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Introduction

This supplement summarizes the regulatory changes the Commission has made as a result of the *Bipartisan Campaign Reform Act of 2002*. The material has been excerpted from past *Record* articles.¹ The excerpts are arranged chronologically.

The Commission encourages readers to insert this Supplement into their *Campaign Guides* and to consult it, along with the *Guides*, until the revised *Guides* are available to the public. ♦

¹ *The final rules on nonfederal funds or “soft money” were summarized in the September 2002 Record, page 1; final rules on electioneering communications were summarized in the November 2002 Record, page 3; final rules on contribution limits and prohibitions were summarized in the December 2002 Record, page 8; final rules on “other provisions,” coordinated and independent expenditures and BCRA reporting requirements were summarized in the January 2003 Record; and interim final rules on the millionaires’ amendment were summarized in the February 2003 Record, page 2. Complete information on BCRA rulemakings is available on the FEC web site at www.fec.gov—click on the BCRA icon.*

Nonfederal Funds or “Soft Money”

On June 22, 2002, the Commission promulgated new and revised rules based on provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that restrict and, in some cases, ban the receipt, solicitation and use of nonfederal funds (sometimes called “soft money”). These rules:

- Prohibit national parties from raising or spending nonfederal funds;
- Require state, district and local party committees to fund certain “federal election activities” with federal funds and, in some cases, with money raised according to new limitations, prohibitions and reporting requirements (i.e., “Levin funds”¹), or with a combination of such funds; and
- Address fundraising by federal and nonfederal candidates and officeholders on behalf of party committees, other candidates and nonprofit organizations.

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¹ See p. 4 for a full description of “Levin funds.”

Soft Money

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The final rules and their Explanation and Justification were published in the July 29 *Federal Register* (67 FR 49064) and are available on the FEC web site at http://www.fec.gov/pdf/nprm/soft_money_nprm/fr67n145p49063.pdf.

Part I: General Information and Terminology

Organization. In order to implement the BCRA, the Commission has revised its existing regulations and added new 11 CFR part 300, which contains most of the rules governing party committees' use of nonfederal funds and the so-called "Levin funds." New part 300 contains five subparts, which address the use of nonfederal funds by each of the following entities:

- National party committees;
- State, district and local party committees;

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- Federal candidates and officeholders;
- State and local candidates; and
- Tax-exempt organizations.

The rules applicable to each of these entities are addressed in detail below, in Part II: Application.

Federal election activity. Many provisions of the BCRA are framed in terms of "federal election activities." As used in 11 CFR part 300, "federal election activity" means any of the following activities:

1. Voter registration activity during the 120 days before a regularly-scheduled federal election and ending on the day of that election;
2. Voter identification, generic campaign activities² and get-out-the-vote activities that are conducted in connection with an election in which one or more candidates for federal office appear on the ballot (regardless of whether state or local candidates also appear on the ballot);
3. A public communication³ that refers to a clearly-identified federal candidate and that promotes, supports, attacks or opposes any federal candidate (This definition applies regardless of whether a nonfederal candidate is also mentioned or identified in the communication and regardless of whether the communication expressly

² "Generic campaign activity" means a public communication that promotes or opposes a political party and does not promote or oppose a clearly-identified federal or nonfederal candidate. 11 CFR 100.25.

³ A "public communication" means any communication by means of television (including cable and satellite), radio, newspaper, magazine, billboard, mass mailing, telephone bank or any other form of general public political advertising. Communications over the Internet are not included in the definition of public communication. 11 CFR 100.26.

4. Services provided by an employee of a state, district or local party committee who spends more than 25 percent of his or her compensated time during that month on activities in connection with a federal election. 11 CFR 100.24(b).

The Commission has also adopted regulations at 11 CFR 100.24(a) that define certain terms used in the above definition of "federal election activity":

1. "In connection with an election in which a candidate for federal office appears on the ballot" means:
 - In an even-numbered year, the period beginning on the day of the earliest filing deadline for primary election ballot access under state law—or on January 1 in states that do not hold primaries—and ending on the day of the general election or the general election runoff if a runoff is held; or
 - In an odd-numbered year, the period beginning on the day that the date is set for a special election in which a federal candidate appears on the ballot, and ending on the day of that election.
2. "Voter registration activity" means contacting individuals by telephone, in person or by other individualized means to assist them in registering to vote. This activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms and assisting individuals with completing and filing these forms.
3. "Get-out-the-vote activity" means contacting registered voters by telephone, in person or by other individualized means in order to assist them in voting (unless the activity is undertaken

by state or local candidates and/or officeholders, or an organization of such candidates or officeholders, and refers only to one or more state or local candidates). This activity includes, but is not limited to:

- Providing individual voters, within 72 hours of an election, with information about when and where polling places are open; and
- Transporting, or offering to transport, voters to polling places.

4. “Voter Identification” means creating or enhancing voter lists by adding information about voters’ likelihood of voting in a particular election or voting for a particular candidate (unless the activity is undertaken by state or local candidates and/or officeholders, or an organization of such candidates or officeholders, and refers only to one or more state or local candidates).

The regulations also identify activities that are *not* included in the definition of “federal election activity.” These are:

1. A public communication that refers solely to one or more clearly-identified candidate(s) for state or local office and does not promote, support, attack or oppose a clearly-identified candidate for federal office. A public communication would, however, be considered a federal election activity if it constituted voter registration, generic campaign activity, get-out-the-vote activity or voter identification;
2. A contribution to a candidate for state or local office, unless the contribution is designated for voter registration, voter identification activity, generic campaign activity, get-out-the vote activity, employee services for these activities or a public communication;

3. The costs of state, district or local political conventions, meetings or conferences; and
4. The costs of grassroots campaign materials that name or depict only a candidate for state or local office. 11 CFR 100.24(c).

Agent. In most cases, regulations that apply to a party committee, a federal candidate or officeholder or a state or local candidate also apply to any “agent” acting on behalf of that individual or organization. For the purposes of 11 CFR part 300, the term “agent” is defined as any person who has “actual authority, either express or implied” to engage in specifically-listed activities on behalf of another person or organization. 11 CFR 300.2(b).

Directly or indirectly established, maintained, financed or controlled. Most of the new regulations that apply to a party committee or a federal candidate or officeholder also apply to any entity “directly or indirectly established, maintained, financed or controlled” by the committee, candidate or officeholder. The new regulation at 11 CFR 300.2(c), which is based on the existing “affiliation” regulation at 11 CFR 100.5(g)(4), includes a series of factors that must be considered, in the context of an overall relationship, to determine whether the presence of one or more of these factors indicates that the individual or committee established, finances, maintains or controls the organization. An entity will not be considered to be directly or indirectly established, financed, maintained or controlled based solely upon activities undertaken before November 6, 2002.

Part II: Application

National Party Committees, Including National Congressional Campaign Committees

General prohibitions. Beginning on November 6, 2002, national

party committees may not solicit,⁴ receive, direct to another person or spend nonfederal funds, that is, funds that are not subject to the limits, prohibitions and reporting requirements of the Act.⁵ Moreover, such committees must use only federal funds to raise funds that are used, in whole or in part, for expenditures and disbursements for federal election activity. 11 CFR 300.10.

Tax-exempt organizations. National party committees may not solicit funds for, or make or direct donations to, tax-exempt 501(c) organizations, or an organization that has applied for this tax status, if the organization makes expenditures or disbursements in connection with federal elections, including federal election activity.⁶ 11 CFR 300.11(a). The committee may establish whether or not the organization makes expenditures or disbursements in connection with federal elections by obtaining a signed certification from an authorized representative of the organization. The certification should state

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⁴ For the purposes of 11 CFR part 300, to “solicit” means to “ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided directly, or through a conduit or intermediary.” Merely providing information or guidance as to the requirement of a particular law does not constitute a solicitation. 11 CFR 300.2(m).

⁵ Commission regulations at 11 CFR 300.13(c) address interim reporting requirements between November 6 and December 31, 2002.

⁶ In no case is a committee prohibited from responding to a request for information about a tax-exempt group that shares the party’s political or philosophical goals. 11 CFR 300.11(f).

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that within the current election cycle the organization has not made, and does not intend to make, such expenditures and disbursements, including payments for debts incurred in an earlier cycle. 11 CFR 300.11(c).

National party committees may solicit funds for, or make or direct donations to, so-called “527 organizations” only if these organizations are:

- Political committees under Commission regulations; or
- State, district or local party committees or authorized campaign committees of state or local candidates. 11 CFR 300.11(a)(3).

Office Building Funds. After November 5, 2002, national party committees may no longer accept funds into party office building accounts and may not use such funds for the purchase or construction of any office facility. Any funds remaining in an office building account on November 6 must be disgorged to the U.S. Treasury or returned to donors no later than December 31, 2002. Any refund check not cashed by February 28, 2003, must be disgorged to the Treasury by March 31. 11 CFR 300.12.

Transition rules. If a national party committee has nonfederal funds in its possession on November 6, 2002, it may use these funds to retire outstanding debts or other obligations relating to the 2002 elections, including runoff elections and recounts, until January 1, 2003. Any remaining nonfederal funds must be disgorged to the Treasury or returned to donors no later than December 31, 2002. Any refund checks not cashed by February 28, 2003, must be disgorged to the Treasury by March 31. The nonfederal accounts of national party committees must file termination reports with the Commission

disclosing the disposition of all funds deposited in nonfederal accounts and building fund accounts. 11 CFR 300.12 and 300.13.

State, District and Local Party Committees and Organizations

Under the new regulations, state, district and local party committees that have receipts or make disbursements for federal election activity may maintain, as appropriate, up to four different types of accounts:

- Federal accounts, for deposit of funds that comply with the limitations, prohibitions and reporting requirements of the Act;
- Nonfederal accounts, for deposit of funds that are governed by state law;
- Allocation accounts, which may be established to make allocable expenditures and disbursements; and
- Levin accounts, for deposit of a new category of funds, called “Levin funds,” that comply with some of the limits and prohibitions of the Act and are also governed by state law.⁷

Levin funds. A state, district or local party committee may spend only those Levin funds that it raises for itself, and these funds can be used only for certain types of voter registration, voter identification, get-out-the-vote and generic campaign activity. Note that certain types of federal election activities may *not* be financed with Levin funds:

- Public communications that refer to a clearly-identified candidate; and
- The services of employees who devote more than 25 percent of their compensated time to activities in connection with a federal election.

