

AGENDA DOCUMENT NO. 11-33



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM

MEMORANDUM

For Meeting of 6-15-11

TO: The Commission

SUBMITTED LATE

FROM: Chair Cynthia L. Bauerly *CB*
Commissioner Ellen L. Weintraub *ELW by CNR*

SUBJECT: Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations

In an effort to reach compromise with our colleagues, we are offering this revised draft of a Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations to implement the decision in Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S. Ct. 876 (2010). This draft is an effort to minimize the areas of disagreement about topics on which to seek public comment. Specifically, this draft asks questions about the important issues of reporting requirements for independent expenditures and electioneering communications as well as financial participation by foreign nationals in the U.S. electoral process in a more limited way while still providing some opportunity for input from the public.

We ask that this draft be placed on the agenda for June 15, 2011.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 104, 110, and 114**

3 **[Notice 2011 – XX]**

4 **Independent Expenditures and Electioneering Communications**

5 **by Corporations and Labor Organizations**

6 **AGENCY:** Federal Election Commission.

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

8 **SUMMARY:** The Federal Election Commission seeks comment on
9 proposed changes to its rules regarding corporate and labor
10 organization funding and reporting of expenditures,
11 independent expenditures and electioneering
12 communications. These and other proposed changes are in
13 response to the decision of the Supreme Court in Citizens
14 United v. FEC. The Commission has made no final
15 decision on the issues presented in this rulemaking.

16 **DATES:** Comments must be received on or before August 15, 2011.
17 Reply comments must be limited to the issues raised in the
18 initial comments and must be received on or before
19 September 5, 2011. The Commission will hold a hearing
20 on these proposed rules and any modifications or
21 amendments thereto that may be proposed, and will
22 announce the date of the hearing at a later date. Anyone
23 wishing to testify at the hearing must file written comments

1 by the due date and must include a request to testify in the
2 written comments.

3 **ADDRESSES:**

4 All comments must be in writing, must be addressed to
5 Robert M. Knop, Assistant General Counsel, and must be
6 submitted in e-mail, facsimile, or paper copy form.

7 Commenters are encouraged to submit comments by e-mail
8 to ensure timely receipt and consideration. E-mail

9 comments must be sent to citizensunited@fec.gov. If e-

10 mail comments include an attachment, the attachment must
11 be in Adobe Acrobat (.pdf) or Microsoft Word (.doc)

12 format. Faxed comments must be sent to (202) 219-3923,

13 with paper copy mailed to the Commission concurrently

14 with the transmitted facsimile. Paper comments and paper

15 copy follow-up of faxed comments must be sent to the

16 Federal Election Commission, Attn.: Robert M. Knop,

17 Assistant General Counsel, 999 E Street, NW.,

18 Washington, DC 20463. All comments must include the

19 full name and postal service address of a commenter, and

20 of each commenter if filed jointly, or they will not be

21 considered. The Commission will post comments on its

22 Web site at the conclusion of the comment period. The

23 hearing will be held in the Commission's ninth floor

hearing room, 999 E Street, NW., Washington, DC 20463.

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**FOR FURTHER
INFORMATION
CONTACT:**

Mr. Robert M. Knop, Assistant General Counsel, or
Attorneys Ms. Esther D. Heiden, Ms. Cheryl A.F. Hemsley,
Mr. Phillip A. Olaya or Ms. Joanna S. Waldstreicher, 999 E
Street, NW., Washington, DC 20463, (202) 694-1650 or
(800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

The Federal Election Campaign Act of 1971,¹ as amended by the Bipartisan
Campaign Reform Act of 2002² (“the Act”), prohibits corporations and labor
organizations from using general treasury funds to make contributions or expenditures in
connection with Federal elections. 2 U.S.C. 441b. Although the prohibition on
expenditures by corporations and labor organizations has been part of the Act since the
Act was first enacted in 1971, the prohibition dates at least to 1947 when Congress
passed the Taft-Hartley Act, 80 ch. 120 § 304, 61 Stat. 136, as amended, 18 U.S.C. 610
(1970).³ The prohibition at 18 U.S.C. 610 was included in the 1971 Act, and was moved
to 2 U.S.C. 441b in 1976. See FEC v. Massachusetts Citizens For Life, Inc., 479 U.S.
238, 246-47 (1986).

