 60, lines 8-13:

Delete line 8 through line 13, "corporate form, the one" and replace with the following:

The Commission does not, however, see any statutory basis for creating restrictions on electioneering communications by a permitted entity whose affiliation with a prohibited entity is based on non-financial factors (e.g., overlapping officers or members). See 100.5(g). So long as such entities maintain separate finances, the permitted entity's electioneering communication would not be treated as having been made by the prohibited entity, because there would be no direct or indirect disbursement by the prohibited entity. Likewise, the Commission does not see any basis for restricting individuals, who work for entities barred from making electioneering communications, from pooling their own funds to finance electioneering communications, provided no corporate or labor organization funds are used.

The Commission also sought comment on whether a 501(c)(4) organization or a 527 organization that was previously incorporated and has changed its status to become a limited liability company or similar type of entity under State law would be permitted to pay for electioneering communications with funds that were donated by individuals to the organization during the time it was incorporated. One"

§ 114.2 Prohibitions on contributions and expenditures.

* * * * *

(b) (1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 100.7(a). Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR 100.8(a);

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1) provided that:

(A) The committee is not a political committee as defined in 11 CFR 100.5;

(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make the electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.