National party committees may not raise or spend Levin funds.

When a party committee receives a donation of Levin funds, this donation:

- Must be permissible under the laws of the state in which the party committee raising and spending the funds is organized;
- May be solicited from some sources that cannot contribute under the Act (e.g., corporations, unions and federal government contractors) so long as the donation is not from foreign nationals or from sources that are impermissible under state law;
- Is limited to \$10,000 in a calendar year from any person, including any entity established, maintained, financed or controlled by that person (if state law limits donations to an amount less than \$10,000, then the lower limit applies); and
- Must be raised using only federal funds or Levin funds to pay the direct costs of the fundraising (including expenses for the solicitation of funds and for the planning and administration of actual fundraising activities and programs) if any portion of the funds will be used for federal election activity. 11 CFR 300.31 and 300.32(a)(4).

Each state, district and local party committee has a separate Levin fund donation limit, and such committees are not considered to be affiliated for the purposes of determining Levin fund donation limits. Levin funds expended or disbursed by a given state, district or local party committee must be raised solely by that particular committee, and these

⁷ An organization may also deposit Levin funds in a nonfederal account that must function as a nonfederal and Levin account. In order to make a disbursement of Levin funds from such an account, the organization must be able to show through a reasonable accounting method approved by the Commission that the organization had received into this account sufficient federal contributions or Levin donations to make the disbursement. 11 CFR 300.30(c)(3)(ii).

committees cannot raise Levin funds through joint fundraising efforts or accept transfers of Levin funds from other committees. Additionally, these committees cannot accept or use as Levin funds any funds that come from, or in the name of, a national party committee, federal candidate or federal officeholder. 11 CFR 300.31 and 300.34(b).

Levin fund expenditures and disbursements. As a general rule, state, district and local party committees must use federal funds to make expenditures and disbursements for federal election activity.⁸ 11 CFR 300.32(a)(2). However, as long as certain conditions are met, a state, district, or local party committee may use Levin funds to pay for all or part of the following types of federal election activity:⁹

- Voter registration activity during the period that begins 120 days before the date of a regularly-scheduled federal election and ends on the day of that election; and
- Voter identification, get-out-the vote activities or generic campaign activity conducted in connection with an election in which a federal candidate appears on the ballot (regardless of whether a state or local candidate also appears on the ballot). 11 CFR 300.32(b).

Levin funds may *not* be used, however, to pay for any part of a federal election activity if:

- The activity refers to a clearly-identified federal candidate; or

⁸ Additionally, an association or similar group of state or local candidates or officeholders must use only federal funds to make expenditures or disbursements for federal election activity. 11 CFR 300.32(a)(1).

⁹ Levin funds may also be used for any purpose that is not federal election activity as long as this use is lawful in the state in which the committee is organized. 11 CFR 300.32(b)(2).

- Any portion of the funds will be used to pay for a television or radio communication, other than a communication that refers solely to a clearly-identified state or local candidate. 11 CFR 300.32(c).

Levin funds may be used to pay for the entirety of permissible federal election activity disbursements only if the party committee's disbursements do not exceed \$5,000 in the aggregate in a calendar year. Disbursements and expenditures that aggregate in excess of \$5,000 per year must be paid entirely with federal funds or allocated between federal funds and Levin funds, according to the minimum allocation percentages described below. 11 CFR 300.33(a).

Allocating expenses. State, district and local party committees that allocate federal election activity expenses between federal and Levin funds must allocate to their federal account one of following minimum percentages, depending on the composition of the ballot for that year:

1. If a Presidential candidate, but no Senate candidate, appears on the ballot, then at least 28 percent of the expenses must be allocated to the federal account.
2. If both a Presidential candidate and a Senate candidate appear on the ballot, then at least 36 percent of the expenses must be allocated to the federal account.
3. If a Senate candidate, but no Presidential candidate, appears on the ballot, then at least 21 percent of the expenses must be allocated to the federal account.
4. If neither a Presidential nor a Senate candidate appear on the ballot, at least 15 percent of the expenses must be allocated to the federal account.

An organization must make payments for allocable expenses either from a federal account or from an allocation account. If payments are made from a federal

account, Levin funds may be transferred to this account, during the 70-day window for such transfers, in order to cover the Levin-fund portion of the expense. 11 CFR 300.33(d).

Expenses that may not be allocated. Certain costs of federal election activity are not allocable:

- Expenditures for public communications that refer to a clearly-identified federal candidate and that promote, support, attack or oppose any federal candidate must be paid entirely with federal funds.
- Salaries and wages for employees who spend more than 25 percent of their compensated time per month on federal election activities, or on activities in connection with federal elections, must be paid entirely with federal funds. Salaries and wages for employees who spend 25 percent or less of their compensated time in this manner must be paid with funds that comply with state law.
- The direct costs of raising funds to be used for federal election activities must be paid with federal funds or, if Levin funds are being raised, with Levin funds. Fundraising costs may not be allocated and no nonfederal funds may be used. 11 CFR 300.33(c).

Office buildings. Under the amended Act and regulations, a state, district or local party committee may spend federal funds or nonfederal funds (including Levin funds) to purchase or construct a party office facility, so long as the funds are not contributed or donated by a foreign national. If a committee chooses to use nonfederal funds or Levin funds, the funds are subject to state law, and the Act will not preempt state law except to prohibit donations by foreign nationals. Moreover, if nonfederal or Levin funds are used, the office facility must not be purchased or constructed for the purpose of influenc-

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ing the election of any federal candidate in any particular election. If federal funds are used to purchase or construct the facility, the Act will preempt the limits and prohibitions of state law. 11 CFR 300.35(a) and (b).

Additionally, a state, district or local party committee may generate income by leasing out a portion of its office building at the usual and normal charge. If the building is purchased in whole or in part with nonfederal funds, then all rental income must be deposited in the committee's nonfederal account and used only for nonfederal purposes. The rental income and its use must also comply with state law. If the building is purchased entirely with federal funds, then the rental income may be deposited in the committee's federal account. Any such income must be disclosed in the committee's reports to the Commission. 11 CFR 300.35(c).

Reporting and recordkeeping for organizations that are not political committees. A state, district or local party committee (or an association of state or local candidates or officeholders) that is not a political committee under the Act is not required to file reports, but must be able to demonstrate through a reasonable accounting method that it has enough funds on hand that comply with the limits and prohibitions of the Act to cover any payment of federal funds (or Levin funds) that it makes for federal election activity. The organization must keep records to this effect and make these records available to the Commission upon request. Payments by such organizations for federal election activity are not "expenditures" for the purpose of determining whether an organization qualifies as a political committee with registration and reporting requirements, unless the payment otherwise qualifies as an expendi-

ture under 2 U.S.C. §431(9).¹⁰ 11 CFR 300.36(a).

*Reporting and recordkeeping for political committees.*¹¹ A state, district or local party committee (or an association of state or local candidates or officeholders) that is a political committee under the Act must file on a monthly schedule and report all receipts and disbursements of federal funds for federal election activity, including the federal portion of allocated expenses. 11 CFR 300.36(b)(1) and (b)(2). See also 11 CFR 100.5.

A state, district or local party committee that is a political committee but that has less than \$5,000 of aggregate receipts and disbursements for federal election activity per calendar year—and any association of state or local candidates or officeholders that is a political committee—must report all receipts and disbursements of federal funds. (The party committee need not report receipts and disbursements of Levin funds.) Such a committee or association of candidates and officeholders should not report federal funds or Levin funds disbursed for federal election activity as "expenditures" on their reports, unless the disbursement otherwise

¹⁰ Certain organizations that make "expenditures," as defined at 11 CFR 100.8(a), in excess of \$1,000 in a calendar year become political committees under the Act and must register and report with the Commission. 11 CFR 100.5. In a separate rulemaking, the Commission has reorganized 11 CFR 100.7 and 100.8. See "Reorganization of Regulations on "Contribution" and "Expenditure" (67 FR 50582, August 5, 2002).

¹¹ These requirements added by the BCRA are in addition to the Act's existing requirements to report expenditures of federal funds. 2 U.S.C. §434 and 11 CFR part 104.

qualifies as an expenditure.¹² 11 CFR 300.36(b)(1) and 300.36(c)(1). See also 2 U.S.C. §421(9) and 11 CFR 100.8.

A state, district or local party committee that has \$5,000 or more of aggregate receipts and disbursements for federal election activity per calendar year must disclose its activity in greater detail, including receipts and disbursements of federal funds and of Levin funds used for federal election activity. 11 CFR 300.36(b)(2) and 300.36(c)(1). Such a committee must also report the allocation percentages used.

Contributions and expenditures of federal funds for federal election activity apply toward the \$50,000 threshold for determining whether a committee must file its reports electronically under the Commission's mandatory electronic filing program. Receipts and disbursements for federal election activity that do not qualify as contributions and expenditures (including Levin fund receipts and disbursements) do not, however, count toward this threshold. 11 CFR 104.18 and 300.36(c)(2). See also 11 CFR 100.7 and 100.8.

Tax exempt organizations. Like national party committees, state, district and local party committees may not solicit funds for, or make or direct donations to, tax-exempt 501(c) organizations, or to organizations that have applied for tax-exempt status, if the organization makes expenditures or disbursements in connection with federal elections, including federal election activity.¹³ Committees may solicit

¹² Associations, or other similar organizations, of state or local candidates may spend federally-permissible funds for federal election activity, but they cannot raise or spend Levin funds.

¹³ In no case is a committee prohibited from responding to a request for information about a tax-exempt group that shares the party's political or philosophical goals. 11 CFR 300.37(f).

funds for, or make or direct donations to, so-called “527 organizations” only if these organizations are:

- Political committees under Commission regulations;
- State, district or local party committees;
- Authorized campaign committees of state or local candidates; or
- A political committee under state law that supports only state or local candidates and that does not make expenditures or disbursements in connection with federal elections, including expenditures or disbursements for federal election activity.

In order to establish whether or not an organization makes expenditures or disbursements in connection with federal elections, party committees may obtain a signed certification from an authorized representative of the organization. The certification should state that within the current election cycle the organization has not made, and does not intend to make, such expenditures and disbursements, including payments for debts incurred from making such expenditures and disbursements in an earlier cycle. 11 CFR 300.37.

Contribution limit. In addition, the new rules raise the individual contribution limit to a state party committee to \$10,000 per year.