¹ Pub. L. No. 92-225, 86 Stat. 3 (1971); 2 U.S.C. 431 *et seq.*
² Pub. L. No. 107-155, 116 Stat. 81 (2002).
³ The Tillman Act of 1907, ch. 420, 34 Stat. 864-65, expressly prohibited corporate contributions in
connection with a Federal election. At the time of the Taft-Hartley Act’s enactment, the Senate report
indicated that the Tillman Act’s prohibition was intended to include a ban on corporate expenditures. See
S. Rep. No. 80-1, at 38-39 (1947) (referring to the “loophole whereby corporations, national banks, and
labor organizations are enabled to avoid the obviously intended restrictive policy of the statute by garbing
their financial assistance in the form of an ‘expenditure’”).

1 The term “contribution or expenditure” includes any “direct or indirect payment,
2 distribution, loan, advance, deposit, or gift of money, or any services, or anything of
3 value . . . to any candidate, campaign committee, or political party or organization,” in
4 connection with any Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1); see also
5 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52 and 100.111. The prohibition on
6 expenditures by corporations and labor organizations includes a subset of “expenditures”
7 known as “independent expenditures,” which are expenditures expressly advocating the
8 election or defeat of a clearly identified candidate that are not made in concert or
9 cooperation with, or at the request or suggestion of, a clearly identified candidate, the
10 candidate’s authorized political committee, or their agents, or a political party committee
11 and its agents. 2 U.S.C. 431(17); 11 CFR 100.16(a).

12 The Bipartisan Campaign Reform Act of 2002 (“BCRA”) amended the Act in part
13 to also prohibit corporations and labor organizations from using general treasury funds to
14 make electioneering communications, even when this spending would not qualify as an
15 independent expenditure. 2 U.S.C. 441b(b)(2). “Electioneering communications” are
16 broadcast, cable, or satellite communications that refer to a clearly identified candidate
17 for Federal office, are publicly distributed within sixty days before a general election or
18 thirty days before a primary election, and are targeted to the relevant electorate. 2 U.S.C.
19 434(f)(3)(A); 11 CFR 100.29(a). The Commission’s regulations implementing the
20 statutory prohibitions against independent expenditures and electioneering
21 communication made by corporations and labor organizations are found at 11 CFR part
22 114.

1 The Act and Commission regulations require entities that make independent
2 expenditures and electioneering communications to report certain information to the
3 Commission. 2 U.S.C. 434(c), 434(f); 11 CFR 104.20, 109.10. The Act and
4 Commission regulations also require communications expressly advocating the election
5 or defeat of a clearly identified candidate, as well as electioneering communications, to
6 include statements disclosing who paid for the communication, and whether the
7 communication was authorized by a Federal candidate or a Federal candidate’s
8 authorized political committee or its agents and, if so, the identity of that candidate. 2
9 U.S.C. 441d(a); 11 CFR 110.11.

10 In Citizens United v. FEC, 558 U.S. ___, 130 S. Ct. 876 (2010) (“Citizens
11 United”), the Supreme Court held that the two statutory provisions prohibiting
12 corporations from making independent expenditures and electioneering communications
13 violate the First Amendment. 130 S. Ct. at 913. At the same time, the Supreme Court
14 affirmed the validity of the Act’s reporting and disclaimer requirements for independent
15 expenditures and electioneering communications at 2 U.S.C. 434(f), 441d(a)(3) and
16 441d(d)(2). Id. at 913-16.