Fundraising by Federal Candidates and Officeholders

The new regulations restrict and, in some cases, prohibit the solicitation and use of nonfederal funds by federal candidates and federal officeholders,¹⁴ including agents acting on their behalf and entities

that are directly or indirectly established, maintained, financed or controlled by one or more federal candidate or officeholder. 11 CFR 300.60 and 300.61.

Federal elections. Under the Act and regulations, federal candidates and officeholders can only solicit, receive, direct, transfer, spend or disburse federal funds in connection with a federal election or for federal election activity. 11 CFR 300.61.

Nonfederal elections. Federal candidates and officeholders can only solicit, receive, direct, transfer, spend or disburse funds in connection with a nonfederal election in amounts and from sources that are both consistent with state law and not in excess of the Act’s limits and prohibitions. However, if a federal candidate or officeholder is also a candidate for state or local office, then he or she may raise and spend nonfederal funds that only comply with state law, so long as the solicitation, receipt and spending of funds refers only to the state or local candidate and/or another state or local candidate for that same office. Individuals simultaneously running for federal and nonfederal office may only raise and spend federal funds for the federal election. 11 CFR 300.62 and 300.63.

Attending, speaking or appearing as a featured guest at a fundraising event. A federal candidate or officeholder may attend, speak or be a featured guest at a fundraising event for a state, district or local committee of a political party, including a fundraising event at which nonfederal funds or Levin funds are raised. The committees may advertise, announce or otherwise publicize that a federal candidate or officeholder will attend, speak or be a featured guest at the fundraising event. Candidates and federal officeholders may speak at such an event without restriction or regulation. 11 CFR 300.64.

Tax-exempt organizations. A federal candidate or officeholder

may make a general solicitation on behalf of a tax-exempt organization, without limits on the source or amount of funds, if the organization does not make expenditures or disbursements in connection with federal elections, including the federal election activities listed below. Moreover, a candidate or office holder may make a general solicitation on behalf of an organization that conducts activities in connection with an election if:

- The organization’s principal purpose is not to conduct election activities, including the federal election activities listed below; and
- The solicitation is not to obtain funds for election activities in connection with a federal election, including federal election activities. 11 CFR 300.65(a) and (c).

Under certain circumstances, a federal candidate or officeholder may also make a specific solicitation explicitly to obtain funds to pay for federal election activities conducted by a tax-exempt organization whose principal purpose is to undertake such activities. The federal election activities for which such a specific solicitation may be made are:

- Voter registration activity during the period that begins 120 days before the date of a regularly-scheduled federal election and ends on the day of that election; and
- Voter identification, get-out-the vote activity or generic campaign activity conducted in connection with an election in which a federal candidate appears on the ballot (regardless of whether a state or local candidate also appears on the ballot). 11 CFR 300.65(c).

Such solicitations are permissible, however, only if they are made solely to individuals and the amount solicited does not exceed

¹⁴ The new regulations at 11 CFR 300.2(o) define an “Individual holding Federal office” as an individual elected to or serving in the office of the U.S. President or Vice President, or in the U.S. Congress.

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\$20,000 during any calendar year. 11 CFR 300.65(b) and (c).

Because the BCRA permits limited solicitations by federal candidates and officeholders only for the specific federal election activities listed above, these individuals *must not* make any solicitations on behalf of a 501(c) organization, or an organization that has applied for this tax status, for other types of election activities, such as public communications promoting or supporting federal candidates.

Determining “principal purpose.” A federal candidate or officeholder may determine a tax-exempt organization’s “principal purpose” by obtaining a signed certification from an authorized representative of the organization stating that:

- The organization’s principal purpose is not to conduct election activities, including the federal election activities listed above; and
- The organization does not intend to pay debts incurred from making federal election disbursements and expenditures (including debts for federal election activity) in a prior election cycle. 11 CFR 300.65(e).

State and Local Candidates

The new regulations prohibit a state or local candidate or officeholder, or any agents acting on his or her behalf,¹⁵ from spending nonfederal funds on a public communication that refers to a clearly-identified federal candidate (regardless of whether a state or local candidate is also identified) and that promotes, supports, attacks

¹⁵ For example, this prohibition would apply to an individual who is both a federal office holder and a state candidate. The regulations at 11 CFR 300 subpart E do not apply to an association of state or local candidates or officeholders.

or opposes a federal candidate. This prohibition applies whether or not the communication expressly advocates a vote for or against a federal candidate.

Tax-Exempt Organizations

The Commission has also added a subpart to 11 CFR 300, subpart C, which addresses the BCRA’s limits and prohibitions on the use of soft money from the perspective of certain tax-exempt organizations. The regulations under this subpart contain the restrictions on fundraising and donations by national party committees and state, district and local party committees and fundraising by federal candidates and officeholders that are also addressed in the subparts devoted to each of these types of entity. 11 CFR 300.50, 300.51 and 300.52.

Advisory Opinions Superseded

These new and revised rules partially supersede the following advisory opinions relating to party office building funds: AOs 2001-12, 2001-1, 1998-8, 1998-7, 1997-14, 1993-9, 1991-5 and 1986-40. Other advisory opinions may no longer be relied upon to the extent that they conflict with the BCRA. ♦

Electioneering Communications

On October 10, 2002, the Commission approved final rules to implement provisions of the BCRA regulating television or radio communications that refer to a clearly identified federal candidate and are distributed to the relevant electorate within 60 days prior to the general election or 30 days prior to a primary.

The final rules and their Explanation and Justification were published in the October 23, 2002, *Federal Register* (67 FR 65190) and are available on the FEC web site at

www.fec.gov/pages/bcra/rulemakings/electioneering_communications.htm.

“Electioneering Communication” Defined

An electioneering communication is any broadcast, cable or satellite communication which fulfills **each** of the following conditions:

The communication refers to a clearly identified candidate. A communication refers to a clearly identified federal candidate if it contains the candidate’s name, nickname or image, or makes any unambiguous reference to the person or their status as a candidate, such as “the Democratic candidate for Senate.” 11 CFR 100.29(b)(2).

The communication is publicly distributed. Generally, a communication is publicly distributed if it is disseminated for a fee by a television station, radio station, cable television system or satellite system.

In the case of Presidential and Vice-Presidential candidates, the communication is publicly distributed if it can be received by 50,000 or more people:

- In a state where a primary election or caucus is being held within 30 days;
- Anywhere in the United States during the period between 30 days prior to the nominating convention and the conclusion of that convention; or
- Anywhere in the United States within 60 days prior to the general election. 11 CFR 100.29(b)(3)(ii).

The Commission will publish on its web site a list of the applicable event in each state that triggers the 30-day period for Presidential and Vice-Presidential candidates.

Electioneering communications are limited to paid programming. The station must seek or receive payment for distribution of the communication. Both infomercials and commercials are included within the definition. 11 CFR 100.29(b)(3)(i).

The communication is distributed during a certain time period before an election. Electioneering communications are transmitted within 60 days prior to a general election or 30 days prior to a primary election for federal office, including elections in which the candidate is unopposed. A “primary election” includes any caucus or convention of a political party which has the authority to nominate a candidate to federal office. 11 CFR 100.29(a)(2).

This condition regarding the timing of the communication applies only to elections in which the candidate referred to is running.

In the case of Congressional candidates only, the communication is targeted to the relevant electorate. The communication targets the relevant electorate if it can be received by 50,000 or more people in the district (in the case of a U.S. House candidate) or state (in the case of a Senate candidate) that the candidate seeks to represent. 11 CFR 100.29(b)(5).

The Federal Communications Commission (FCC) will provide on its web site the information necessary to determine whether a communication can be received by 50,000 people. Under interim rules promulgated by the FEC, if this information is not yet available, the person making a communication may argue that it could not have been received by 50,000 people of the relevant electorate.¹ To make this argument, they may:

- Use written documentation from the entity that transmitted the communication;
- Demonstrate that the communication is not distributed on a station located in a metropolitan area; or

¹ *The interim rules were published in the October 23, 2002, Federal Register (67 FR 65212). The full text of the final rules and the Explanation and Justification is available on the FEC web site at <http://www.fec.gov/register.htm> and from the FEC faxline at 202-501-3413 (document 358).*

- Demonstrate that the person possesses information which leads them to reasonably believe that the communication could not be received by 50,000 or more people in the relevant area.

Exemptions

The regulations at 11 CFR 100.29(c)(1) through (6) exempt certain communications from the definition of “electioneering communication:”

- A communication that is disseminated through a means other than a television station, radio station, cable television system or satellite system. For example, printed media—including newspapers, magazines, bumper stickers, yard signs and billboards—are not included, nor are communications over the Internet, e-mail or the telephone;
- A news story, commentary or editorial broadcast by a television station, radio station, cable television system or satellite system. However, the facilities may not be owned or controlled by a political party, political committee or candidate, unless the communication satisfies the exemption for news stories at 11 CFR 100.132(a) and (b);
- Expenditures or independent expenditures that must otherwise be reported to the FEC;
- A candidate debate or forum or a communication that solely promotes a debate or forum. Communications promoting the debate or forum must be made by or on behalf of the sponsor;
- Communications by state or local candidates that do not promote, support, attack or oppose federal candidates; and
- Communications by 501(c)(3) organizations. However, these organizations are still barred from participating in partisan political activity by the Internal Revenue Code. Making electioneering

communications may jeopardize their tax-exempt status.²

Application

Corporations and Labor Organizations. Corporations and labor organizations are prohibited from making or financing electioneering communications to those outside of their restricted class. 11 CFR 114.2(b)(2)(iii).³

Further, they may not provide funds to any person if they know, have reason to know or are willfully blind to the fact that the funds are for the purpose of making electioneering communications. 11 CFR 114.14(a) and (c).

Qualified Nonprofit Corporations. Qualified nonprofit corporations (QNC) may make electioneering communications. To qualify, the entity must be a nonprofit corporation incorporated under 26 U.S.C. §501(c)(4) that is ideological in nature and qualifies for exemptions under 11 CFR 114.10.

If a QNC makes electioneering communications that aggregate in excess of \$10,000 in a calendar year, it must certify that it is eligible for the QNC exemption. The certification must include the name and address of the corporation and the signature and printed name of the individual making the qualifying statement. It must also certify that the corporation meets the standards of a QNC, either by satisfying all of

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² *For further information on 501(c)(3) organizations, contact the Exempt Organizations division of the IRS at 1-877-829-5500.*

³ *Generally, the restricted class comprises the executive and administrative personnel and their families. It also includes a corporation’s stockholders and their families, or a labor or membership organization’s members and their families. See 11 CFR 114.1(c) and (e).*

Electioneering Communications

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the qualifications at 11 CFR 114.10(c)(1)-(5), or through a court ruling pursuant to 11 CFR 114.10(e)(1)(i)(B). The certification is due no later than when the first electioneering communications report is required to be filed. 11 CFR 100.29(e).

QNCs still may not make contributions to federal political committees, nor may they accept any funds from corporations or labor organizations. 11 CFR 114.10(d)(2) and (3). Also, these regulations do not supercede any section of the Internal Revenue Code regarding 501(c)(4) organizations. 11 CFR 100.29(i).

"527" Organizations. The prohibition against the use of corporate funds to make or finance electioneering communications does not apply to certain organizations incorporated under 26 U.S.C. §527.

Incorporated state party committees and state candidate committees registered as 527 organizations are exempt from the corporate prohibition provided that the committee:

- Is not a political committee as defined at 11 CFR 100.5;
- Incorporates for liability purposes only;
- Does not use any funds donated by corporations or labor organizations to fund the electioneering communication; and
- Complies with the FEC's reporting requirements for electioneering communications. 11 CFR 114.2(b)(2)(iii).

Unincorporated, unregistered "527" organizations may also make electioneering communications, subject to the disclosure requirements and the prohibition against corporate and labor funds.

Individuals and Partnerships. Individuals and partnerships may make or finance electioneering communications, provided that certain conditions are met. Those

that accept funds provided by corporations or labor organizations may not use those funds to pay for electioneering communications, nor may they give these funds to another to defray the costs of making an electioneering communication. 11 CFR 114.14(b).

They must be able to demonstrate through a reasonable accounting procedure that no prohibited funds were used to pay for the electioneering communication. 11 CFR 114.14(d).

Disclosure Requirements

The BCRA requires that electioneering communications which cost more than \$10,000 must be disclosed to the FEC within 24 hours of the disclosure date. Reporting requirements for electioneering communications are included in the reporting rulemaking summarized on page 19. ♦

Contribution Limits and Prohibitions

On October 31, 2002, the Commission approved final rules to implement provisions of the BCRA that:

- Increase the contribution limits for individuals and political committees;
- Modify recordkeeping requirements for political committee treasurers;
- Prohibit certain contributions and donations by minors; and
- Strengthen the current statutory prohibitions on contributions and donations by foreign nationals.

The final rules and their Explanation and Justification were published in the November 19, 2002, *Federal Register* (67 FR 69928) and are available on the FEC web site at www.fec.gov/pages/bcra/rulemakings/part_110_rules.htm.

Contribution Limits Increased

On January 1, 2003, a number of contribution limits increased, and some of the limits became indexed for inflation.

Contributions to candidates and political party committees. The limits on contributions made by individuals and non-multicandidate committees increased to \$2,000 per election to federal candidates and \$25,000 per year to national party committees. 11 CFR 110.1(b)(1) and 110.1(c)(1). These limits will be indexed for inflation, as described below.

Aggregate biennial contribution limitations for individuals. The former \$25,000 annual limit for individuals has been replaced by a new biennial limit of \$95,000. This limit includes up to \$37,500 in contributions to candidate committees and up to \$57,500 in contributions to any other committees. The \$57,500 portion of the biennial limit contains a further restriction, in that no more than \$37,500 of this amount may be given to committees that are not national party committees. 11 CFR 110.5(b)(1).¹ The biennial limit will be indexed for inflation.

Special contribution limit to Senate candidates. The limit on contributions made to Senate candidates by the Republican and Democratic Senatorial campaign committees or the national committees of a political party, or any combination of these committees,

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¹ Under the so-called millionaires' amendment, individual limits to Congressional candidates increase if the candidate's opponent makes expenditures from his or her personal funds above a certain threshold. Contributions made under this provision will not be subject to the overall biennial limit. The Commission has address the millionaires' amendment in a separate rulemaking, described on page 22.

Contribution Limits

Donors	Recipients				Special Limits
	Candidate Committee	PAC ¹	State, District and Local Party Committee ²	National Party Committee ³	
Individual	\$2,000* per election ⁴	\$5,000 per year	\$10,000 per year combined limit	\$25,000* per year	Biennial limit of \$95,000* (\$37,500 to all candidates and \$57,500 ⁵ to all PACs and parties)
State, District and Local Party Committee²	\$5,000 per election combined limit	\$5,000 per year combined limit	Unlimited transfers to other party committees		
National Party Committee³	\$5,000 per election	\$5,000 per year	Unlimited transfers to other party committees		\$35,000* to Senate candidate per campaign ⁶
PAC Multicandidate⁷	\$5,000 per election	\$5,000 per year	\$5,000 per year combined limit	\$15,000 per year	
PAC Not Multicandidate⁷	\$2,000* per election	\$5,000 per year	\$10,000 per year combined limit	\$25,000* per year	

*These limits will be indexed for inflation.

¹ These limits apply to both separate segregated funds (SSFs) and political action committees (PACs). Affiliated committees share the same set of limits on contributions made and received.

² A state party committee shares its limits with local and district party committees in that state unless a local or district committee's independence can be demonstrated. These limits apply to multicandidate committees only.

³ A party's national committee, Senate campaign committee and House campaign committee are each considered national party committees, and each have separate limits, except with respect to Senate candidates—see Special Limits column.

⁴ Each of the following is considered a separate election with a separate limit: primary election, caucus or convention with the authority to nominate, general election, runoff election and special election.

⁵ No more than \$37,500 of this amount may be contributed to state and local parties and PACs.

⁶ This limit is shared by the national committee and the Senate campaign committee.

⁷ A multicandidate committee is a political committee that has been registered for at least six months, has received contributions from more than 50 contributors and—with the exception of a state party committee—has made contributions to at least five federal candidates.

Contribution Limits and Prohibitions

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will increase to \$35,000 per six-year cycle. 11 CFR 110.2(e)(1). This special limit will also be indexed for inflation.

Indexing. Under the old regulations, the coordinated party expenditure and Presidential candidate expenditure limits were indexed for inflation. The new rules extend the inflation indexing to contributions to candidates and national party committees by individuals and non-multicandidate committees, the biennial aggregate contribution limit for individuals and the limit on contributions to Senate candidates by certain national party committees. 11 CFR 110.17(a) and (b).

For the “per election” limit on contributions to candidates, the indexing changes will take effect on the day after the general election and remain in effect through the day of the next regularly-scheduled general election. 11 CFR 110.1(b)(1)(ii). For example, an increase in the limit made in January 2005 would be effective from November 3, 2004, to November 7, 2006, and would only affect elections held after November 3, 2004. On the other hand, the indexing changes for the calendar-year-based limits will affect the calendar-based period that follows, or from January 1 of the odd-numbered year through December 31 of the next even-numbered year. 11 CFR 110.1(c)(ii), 110.2(e)(2) and 110.5(b)(3). The Commission will announce the amount of the adjusted expenditure and contribution limits in the *Federal Register* and on the FEC web site at www.fec.gov. These indexing provisions will first be applied in 2005. 11 CFR 110.17(e).

The applicable expenditure and contribution limits will be adjusted according to the Consumer Price Index (CPI). The limits will be adjusted in odd-numbered years, and will be increased by the percent-

age difference between the CPI during the 12 months preceding the beginning of that calendar year and the CPI during the base year, which is 2001. The rules contain a rounding provision so that the inflation-adjusted amount will be rounded to the nearest multiple of \$100. 11 CFR 110.17(c) and (d).

Redesignations and Reattributions

The Commission has streamlined its rules for designating contributions to a particular election. When an individual or non-multicandidate committee makes an excessive contribution to a candidate’s authorized committee, the committee may automatically redesignate excessive contributions to the general election if the contribution:

- Is made before that candidate’s primary election;
- Is not designated in writing for a particular election;
- Would be excessive if treated as a primary election contribution; and
- As redesignated, does not cause the contributor to exceed any other contribution limit. 11 CFR 110.1(b)(5)(ii)(B)(1)-(4).

In the case of an authorized committee of a Presidential candidate who accepts public funding for the general election, this presumption is available only to the extent that the candidate is permitted to accept contributions to a general election legal and accounting compliance (GELAC) fund.

The redesignation presumption also includes a backward-looking provision where an undesignated, excessive contribution made after the primary, but before the general election, may be automatically applied to the primary if the campaign committee has more net debts outstanding from the primary than the excessive portion of the contribution. The redesignation, of course, may not cause the contributor to exceed any contribution limits. 11 CFR 110.1(b)(5)(ii)(C).

The candidate committee is required to notify the contributor of the redesignation by paper mail, e-mail, fax or other written method within 60 days of the treasurer’s receipt of the contribution. Also, at the time of notification, the contributor must be given the opportunity to request a refund. 11 CFR 110.1(b)(5)(ii)(B)(5)-(6) and 110.1(b)(5)(ii)(C)(6)-(7).

Similarly, the Commission has also updated its rules regarding reattributions. When an excessive contribution is made via a written instrument with more than one individual’s name imprinted on it, but only has *one* signature, the permissible portion will be attributed to the signer and the excessive portion may now be attributed to the other individual whose name is imprinted on the written instrument, without obtaining a second signature, so long as the reattribution does not cause the contributor to exceed any other contribution limit. 11 CFR 110.1(k)(3)(ii)(B)(1).

Political committees employing this presumption must notify all contributors in writing or via e-mail within 60 days of the committee treasurer’s receipt of the check. At the time of notification, the committee must offer the contributor who signed the check a refund of the excessive portion. 11 CFR 110.1(k)(3)(ii)(B)(2) and (3).

Recordkeeping. To facilitate audits that determine compliance with the contribution limits, political committee treasurers are now required to maintain either a full-size photograph or a digital image of each check or written instrument by which a contribution of \$50 or more is made. 11 CFR 102.9(a)(4). Under a new section added to the rule outlining the explicit standard for acceptable accounting methods, the committee’s records must demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general elec-

tion contributions received minus the sum of general election disbursements made. 11 CFR 102.9(e)(2). In addition, for the political committee redesignations or reattributions to be effective, any signed writings from contributors that accompany the contribution and the committee's notices must be retained.