17 The Commission seeks comment on whether or not it should modify its
18 regulations by: (1) eliminating the prohibitions in 11 CFR 114.2 and 114.14 on the use of
19 corporate and labor organization general treasury funds to finance expenditures,
20 independent expenditures and electioneering communications; (2) eliminating 11 CFR
21 114.15, which permits corporations and labor organizations to make electioneering
22 communications that are not the functional equivalent of express advocacy; (3)
23 eliminating the prohibitions in 11 CFR 114.3 and 114.4 regarding express advocacy in

1 communications to the general public and revising the standards for voter registration and
2 get-out-the-vote (“GOTV”) drives; (4) revising the Commission’s corporate facilitation
3 rules in 11 CFR 114.2(f); (5) revising certain reporting requirements in 11 CFR 104.20
4 and 109.10 pertaining to independent expenditures and electioneering communications;
5 and (6) revising the regulations governing financial participation by foreign nationals in
6 the U.S. electoral process.

7 Although Citizens United did not directly address whether labor organizations
8 also have a First Amendment right to use their general treasury funds for independent
9 expenditures and electioneering communications, the Act and Commission regulations
10 treat labor organizations in a similar manner to corporations. See 2 U.S.C. 441b; see
11 generally 11 CFR Part 114. Because the Court’s Citizens United decision, when
12 addressing corporations, often referred to labor organizations in a similar fashion, and in
13 so doing provided no basis for treating labor organization communications differently
14 than corporate communications under the First Amendment, the Commission proposes to
15 make the same regulatory changes in this Notice of Proposed Rulemaking for both
16 corporations and labor organizations.

17 I. Background

18 In Citizens United, the Supreme Court held that the Act’s prohibitions on
19 financing independent expenditures or electioneering communications with corporate
20 general treasury funds violate the First Amendment. In doing so, the Supreme Court
21 overruled Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990)
22 (“Austin”), which had upheld a comparable State law prohibiting independent
23 expenditures by corporations using their treasury funds. Citizens United also overruled

1 the part of the Court’s decision in McConnell v. FEC, 540 U.S. 93, 204-06 (2003)
2 (“McConnell”) that upheld BCRA section 203’s prohibition on corporate electioneering
3 communications.

4 A. Before BCRA

5 The Act and Commission regulations prohibit corporations and labor
6 organizations from using general treasury funds to make expenditures, including
7 independent expenditures. 2 U.S.C. 441b(a) and (b)(2); 11 CFR 114.2(b)(2).
8 Notwithstanding these prohibitions, the Act and Commission regulations permit
9 corporations and labor organizations to establish and administer separate segregated
10 funds (“SSFs”). 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.5. The funds for a corporation’s or
11 labor organization’s SSF may generally only be solicited from those within the
12 corporation or labor organization’s restricted class.⁴ The restricted class for a corporation
13 generally only includes the corporation’s executive and administrative personnel,
14 stockholders, and the families of these groups. The restricted class for a labor
15 organization generally only includes the labor organization’s members, executive or
16 administrative personnel, and the families of these groups. Even though the solicitation
17 authority is limited, an SSF may receive and accept unsolicited funds from persons
18 outside the SSF’s restricted class. 11 CFR 114.5(g); see also 11 CFR 114.5(f)
19 (establishing that SSFs are subject to the contribution limits for political committees).
20 SSF funds can be contributed directly to candidates for Federal office subject to the
21 amount limitations of the Act. SSF funds may also be used to pay for independent
22 expenditures to communicate to the general public.

⁴ The funds for a corporation’s or labor organization’s SSF may also be solicited twice yearly from employees outside of the restricted class. 11 CFR 114.6.

1 In 1986, in FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986)
2 (“MCFL”), the Supreme Court held that incorporated advocacy organizations possessing
3 certain characteristics could not constitutionally be barred from using general treasury
4 funds to make independent expenditures but let stand the prohibition as to corporations
5 that did not possess the same characteristics. Specifically, the MCFL Court held
6 unconstitutional the Act’s funding restrictions on corporate independent expenditures as
7 applied to non-profit corporations that (a) were formed for the sole purpose of promoting
8 political ideas, (b) did not engage in business activities, and (c) did not accept
9 contributions from for-profit corporations or labor organizations. Id. at 263-64.