Prohibition on Contributions and Donations by Minors

Under the new regulations, individuals who are under 18 years old are prohibited from making contributions to federal candidates and contributions or donations to committees of political parties 11 CFR 110.19(a) and (b). By including the term "donation" in this regulation, the prohibition encompasses both federal and nonfederal accounts of political party committees. Thus, this provision preempts state law to the extent that state law may permit minors to make donations to state, district and local party committees. In the Explanation and Justification for this rule, the Commission indicated that prohibiting donations by minors to all committees of state, district and local parties has a federal purpose because donations of nonfederal funds to state parties could otherwise be used, in part, to finance "federal election activities."²

The final rules make clear that individuals under 18 may, however, participate in volunteer work for federal candidates and political party committees and may continue to make contributions to unauthorized committees that are not political party committees, such as PACs, under certain conditions. See 11 CFR 110.19(c).

² "Federal election activity," is defined on page 2.

Prohibition on Contributions, Donations, Expenditures, Disbursements by Foreign Nationals

New section 11 CFR 110.20 implements BCRA's prohibition on contributions, donations, expenditures and disbursements solicited,³ accepted, received or made directly or indirectly by or from foreign nationals in connection with state and local elections as well as federal elections. This ban also applies to:

- Contributions and donations to political party committees;
- Contributions and donations to party committee building funds;
- Disbursements for electioneering communications;⁴ and
- Expenditures, independent expenditures, and disbursements in connection with an election.⁵

The Commission has included a knowledge requirement and knowledge standards with regard to the solicitation, acceptance or receipt of foreign national contributions or donations, determining that this would produce a less harsh result than a strict liability standard.

Knowledge. The final rules contain in the definition of "knowingly" three standards of knowledge that focus on the sources of funds received. Meeting any one of these standards would satisfy the knowledge requirements of this rule.

The first standard is actual knowledge that funds have come from a foreign source. The second

³ The term "solicit" at section 11 CFR 110.20 has the same meaning as in section 11 CFR 300.2(m), "to ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary."

⁴ "Electioneering communication" is defined on page 8.

⁵ An additional ban on foreign national donations to Presidential inaugural committees will be addressed in a later rulemaking.

is an awareness on the part of the person soliciting, accepting or receiving the contribution or donation of certain facts that would lead a reasonable person to conclude that there is a substantial probability that the contribution or donation is coming from a foreign source. The third standard is an awareness on the part of the person soliciting, accepting or receiving a contribution or donation of facts that should have prompted a reasonable inquiry into whether the source of the funds is a foreign national, but the person neglected to undertake such an inquiry. 11 CFR 110.20(a)(4)(i)-(iv).

The rule further outlines the types of information that should lead a recipient to question the origin of a contribution or donation under this section. They are:

- Use by a contributor or donor of a foreign passport or passport number;
- Use by a contributor or donor of a foreign address;
- A check or other written instrument is drawn on an account or a wire transfer from a foreign bank; or
- Contributors or donors live abroad. 11 CFR 110.20(a)(5)(i)-(iv).

Knowledge safe harbor. The Commission has adopted a narrowly-tailored safe harbor for the knowledge standards. A person shall be deemed to have conducted a reasonable inquiry into a possible foreign national contribution if he or she seeks and obtains copies of current and valid U.S. passport papers for U.S. citizens who are contributors or donors and to whom any of the above four types of information are applicable. 11 CFR 110.20(a)(7).

Assisting foreign national contributions or donations. The foreign national prohibition applies to a person who knowingly provides

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Contribution Limits and Prohibitions

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substantial assistance to foreign nationals in the making of contributions, donations, expenditures, independent expenditures and disbursements in connection with federal and nonfederal elections. This prohibition covers, but is not limited to, acting as a conduit or intermediary for foreign national contributions and donations. 11 CFR 110.20(g).◆

Other Provisions

On November 25, 2002, the Commission approved final rules to implement provisions of the BCRA that:

- Specify new requirements for disclaimers accompanying radio, television, print and other campaign communications;
- Make changes regarding the personal use of campaign funds by candidates and federal officeholders;
- Allow non-incumbent federal candidates to pay themselves salaries from campaign funds, as described below;
- Expand the scope of the statutory prohibition on fraudulent misrepresentation; and
- Increase the civil penalties for violating the prohibition on contributions made in the name of another.

The final rules and their Explanation and Justification were published in the December 13, 2002, *Federal Register* (67 FR 76962) and are available on the FEC web site at www.fec.gov/pages/bcra/rulemakings/other_provisions.htm.

Disclaimers

The new regulations replace pre-BCRA 11 CFR 110.11 with a new

section of the same number that implements statutory changes to the disclaimer requirements. The disclaimer requirements in this new section apply to public communications, including “communications through any broadcast, cable or satellite transmission, newspaper, magazine, outdoor advertising facility, mailing or other type of general public political advertising.” See 11 CFR 100.26. These requirements also apply to political committees’ web sites, to unsolicited e-mail of more than 500 substantially-similar communications and to any “electioneering communication.” All disclaimers must be “clear and conspicuous” regardless of the medium in which the communication is transmitted. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. 11 CFR 110.11(c)(1).

Political committees. Any communication made by a political committee—including communications that do not expressly advocate the election or defeat of a clearly-identified federal candidate or solicit a contribution—must display a disclaimer. 11 CFR 110.11(a)(1).

The disclaimer for a communication paid for and authorized by a candidate or candidate’s committee must state that the communication is paid for by the candidate’s committee. The disclaimer for a communication authorized by the candidate or candidate’s committee, but paid for by any other person, must state both who paid for the communication and that it was authorized by that candidate.

Communications not authorized by a candidate or his/her campaign committee, including any solicitation, must disclose the permanent street address, telephone number or web site address of the person who paid for the communication, and also state that the communication was not authorized by any candidate. 11 CFR 110.11(b).

Specific requirements for radio and television communications. For radio and television communications authorized by a candidate, the candidate must deliver an audio statement identifying himself or herself, and stating that he or she has approved the communication. For a television communication, this disclaimer must be conveyed by either:

- A full-screen view of the candidate making the statement; or
- A “clearly identifiable photographic or similar image of the candidate” that appears during the candidate’s voice-over statement. 11 CFR 110.11(c)(3)(ii)(A) and (B).

Additionally, television communications must contain a “clearly readable” written statement that appears at the end of the communication for a period of at least four seconds with a reasonable degree of color contrast between the background and the disclaimer statement. The written statement must occupy at least four percent of the vertical picture height. 11 CFR 110.11(c)(3)(iii).

For a radio or television communication that is not authorized by a candidate, the name of the political committee or other person who is responsible for the communication and, if applicable, the name of the sponsoring committee’s connected organization is required in the disclaimer.¹

In the case of a televised ad, the disclaimer must also include a statement that is conveyed by a full screen view of a representative of the political committee or other person making the statement, or a voice-over by the representative. In addition, the disclaimer must appear in writing at the end of the communication in a “clearly readable”

¹ In addition, communications transmitted through telephone banks, as defined by 11 CFR 100.28, must carry this same disclaimer statement.

manner with a reasonable degree of color contrast to the background, and it must be shown for a period of four seconds. 11 CFR 110.11(c)(4).

The regulations include safe harbor guidelines for television communication disclaimers:

- A still picture of the candidate shall be considered “clearly identifiable” if it occupies at least 80 percent of the vertical screen height; and
- Disclaimers that are printed in black text on a white background, as well as disclaimers that have at least the same degree of contrast with the background color as the degree of contrast between the background color and the color of the largest text used in the communication, will be considered “clearly readable.” 11 CFR 110.11(c)(3)(iii)(C).

Specific requirements for printed communications. Printed materials must contain a printed box that is set apart from the contents in the communication. The disclaimer print in this box must be of sufficient type size to be “clearly readable” by the recipient of the communication, and the print must have a reasonable degree of color contrast between the background and the printed statement. 11 CFR 110.11(c)(2)(ii) and (iii).

The regulations contain a safe harbor that establishes a fixed, twelve-point type size as a sufficient size for disclaimer text in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches by 36 inches. 11 CFR 110.11(c)(2)(i). Disclaimers for larger communications will be judged on a case-by-case basis.

The regulations additionally provide two safe harbor examples that would comply with the color-contrast requirement:

- The disclaimer is printed in black text on a white background; or

- The degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication. 11 CFR 110.11(c)(2)(iii).²

Personal Use of Campaign Funds

The new rules retain the existing prohibition against the personal use of campaign funds as well as the so-called “irrespective test.” Candidates may not, therefore, use funds in a campaign account to “fulfill a commitment, obligation, or expense of any person that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 CFR 113.1(g). Personal use of campaign funds includes, but is not limited to, payment of the following: household items or supplies, clothing (except for clothing items of *de minimis* value), tuition payments, mortgage, rent or utility payments, vacations and health or country club dues. 11 CFR 113.1(g)(1)(i). The regulations have, however, been amended as follows.

Candidate salaries. The most notable change permits a candidate for federal office to receive a salary from his or her principal campaign committee.³ According to the regulations, a salary may be received under the following conditions:

- The salary must be paid by the principal campaign committee.
- The salary must not exceed the lesser of either the minimum annual salary for the federal office sought or what the candidate

received as earned income in the previous year.⁴

- Individuals who elect to receive a salary from their campaign committees must provide income tax records and additional proof of earnings from relevant years upon request from the Commission.
- Payments of salary from the committee must be made on a pro-rata basis.⁵
- Incumbent federal officeholders may not receive salary payment from campaign funds.
- The first payment of salary shall be made no sooner than the filing deadline for access to the primary election ballot in the state in which the candidate is running for office.⁶

Members of a candidate’s family. The new regulations amend the definition of a candidate’s family at 11 CFR 113.1(g)(7). The previous regulations included as a member of a candidate’s family, “a person who has a committed relationship with a candidate, such as sharing a household and having mutual responsibility for each other’s welfare or living expenses.” 11 CFR 113.1(g)(7)(iv). This section has been removed from the new regulations and replaced with a provision that includes any person who shares a residence with the candidate.

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⁴ Any salary paid by the campaign committee will be equal to the lesser of these two amounts. Furthermore, additional salary or wages received from other sources will count toward the limit that may be received by the candidate.

⁵ This provision will prevent a candidate from receiving a whole year’s salary if he or she is not a candidate for an entire twelve-month period.

⁶ The filing deadline for the primary election for federal candidates is determined by state law. In those states that do not have a primary election, candidates may not receive payment until after January 1st of each even-numbered year.

² Please note these examples do not constitute the only ways to satisfy the color contrast requirement.