10 In 1990, in Austin, the Supreme Court upheld a State law that prohibited
11 corporate independent expenditures supporting or opposing any candidate for State
12 office. 494 U.S. at 659. The Supreme Court based this holding on the compelling
13 governmental interest in preventing “the corrosive and distorting effects of immense
14 aggregations of wealth that are accumulated with the help of the corporate form and that
15 have little or no correlation to the public’s support for the corporation’s political ideas.”
16 Id.

17 B. Impact of BCRA

18 In enacting section 203 of BCRA, Congress extended the Act’s prohibitions on
19 the use of general treasury funds for corporate and labor organization expenditures
20 (including independent expenditures) under 2 U.S.C. 441b to include, for the first time,
21 electioneering communications. 2 U.S.C. 441b(b)(2); see also 2 U.S.C. 434(f)(3). The
22 Commission implemented the electioneering communications provisions of BCRA by
23 modifying sections 104.3, 114.2 and 114.10, and promulgating new regulations at

1 11 CFR 100.29 and 114.14. See Explanation and Justification for Final Rules on
2 Electioneering Communications, 67 FR 65190 (Oct. 23, 2002), available at
3 http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf.

4 In response to a facial challenge to the corporate-funding restrictions, reporting
5 obligations, and disclaimer requirements applicable to electioneering communications,
6 the Supreme Court upheld BCRA’s electioneering communication provisions at 2 U.S.C.
7 434(f), 441b, and 441d. See McConnell, 540 U.S. at 194, 201-02, 207-08. Specifically,
8 the Supreme Court held that the prohibition on the use of general treasury funds by
9 corporations and labor organizations to pay for electioneering communications in
10 2 U.S.C. 441b(b)(2) was not facially overbroad, because the “vast majority” of
11 communications that met the definition of electioneering communications were “intended
12 to influence [] voters’ decision” and were “the functional equivalent of express
13 advocacy.” Id. at 206.

14 Subsequently, in Wisconsin Right to Life, Inc. v. FEC, 551 U.S. 449 (2007)
15 (“WRTL”), the Supreme Court considered an as-applied challenge brought by a non-
16 profit corporation. The plaintiff sought to use its own general treasury funds, including
17 donations it had received from other corporations, to pay for broadcast advertisements
18 referring to Senator Feingold and Senator Kohl during the electioneering communications
19 window before the 2004 general election in which Senator Feingold, but not Senator
20 Kohl, was on the ballot. The plaintiff argued that these communications were genuine
21 issue ads run as part of a grassroots lobbying campaign on the issue of Senate filibusters
22 of judicial nominations. Id. at 457-61. The Court held that a communication is the
23 “functional equivalent of express advocacy” only if it is “susceptible of no reasonable

1 interpretation other than as an appeal to vote for or against a specific candidate.” Id. at
2 469. Applying that standard, the Supreme Court held that section 441b(b)(2) was
3 unconstitutional as applied to the plaintiff’s advertisements because the advertisements
4 were not the “functional equivalent of express advocacy.” Id. at 476, 480-81. The
5 Commission adopted the regulation at 11 CFR 114.15 in response to the Supreme Court’s
6 ruling in WRTL. Explanation and Justification for Final Rules on Electioneering
7 Communications, 72 FR 72899, 72902 (Dec. 26, 2007), available at
8 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf.

9 C. Citizens United

10 In January 2008, Citizens United, a non-profit corporation, released a film in
11 theaters and on DVD about then-Senator Hillary Clinton, who was a candidate in the
12 Democratic Party’s 2008 Presidential primary elections. Citizens United intended to pay
13 cable companies to make the film available to digital cable subscribers for free through
14 video-on-demand, which allows subscribers to view programming, including movies.
15 Citizens United planned to make the film available within thirty days of the 2008 primary
16 elections.

17 Citizens United filed suit seeking a preliminary injunction, arguing (a) that the
18 ban on corporate electioneering communications at 2 U.S.C. 441b(b)(2) was
19 unconstitutional as applied to payments to make the film available through video-on-
20 demand and (b) that the reporting and disclaimer requirements at 2 U.S.C. 434(f) and
21 441d were unconstitutional as applied to payments for the film and for three planned
22 advertisements for the movie. The United States District Court denied Citizens United a

1 preliminary injunction and granted the Commission’s motion for summary judgment.

2 See Citizens United v. FEC, 530 F. Supp. 2d 274 (D.D.C. 2008).

3 On appeal, the Supreme Court initially heard argument in March 2009 and
4 thereafter requested supplemental briefing and rehearing on whether the relevant portions
5 of Austin and McConnell should be overturned. The Supreme Court then invalidated
6 section 441b’s restrictions on corporate independent expenditures and electioneering
7 communications.⁵ 130 S. Ct. at 913. The Supreme Court held that the prohibition on
8 corporate independent expenditures and electioneering communications is a ban on
9 speech and concluded that section 441b was therefore “subject to strict scrutiny.” Id. at
10 898. The Supreme Court reached this conclusion “notwithstanding the fact that [an SSF]
11 created by a corporation can still speak,” which the Court determined did not provide an
12 adequate alternative mechanism for corporate speech. Id. at 897.

13 In striking down the ban on corporate independent expenditures and
14 electioneering communications, the Court overruled Austin. The Court concluded that
15 “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less
16 true because the speech comes from a corporation rather than an individual.’” Id. at 904
17 (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)).

18 The Supreme Court further held that, while the government has a compelling
19 interest in preventing corruption or the appearance of corruption, “independent

⁵ Based on this decision, on January 26, 2010, the James Madison Center for Free Speech filed a Petition for Rulemaking, available at http://www.fec.gov/law/law_rulemakings.shtml, requesting that the Commission adopt conforming regulations and repeal 11 CFR 114.2 and 114.14, which implement the ban on the use of general treasury funds by corporations and labor organizations to make independent expenditures and electioneering communications. On April 21, 2011, United States Representative Chris Van Hollen filed a Petition for Rulemaking requesting that the Commission revise its regulation at 11 CFR 109.10 regarding the reporting of independent expenditures. See Petition for Rulemaking To Revise and Amend Regulations Relating to Disclosure of Independent Expenditures, available at www.sers.nictusa.com/fosers/.

1 expenditures, including those made by corporations, do not give rise to corruption or the
2 appearance of corruption.” Id. at 909. The Supreme Court also disagreed that corporate
3 independent expenditures can be limited because of an interest in protecting dissenting
4 shareholders from being compelled to fund corporate political speech and held that such
5 disagreements may be corrected by shareholders through the procedures of corporate
6 democracy. Id. at 911. The Supreme Court found no compelling government interest to
7 support the limits on corporations’ independent political speech and, thus, invalidated
8 441b’s restrictions with respect to corporate independent expenditures and electioneering
9 communications. Id. at 913.

10 Citizens United also challenged the Act’s disclaimer and reporting provisions at
11 434(f) and 441d as applied to Citizens United’s film and three advertisements for the
12 film. Under the Act, electioneering communications must include a statement identifying
13 the person responsible for payment for the advertisement. 2 U.S.C. 441d(a). Also, any
14 person who spends more than \$10,000 on electioneering communications within a
15 calendar year must file a reporting statement with the Commission identifying the person
16 making the electioneering communication, the election to which the communication
17 pertains, and information about certain contributors. 2 U.S.C. 434(f)(2). The Supreme
18 Court rejected that challenge, upholding the reporting provisions because “transparency
19 enables the electorate to make informed decisions and give proper weight to different
20 speakers and messages.” Citizens United, 130 S. Ct. at 916. The Court found that
21 disclaimer and reporting requirements impose no ceiling on campaign-related spending,
22 do not prevent anyone from speaking, and advance the public’s “interest in knowing who
23 is speaking about a candidate shortly before an election.” Id. at 914-15. The Court also

1 concluded that “prompt disclosure of expenditures can provide shareholders and citizens
2 with the information needed to hold corporations and elected officials accountable for
3 their positions and supporters.” Id. at 916.