³ This amendment to the regulations supersedes Advisory Opinion 1999-1.

Other Provisions

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The Commission recognized that any person living with the candidate may pay a share of his or her living expenses without making a contribution to the campaign. The Commission further noted that the personal funds of a candidate would include his or her share of a joint account held with the person(s) with whom a residence is shared. However, gifts from the campaign to family members or anyone residing with the candidate are prohibited because they may be used support personal expenses of the candidate. 11 CFR 113.1(g)(4).

Recordkeeping of personal uses. Recordkeeping requirements for expenses that may be partly personal in nature have been added to the regulations. Such expenses may include, but are not limited to, the costs of vehicles, travel, meals and legal services.⁷ The new provision requires that logs of these expenses be maintained to help the Commission determine on a case-by-case basis what portion was for personal use rather than for campaign related activity or officeholder duties.

Any other lawful purpose. The BCRA deleted the phrase “for any other lawful purpose” from the list of permitted uses of campaign funds at 2 U.S.C. §439a. Therefore, the Commission has removed the section referring to “any other lawful purpose” regarding the use of campaign funds. Thus, in addition to paying expenses in connection with the campaign for federal office, campaign funds may be used only for non-campaign purposes included in an exhaustive list found at 11 CFR 113.2 (a), (b), and (c).

Contributions to other candidates. In a previous rulemaking, the Commission amended the regulations regarding contribution limits

(see page 10). The Commission has noted, however, that the contribution limits for authorized candidate committees has not changed as a result of the BCRA. Authorized committees may make contributions of \$1,000 or less to authorized committees of other federal candidates. They may also make contributions to state and local candidates in furtherance of the federal candidate’s election. See 2 U.S.C. §439a(a)(1).

Payment of campaign and officeholder expenses from campaign accounts. Congress has deleted the phrase “in excess of any amount to defray” campaign expenses from 2 U.S.C. §439a. Therefore, the Commission has revised 11 CFR 113.1 and 113.2 so that officeholders may spend money from campaign accounts to pay for campaign and non-campaign expenses incurred as a consequence of holding federal office. Such expenses, according to the Commission, may be paid in any order.

Prohibitions on Fraudulent Solicitations

The final rule prohibits a person from fraudulently misrepresenting that the person is speaking, writing or otherwise acting for, or on behalf of, a federal candidate or political party, or an employee or agent of either, for the purpose of soliciting contributions or donations. Persons are also banned from willfully and knowingly participating in, or conspiring to participate in, any scheme to do so. 11 CFR 110.6(b)(1) and (2). The regulation implementing this new provision, together with the pre-BCRA fraudulent misrepresentation regulation formerly found at 11 CFR 110.9(b), is combined in new 11 CFR 110.16.

Civil Penalties

The BCRA amends the Federal Election Campaign Act (the Act) to impose greater penalties for knowing and willful violations of the Act regarding contributions made in the

name of another.⁸ The Commission has amended the regulations to impose a civil penalty for such violations that is not less than 300 percent of the amount of any contribution, but is no more than \$50,000 or 1,000 percent of the amount of the contribution involved. 11 CFR 111.24. ♦

Coordinated, Independent Expenditures

On December 5, 2002, the Commission approved final rules to implement provisions of the BCRA that:

- Define coordination between a candidate or a political party and a person making a communication; and
- Set forth requirements for political party committees regarding the permitted timing of independent and coordinated expenditures, and transfers and assignments.

Note that new reporting requirements for certain independent expenditures are included in the final rules on BCRA reporting, approved on December 12, 2002.¹

The final rules and their Explanation and Justification were published in the January 3, 2003, *Federal Register* (68 FR 421) and are available on the FEC web site at www.fec.gov/pages/bcra/

⁸ The Act’s civil penalties are set forth in two tiers of monetary penalties at 2 U.S.C. §§437g(a)(5), (6), and (12). The first tier addresses violations of the Act, whereas the second tier speaks to “knowing and willful” violations of the Act. The Commission addressed changes to the second tier regarding contributions in the name of another.

¹ This rulemaking is summarized on page 19.

⁷ See 11 CFR 113.1(g)(1)(ii)(A), (B), (C), and (D) and 11 CFR 113.2.

[rulemakings/ coordinated_independent_expenditures.htm](#).

Coordination

The BCRA repealed Commission regulations defining a “coordinated general public political communication” (old 11 CFR 100.23), and instructed the Commission to promulgate new rules on “coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees.” Pub. L. 107-155, sec. 214(c) (March 27, 2002).

New 11 CFR 109.20(a) implements 2 U.S.C. §§441a(a)(7)(B)(i) and (ii) by defining “coordinated” to mean “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.”²

The rules in section 109.21 define a “coordinated communication,” which is treated as an in-kind contribution to the candidate, authorized committee or party committee the communication is coordinated with, and must be reported as such. The new regulations provide for a three-part test to determine whether a communication is coordinated. Satisfaction of all of the three specific tests justifies the conclusion that payments for the coordinated communication are for the purpose of influencing a federal election. The three parts of the test consider:

- The source of payment;
- A “content standard” regarding the subject matter of the communication; and
- A “conduct standard” regarding the interactions between the person paying for the communication and the candidate or political party committee. 11 CFR 109.21(a).

Source of Payment. A coordinated communication is paid for by someone other than a candidate, an authorized committee or a political party committee. However, a person’s status as a candidate would not exempt him or her from the coordination regulations with respect to payments he or she makes on behalf of a different candidate. 11 CFR 109.21(a)(1).

Content Standard. The purpose of the four content standards is to determine whether the subject matter of a communication is reasonably related to an election. A communication that meets any of these four standards meets the content requirement:

1. A communication that is an “electioneering communication”;
2. A public communication that republishes, disseminates or distributes candidate campaign materials, unless the activity meets one of the exceptions at 11 CFR 109.23(b) discussed in the conduct standards below;
3. A public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; or
4. A public communication that:
 - Refers to a clearly-identified federal candidate or political party;
 - Is publicly distributed or disseminated 120 days or fewer before a primary or general election or a convention or caucus with the authority to nominate a candidate; and
 - Is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction where one or more candidates of the political party appear on the ballot. 11 CFR 109.21(c)(1)-(4).

Conduct Standard. Under the final rules, if one of the conduct standards is met, and the first two parts of the test (the content standards and the source of payment) are also met, then the communication is coordinated. 11 CFR

109.21(d). The conduct standards are as follows:

1. *Request or Suggestion.* This test has two prongs, and satisfying either satisfies the test. The first prong is satisfied if the person creating, producing or distributing the communication does so at the request or suggestion of a candidate, authorized committee, political party committee or agent of any of these. The second prong of the “request or suggestion” conduct standard is satisfied if a person paying for the communication suggests the creation, production or distribution of the communication to the candidate, authorized committee, political party committee or agent of any of the above, and the candidate or political party committee assents to the suggestion. 11 CFR 109.21(d)(1).
2. *Material Involvement.* This test is satisfied if a candidate, candidate committee, political party committee or an agent of any of these was “materially involved in decisions” regarding any of the following aspects of a public communication paid for by someone else:
 - Content of the communication;
 - Intended audience;
 - Means or mode of the communication;
 - Specific media outlet used;
 - Timing or frequency of the communication; or
 - Size or prominence of a printed communication or duration of a communication by means of broadcast, cable or satellite. 11 CFR 109.21(d)(2).
3. *Substantial Discussion.* A communication meets this standard if it is created, produced or distributed after one or more substantial discussions between the person paying for the communication, or the person’s

² “Agent” is defined at 11 CFR 109.3, for the purposes of part 109 only.

(continued on page 18)

Coordinated, Independent Expenditures

(continued from page 17)

agents, and the candidate clearly identified in the communication or that candidate's committee, that candidate's opponent or opponent's committee, a political party committee, or an agent of the above. A discussion would be "substantial" if information about the plans, projects, activities or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication is conveyed to the person paying for the communication. 11 CFR 109.21(d)(3).

4. *Employment of Common Vendor.*

This conduct standard explains what a common vendor is and provides that the use of a common vendor in the creation, production or distribution of a communication satisfies the conduct standard if:

- The person paying for the communication contracts with, or employs, a "commercial vendor" to create, produce or distribute the communication.³
- The commercial vendor, including any officer, owner or employee of the vendor, has a previous or current relationship with the candidate or political party committee that puts the commercial vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee. This previous relationship is defined in terms of nine specific services related to campaigning and campaign communications. Note that these services would have to have been rendered during the election cycle in which the communication is first publicly distributed.

³ The term "commercial vendor" is defined at 11 CFR 116.1(c).

- The commercial vendor uses or conveys information about the campaign plans, projects, activities or needs of the candidate or political party committee, or information previously used by the commercial vendor in serving the candidate or political party committee, to the person paying for the communication, and that information is material to the creation, production or distribution of the communication. 11 CFR 109.21(d)(4).

5. *Former Employee/Independent Contractor.*

This standard applies to communications paid for by a person who has previously been an employee or an independent contractor of a candidate's campaign committee or a political party committee during the election cycle. The standard requires that the former employee use or convey material information about the plans, projects, activities or needs of the candidate or political party committee, or material information used by the former employee in serving the candidate or political party committee, to the person paying for the communication, and the information is material to the creation, production or distribution of the communication. 11 CFR 109.21(d)(5).⁴

⁴ Under the final rules, a candidate or political party committee would not be held responsible for receiving or accepting an in-kind contribution that resulted only from conduct described in the fourth and fifth conduct standards. 11 CFR 109.21(d)(4) and (d)(5). However, the person paying for a communication that is coordinated because of conduct described in the fourth or fifth conduct standards would still be responsible for making an in-kind contribution for purposes of the contribution limitations, prohibitions and reporting requirements of the Act. 11 CFR 109.21(b)(2).

6. *Dissemination, distribution or republication of campaign material.* A communication that republishes, disseminates or distributes campaign material only satisfies the first three conduct standards on the basis of the candidate's conduct—or that of his or her committee or agents—that occurs after the original preparation of the campaign materials that are disseminated, distributed or republished. 11 CFR 109.21(d)(6).⁵

Agreement or formal collaboration. Neither agreement (defined as a mutual understanding on any part of the material aspect of the communication or its dissemination) nor formal collaboration (defined as planned or systematically-organized work) is necessary for a communication to be a coordinated communication. 11 CFR 109.21(e).

Safe harbor for responses to inquiries about legislative or policy issues. A candidate's or political party committee's response to an inquiry about that candidate's or party's positions on legislative or policy issues, which does not include discussion of campaign, plans, projects, activities or needs, will not satisfy any of the conduct standards. 11 CFR 109.21(f)

Party Coordinated Communications. Although Congress did not specifically direct the Commission

⁵ Please note that the financing of the distribution or republication of campaign materials, while considered an in-kind contribution by the person making the expenditure, is not considered an expenditure by the candidate's authorized committee unless the dissemination, distribution or republication of campaign materials is coordinated. Additionally, republications of campaign materials coordinated with party committees are in-kind contributions to such party committees, and are reportable as such. 11 CFR 109.23(a).

to promulgate a new regulation on coordinated communications paid for by political party committees, the Commission is promulgating final rules to set forth the circumstances under which communications paid for by a party committee would be considered to be coordinated with a candidate, a candidate's authorized committee or their agents. These rules would generally apply the same coordination standards that would be applied to communications paid for by other persons. 11 CFR 109.37.

Coordinated and Independent Expenditures by Party Committees

National, state and subordinate committees of political parties may make expenditures up to prescribed limits in connection with the general election campaigns of federal candidates without counting such expenditures against the committees' contribution limits. 2 U.S.C. §441a(d). These expenditures are commonly referred to as "coordinated party expenditures," and the limits for these expenditures can be found in new section 11 CFR 109.32.⁶

When coordinated party expenditures can be made. Political party committees can make coordinated party expenditures in connection with the general election campaign before or after the party's candidate has been nominated. All pre-nomination coordinated expenditures continue to be subject to the coordinated party expenditure limitations, whether or not the candidate on whose behalf they are made receives the party's nomination. 11 CFR 109.34.

Restrictions on making both independent expenditures and coordinated expenditures. In BCRA, Congress prohibits political party committees, under certain conditions, from making both

coordinated party expenditures and independent expenditures with respect to the same candidate, and from making transfers and assignments to other political party committees. 2 U.S.C. §441a(d)(4). Congress plainly intended to combine certain political party committees into a collective entity or entities for purposes of these restrictions. 2 U.S.C. §441a(d)(4)(B).

For the purposes of these restrictions only, all political parties established and maintained by a national political party (including all Congressional campaign committees), and all political committees established and maintained by a state political party (including any subordinate committee of a state committee), shall be considered to be a single political committee. 11 CFR 109.35(a).

Under the BCRA and the new regulations, a political party committee is prohibited from making any post-nomination coordinated party expenditure in connection with the general election campaign of a candidate at any time after that political party committee makes any post-nomination independent expenditure with respect to the candidate. 11 CFR 109.35(b)(1). Similarly, a political party committee is prohibited from making any post-nomination independent expenditure with respect to a candidate at any time after that political party committee makes a post-nomination coordinated expenditure in connection with the general election campaign of the candidate. 11 CFR 109.35(b)(2).

Prohibited Transfers. Congress provided in the BCRA that a "committee of a political party" that makes coordinated party expenditures with respect to a candidate must not, during an election cycle, transfer any funds to, assign authority to make coordinated party expenditures under 2 U.S.C. §441a(d) to, or receive a transfer of

funds from, a "committee of the political party" that has made or intends to make an independent expenditure with respect to the candidate. 2 U.S.C. §441a(d)(4)(C). The final rules generally track this statutory language. 11 CFR 109.35(c).

National party independent expenditures on behalf of Presidential candidates. Prior to the enactment of the BCRA, the Commission's rules prohibited a national committee of a political party from making independent expenditures in connection with the general election campaign of a Presidential candidate. See former 11 CFR 110.7(a)(5). However, section 441a(d)(4), added by the BCRA, precludes such a broad prohibition. As a result, the Commission has added a new section that specifically prohibits a national committee of a political party from making independent expenditures with respect to a Presidential candidate if it serves as the principal campaign committee or authorized committee of its Presidential candidate under 11 CFR 9002.1(c). 11 CFR 109.36. ♦

Reporting

On December 12, 2002, the Commission approved final rules on reporting requirements related to the BCRA, including:

- Reporting of independent expenditures;
- Reporting of electioneering communications;
- Quarterly reporting by the principal campaign committees of House and Senate candidates;
- Monthly reporting by national committees of political parties; and
- Reporting funds for state and local party office buildings.

(continued on page 20)

⁶ These limits were formerly located at 11 CFR 110.7.

Reporting

(continued from page 19)

The final rules and their Explanation and Justification were published in the January 3, 2003, *Federal Register* (68 FR 404) and are available on the FEC web site at http://www.fec.gov/pages/bcra/rulemakings/rulemakings_bcra.htm.

Independent Expenditures

The BCRA requires political committees and other persons who make independent expenditures at any time during a calendar year—up to and including the 20th day before an election—to disclose this activity within 48 hours each time that the expenditures aggregate \$10,000 or more. This reporting requirement is in addition to the pre-BCRA requirement to file 24-hour notices of independent expenditures each time that disbursements for independent expenditures aggregate at or above \$1,000 during the last 20 days—up to 24-hours—before an election. 2 U.S.C. §§434(b), (d) and (g). The new rules address when and how such reports should be filed.

Independent expenditures aggregating less than \$10,000. Committees must report on Schedule E of Form 3X independent expenditures that aggregate less than \$10,000 with respect to a given election during the calendar year that are made up to and including the 20th day before an election. The report must be filed no later than the filing date of the committee's next regularly-scheduled report. 11 CFR 104.4(a) and (b)(1). Individuals other than political committees disclose on FEC Form 5 independent expenditures aggregating in excess of \$250 with respect to a given election during the calendar year that are made during this time period. The report must be filed by the filing deadline of the next report under the quarterly filing schedule. 11 CFR 109.10(b).

Both committees and individuals must file an additional report each

time that independent expenditures made less than 20 days, but more than 24 hours, before an election aggregate in excess of \$1,000. These reports must be *received* by the Commission by the end of the day following the date that the communication is publicly disseminated. All individuals and committees, even those supporting or opposing Senate candidates, must file 24-hour notices of independent expenditures with the Commission. Electronic filers must file these reports electronically, and paper filers may file by fax or e-mail. Additionally, electronic filers and paper filers may file 24-hour reports using the FEC web site's online program. 11 CFR 104.4(c), 109.10(d) and 100.19(d)(3).

Independent expenditures aggregating \$10,000 and above. Once an individual's or committee's independent expenditures reach or exceed \$10,000 in the aggregate at any time up to and including the 20th day before an election, they must be reported within 48 hours of the date that the expenditure is publicly distributed. All 48-hour reports must be filed with and *received* by the Commission at the end of the second day after the independent expenditure is publicly distributed. Electronic filers must file these reports electronically, and paper filers may file by fax or e-mail. 11 CFR 104.4(b)(2), 109.10(c) and 100.19(d)(3).

Verification of independence. All 24- and 48-hour reports must contain, among other things, a verification under penalty of perjury as to whether the expenditure was made in cooperation, consultation or concert with a candidate, a candidate's committee, a political party committee or an agent of any of these. 11 CFR 104.4(d)(1) and 109.10(e)(1)(v).

Aggregating independent expenditures for reporting purposes. Independent expenditures are aggregated toward the various

reporting thresholds on a per-election basis within the calendar year. Consider, as examples, the following scenarios, all of which occur outside of the 20-day window before an election when 24-hour notices are required:

- If a committee makes \$5,000 in independent expenditures with respect to a Senate candidate, and \$5,000 in independent expenditures with respect to a House candidate, then the committee is not required to file 48-hour reports, but must disclose this activity on its next regularly-scheduled report.
- If the committee makes \$5,000 in independent expenditures with respect to a clearly-identified candidate in the primary, and an additional \$5,000 in independent expenditures with respect to the same candidate in the general, then again no 48-hour notice is required and the expenditures are disclosed on the committee's next report.
- If the committee makes \$6,000 in independent expenditures supporting a Senate candidate in the primary election and \$4,000 opposing that Senate candidate's opponent in the same election, then the committee must file a 48-hour report.

The date that a communication is publicly disseminated serves as the date that a person or committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amounts of \$1,000 or \$10,000. The calculation of the aggregate amount of the independent expenditures must include both disbursements for independent expenditures and all contracts obliging funds for disbursements of independent expenditures. 11 CFR 104.4(f).

Electioneering Communications

The BCRA requires persons who make electioneering communications that aggregate more than

\$10,000 to file disclosure statements with the Commission within 24 hours of the disclosure date. 2 U.S.C. §434(f)(1). The new regulations implement this provision, and require that the statement be *received* by the Commission by 11:59 on the day following the disclosure date. Electronic filers must file these reports electronically, and paper filers may file by fax or e-mail. 11 CFR 100.19(f).

The regulations define “disclosure date” as:

- The first date on which an electioneering communication is publicly distributed, provided that the person making the electioneering communication has made disbursement(s), or has executed contract(s) to make disbursements, for the direct costs of producing or airing¹ one or more electioneering communication aggregating in excess of \$10,000; or
- Any other date during the same calendar year on which an electioneering communication is publicly distributed, provided that the person making the communication has made disbursement(s) or executed contract(s) to make disbursements for the direct costs of airing one or more electioneering communication aggregating in excess of \$10,000 since the most recent disclosure date. 11 CFR 104.20(a)(1)(i).

Disbursements made at any time for the direct costs of producing or airing the publicly-distributed electioneering communication, or

¹ *The direct costs of producing or airing electioneering communications are defined as the costs charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media and talent, or the cost of airtime on broadcast, cable and satellite radio and television stations, studio time, material costs and the charges for a broker to purchase the airtime. 11 CFR 104.20(a)(2).*

other unreported electioneering communications, count toward the threshold. However, costs already reported for earlier electioneering communications are not included.

Each statement must disclose:

- The identification of the person who made the disbursement, or who executed a contract to make a disbursement, and the person’s principal place of business if the person is not an individual;
- The identification of any person sharing or exercising direction or control² over the activities of the person who made the disbursement or executed the contract;
- The identification of the custodian of books and accounts from which the disbursements were made;
- The amount of each disbursement or amount obligated in excess of \$200 during the period covered by the statement, the date of the transaction and the person who received the funds;
- All clearly-identified candidates referred to in the electioneering communication and the elections in which they are candidates;
- The disclosure date; and
- The name and address of each donor who, since the first day of the preceding calendar year, has donated in the aggregate \$1,000 or more to the person making the disbursements, or to the separate segregated bank account if the disbursements were paid exclusively from that bank account. 11 CFR 104.20(c).