4 II. Overview of Changes to Part 114 Corporate and Labor Organization Activity

5 Commission regulations implementing the statutory provisions invalidated by
6 Citizens United are no longer valid.⁶ These regulations include portions of current
7 11 CFR part 114, which concern corporate and labor organization activity. Accordingly,
8 in this rulemaking, the Commission proposes (1) to amend 11 CFR 114.2, 114.3, and
9 114.4, (2) to remove 11 CFR 114.10, 114.14, and 114.15, and (3) to add a new 11 CFR
10 114.16. The Commission also seeks comment on whether to revise 11 CFR 114.2(f).

11 The Commission’s proposed changes to 11 CFR part 114 seek to comply with the
12 Court’s holding in Citizens United by (1) modifying specific language within sections of
13 part 114 that prohibit corporations and labor organizations from using general treasury
14 funds to finance independent expenditures and electioneering communications and (2)
15 repealing language that appears superfluous given the permissible uses of general
16 treasury funds under Citizens United. Because the Court’s holding in Citizens United left
17 intact the prohibition on corporate and labor organization contributions under 2 U.S.C.
18 441b, the Commission does not propose to change the provisions in 11 CFR part 114 that
19 implement this contribution ban. However, the Commission seeks comment on the
20 possibility of revising its rules prohibiting the facilitation of contributions by corporations
21 and labor organizations, to the degree that facilitation activity is conducted independently
22 of candidates.

⁶ See FEC Statement on the Supreme Court’s Decision in Citizens United v. FEC, Feb. 5, 2010, available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>.

1 Among the Commission’s proposals to comply with Citizens United are
2 alternatives for modifying current 11 CFR 114.2(b)(2)(i), which prohibits corporations
3 and labor organizations from making expenditures, including independent expenditures.
4 The Commission proposes to modify 11 CFR 114.2(b)(2)(i) in one of two ways: (1)
5 narrow the prohibition to allow all expenditures except those that are coordinated with a
6 candidate or a political party committee or (2) narrow the prohibition to allow only
7 communications that are not coordinated with a candidate or a political party committee,
8 while continuing to prohibit non-communicative expenditures. These alternative
9 approaches would also apply to the expenditure prohibition for voter registration and
10 GOTV drives, as discussed below in the proposed changes to section 114.3 (with respect
11 to the restricted class) and section 114.4 (with respect to the general public).

12 While the Commission proposes to retain the reporting requirements currently in
13 11 CFR 114.3(b), which require corporations and labor organizations to report
14 disbursements for communications containing express advocacy made to the restricted
15 class, it recognizes that a communication containing express advocacy may now be made
16 both to the general public and the restricted class, thereby triggering different thresholds
17 for reporting obligations. With respect to 11 CFR 114.4, the Commission proposes to
18 remove the prohibition on making express advocacy communications to those outside the
19 restricted class, but maintain the restrictions on coordinating with candidates and political
20 parties when making communications to those outside the restricted class. Additionally,
21 the Commission proposes to adopt a new 11 CFR 114.16 that incorporates certain
22 provisions of current 11 CFR 114.10. These provisions would affirmatively recognize
23 the right of corporations and labor organizations to make independent expenditures and

1 electioneering communications. These provisions would reference other Commission
2 regulations that now apply to corporations and labor organizations that make such
3 independent expenditures or electioneering communications, including references to the
4 reporting requirements for independent expenditures and electioneering communications
5 under 11 CFR 104.4(a), 109.10(b), and 104.20(b), and the disclaimer provisions of
6 11 CFR 110.11. Finally, the Commission proposes to remove 11 CFR 114.10, 114.14,
7 and 114.15, which implement exceptions to the general prohibition against corporate and
8 labor organization funding of independent expenditures and electioneering
9 communications, since, given the holding in Citizens United, the exceptions no longer
10 appear to be necessary.