² *Persons sharing or exercising direction or control means officers, directors, executive directors or their equivalent, partners and, in the case of unincorporated organizations, owners of the entity or person making the disbursement for the electioneering communication. 11 CFR 104.20(a)(3).*

Filing Frequency for House and Senate Committees and National Party Committees

House and Senate Candidates.

The BCRA requires that all principal campaign committees of House and Senate candidates file quarterly in non-election years as well as in election years. 2 U.S.C.

§434(a)(2)(B). As a result, House and Senate campaign committees may no longer file on a semi-annual basis during non-election years. 11 CFR 104.5(a).

National party committees. Under the BCRA, national party committees must file on a monthly basis in all years. 2 U.S.C. §434(a)(4)(B).

Thus, under the new regulations a national committee of a political party, including a national Congressional campaign committee, must always file monthly and may no longer file on a quarterly basis in election years and semi-annually in non-election years. 11 CFR 104.5(c)(4).

Funds for Party Office Buildings

Commission regulations on nonfederal funds (or “soft money”) provide that donations used by a state, district or local party committee for the purchase or construction of an office building are subject to state law if they are donated to a nonfederal account. However, if funds or things of value are contributed to or used by the party’s federal account to buy or build an office building, then the amounts donated are contributions. 11 CFR 300.12 and 300.35. The new rules clarify that any funds or things of value received by a federal account and used for the purchase or construction of an office facility, regardless of any specific contributor designation, are contributions and not treated any differently from other funds or goods donated to the federal account. 11 CFR 104.3(g). ♦

Millionaires' Amendment

On December, 19, 2002, the Commission approved interim final rules that increases individual contribution limits and coordinated party expenditure limits for certain candidates running against self-financed opponents. The rules address:

- Monetary thresholds that trigger the increased individual contribution and coordinated party expenditure limits;
- Computation formulas used to determine the application of the increased limits;
- The specific amounts of the increases in individual contribution limits;
- New reporting and notification requirements; and
- Repayment restrictions for personal loans from the candidate.

Threshold Amounts

The provisions of the BCRA's Millionaires' Amendment increase the individual contribution and coordinated party expenditure limits for House and Senate candidates whose opponents' personal spending exceeds their own by more than certain threshold amounts. The difference between the candidates' expenditures of personal funds can be reduced by a disparity in other campaign fundraising. The threshold amounts for House and Senate candidates differ. For House candidates the threshold amount is \$350,000; for Senate candidates it is two times the sum of \$150,000 plus an amount equal to the voting age population of the state in question multiplied by \$0.04.¹

¹ Differently formulated: $\$150,000 + (.04 \times (\text{voting age population})) = \text{Senate threshold}$.

Opposition Personal Funds Amount

As noted above, opposition personal spending that exceeds the threshold amounts does not by itself trigger increased contribution limits. The regulations also take into account expenditures from the personal funds of the candidate seeking increased limits under the Millionaires' Amendment as well as fundraising by the campaigns.

Campaigns must use the appropriate "opposition personal funds amount" formula to determine whether an opposing candidate has spent sufficient personal funds in comparison to the amounts raised by the campaigns to trigger increased contribution and coordinated party expenditure limits. The opposition personal funds formula takes half the difference between the gross receipts of the candidate and the gross receipts of the opponent and subtracts that from the amount by which the opponent is outspending the candidate using their personal funds.² Hence, a candidate with a significant fundraising advantage

² Depending on the date of computation, the formula is either $a - b$; $a - b - ((c - d)/2)$; or $a - b - ((e - f)/2)$, where:

- $a = \text{opponent's personal funds spending}$;
- $b = \text{candidate's personal funds spending}$;
- $c = \text{candidate's receipts (contributions not from candidate)}$;
- $d = \text{opponent's receipts (contributions not from opponent)}$;
- $e = \text{candidate's receipts (contributions not from candidate)}$;
- $f = \text{opponent's receipts (contributions not from opponent)}$.

The values for c and d are determined on June 30 of the year before the election (report due on July 15), and the values for e and f are determined on December 31 of the year before the election (year-end report due on January 31). Prior to July 16 of the year before the election, values for c , d , e , and f are not included in the equations, and the "opposition personal funds amount" formula is $a - b$.

over a self-financed opponent might not receive an increased contribution limit. In this way, the new rules avoid giving increased contribution limits to candidates whose campaigns have a significant fundraising advantage over their opponents.

Increased Contribution Limits

When a House candidate's opposition personal funds amount exceeds the \$350,000 threshold:

- The contribution limits for the candidate triple; and
- The national and state party committees may make coordinated expenditures on behalf of the candidate that are not subject to the usual 2 U.S.C. §441a(d) limits.

For Senate candidates, the extent to which a candidate's opposition personal funds amount exceeds the threshold determines the amount of the increase in contribution limits. If it exceeds:

- Twice the threshold,³ then the contribution limits for the candidate are tripled;
- Four times the threshold,⁴ then the contribution limits for the candidate are raised six-fold;
- Ten times the threshold,⁵ then the contribution limits for the candidate are raised six-fold, and the national and state party committees may make unlimited coordinated expenditures on the candidate's behalf.

Avoiding Excessive Contributions Under the Increased Limits

Campaigns that accept contributions under the increased limits must continually monitor the opposition personal funds amount to ensure their continued eligibility for the increased limits and to make sure that they have not accepted excessive contributions. Similarly,

³ $\$300,000 + (\$0.08 \times \text{VAP})$.

⁴ $\$600,000 + (\$0.16 \times \text{VAP})$.

⁵ $\$1,500,000 + (\$0.40 \times \text{VAP})$.

national and state party committees must monitor the opposition personal funds amount for campaigns in which they are making coordinated party expenditures in excess of the regular coordinated party expenditure limits (at 11 CFR 109.32(b)).

Senate candidates (and their authorized committees) must not accept and national and state party committees making coordinated party expenditures on behalf of Senate candidates must not make any contribution or coordinated party expenditure that causes the aggregate contributions accepted and coordinated party expenditures made under the increased limits to be greater than 110 percent of the opposition personal funds amount.

Similarly, House candidates (and their authorized committees) must not accept and national and state party committees making coordinated party expenditures on behalf of House candidates must not make any contribution or coordinated party expenditure that causes the aggregate contributions accepted and coordinated party expenditures made under the increased limits to be greater than 100 percent of the opposition personal funds amount.

Reporting and Notification

In order to facilitate this continual monitoring of fundraising and personal spending by candidates and party committees, new reporting and notification requirements have been added to the regulations.

At the outset, candidates must declare on their Statement of Candidacy (FEC Form 2) the amount by which their personal spending on the campaign will exceed the applicable threshold amount. 11 CFR 101.1(a). Also, to facilitate opposition personal funds calculations, by July 15 of the year before the election and January 31 of the year in which the election takes place, each principal campaign committee must file a report disclosing the aggregate gross receipts for

the primary and general elections, and the candidate's aggregate contributions from personal funds for the primary and general elections (FEC Form 3Z-1). 11 CFR 104.19.

Additionally, a Senate candidate's principal campaign committee must notify the Secretary of the Senate, the Commission and each opposing candidate within 24 hours when the candidate makes an expenditure from personal funds that aggregates in excess of the threshold (FEC Form 10). 11 CFR 400.21(a). A House candidate's principal campaign committee must notify the Commission, each opposing candidate and the national party committee of each opposing candidate within 24 hours when the candidate makes an expenditure from personal funds that aggregates in excess of the threshold (FEC Form 10). 11 CFR 400.21(b).

From that time on, the committee must also notify all of the above-listed entities within 24 hours whenever the candidate makes an additional expenditure from personal funds in excess of \$10,000. 11 CFR 400.22. Both the initial and additional notifications must be made by faxing or e-mailing a copy of FEC Form 10 to all of the entities mentioned above.⁶ 11 CFR 400.24.

Within 24 hours after they become eligible, candidates who qualify for increased coordinated party expenditure limits (or their principal campaign committees) must file FEC Form 11 to inform their national and state party committees and the Commission of the opposition personal funds amount.

National or state political party committees that make coordinated

expenditures on behalf of a candidate whose limits have been raised must notify the Commission and the candidate on whose behalf the expenditure is made within 24 hours, using Schedule F. 11 CFR 400.30(c)(2).

Senate candidates operating under the increased limits (or their principal campaign committees) must file FEC Form 12 within 24 hours after the aggregate amount of contributions accepted and coordinated party expenditures made under the increased limits reaches 110 percent of the opposition personal funds amount.

House candidates operating under the increased limits (or their principal campaign committees) must file FEC Form 12 within 24 hours after the aggregate amount of contributions accepted and coordinated party expenditures made under the increased limits reaches 100 percent of the opposition personal funds amount.

Repayment of Personal Loans from Candidate

Apart from the calculations and disclosure requirements surrounding the increased contribution limits, the new rules also restrict the repayment of loans made by the candidate to his or her committee. The new rules apply to all candidates, without regard to any of the Millionaires' Amendment provisions. For personal loans⁷ from the candidate to his or her authorized committee that aggregate more than \$250,000, the following rules apply:

- The committee may use contributions to repay the candidate for the entire amount of the loan or loans only if those contributions were made on or before the day of the election; and
- The committee may use contributions to repay the candidate only up to \$250,000 from contributions

⁶ Note that, for Senate candidates, the original Form 10 will be filed with the Secretary of the Senate in the manner that all forms are normally filed. Similarly, for House candidates, the original Form 10 will be filed electronically with the Commission.

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Millionaires' Amendment

(continued from page 23)

made after the date of the election.
11 CFR 116.11(b).

Furthermore, if the committee uses the amount of cash-on-hand as of the date of the election to repay the candidate for loans in excess of \$250,000, it must do so within 20 days of the election. 11 CFR 116.11(c). During that time, the committee must treat the portion of candidate loans that exceed \$250,000, minus the amount of cash-on-hand as of the day after the election, as a contribution by the candidate. 11 CFR 116.11(c).

Additional Information

These rules, and their Explanation and Justification, are published in the January 27, 2003, *Federal Register* (68 FR 3970) and are available on the FEC web site at <http://www.fec.gov/pages/bcra/rulemakings/millionaire.htm>. The rules took effect on February 26, 2003. ♦

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