11 III. Proposed 11 CFR 114.2(b) – Prohibitions on certain expenditures

12 The Commission regulation at 11 CFR 114.2(b) implements 2 U.S.C. 441b(a) by
13 prohibiting corporations and labor organizations from making expenditures, including
14 independent expenditures⁷ (i.e., expenditures for express advocacy⁸ communications to
15 those outside their restricted classes). This rule also prohibits corporations and labor

⁷ An “independent expenditure” is statutorily defined as “an expenditure by a person— (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. 431(17). Similarly, the Commission’s regulations define an “independent expenditure” as “an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . .” 11 CFR 100.16(a).

⁸ Express advocacy is defined in 11 CFR 100.22 as “any communication that—(a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ’76,” “Reagan/Bush” or “Mondale!”; or (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because— (1) The electoral portion of the communication is unmistakable, unambiguous, and

1 organizations from making payments for electioneering communications to those outside
2 their restricted classes unless certain criteria are met. The Supreme Court’s decision in
3 Citizens United invalidated the prohibitions on corporate and labor organization
4 independent expenditures and electioneering communications in 2 U.S.C. 441b(a).⁹
5 Accordingly, certain portions of 11 CFR 114.2(b) are no longer valid. Thus, the
6 Commission proposes to revise this regulation to repeal the prohibitions on independent
7 expenditures and electioneering communications.

8 A. 11 CFR 114.2(b)(2)(i) – Prohibition on Corporate and Labor Organization
9 Expenditures

10 Current 11 CFR 114.2(b)(2)(i) generally prohibits corporations and labor
11 organizations from making “expenditures,” as defined in 11 CFR part 100, subpart D.
12 With certain exceptions, this prohibition applies to all expenditures whether they are
13 independent, coordinated, or any other form of expenditure, including in-kind
14 contributions.¹⁰ It also applies whether expenditures are for communications or are for
15 non-expressive activity.

16 The Commission is considering two alternatives for revising 11 CFR
17 114.2(b)(2)(i). Both alternatives would permit corporations and labor organizations to
18 make independent expenditures from their general treasury funds for communications
19 that are not coordinated with a candidate or political party, and both alternatives would

suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.”

⁹ See discussion above regarding the applicability of the Citizens United holding to labor organizations.

¹⁰ An example of an in-kind contribution is “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for the goods or services.” 11 CFR 100.111(e)(1). All corporate and labor organization contributions, including in-kind contributions, continue to be prohibited under Citizens United. Coordinated communications and coordinated expenditures continue to be prohibited because they are a form of in-kind contribution. 11 CFR 109.20(b), 109.21(b).

1 maintain the prohibition on corporate and labor organization expenditures for all
2 activities that are coordinated with a candidate or political party as defined in 11 CFR
3 109.20 or 109.21. The alternatives differ in that Alternative A would permit corporate
4 and labor organizations to make all types of expenditures from their general treasuries for
5 any non-coordinated activities, whether or not they are communications, while
6 Alternative B would maintain the existing prohibition on non-expressive expenditures by
7 corporations and labor organizations regardless of whether they are coordinated with a
8 candidate or political party. The Commission invites comment on which, if either, of the
9 two proposals would better implement Citizens United and why.

10 As discussed in more detail below, Alternative A proposes treating all
11 expenditures the same on the ground that Citizens United did not distinguish among
12 different types of expenditures so long as they are made independently of any campaign
13 or political party. By contrast, Alternative B suggests distinguishing between
14 expenditures for communications and other types of expenditures, on the specific ground
15 that the Court's holding in Citizens United struck down only prohibitions on political
16 speech as inconsistent with the First Amendment, but did not address conduct more
17 generally. Under the statute and the Commission's historical understanding,
18 "independent expenditures" are limited only to communications. The Commission seeks
19 comment on whether it has the legal authority to interpret the Court's holding in Citizens
20 United to reach beyond political speech in the form of independent expenditures to non-
21 communicative expenditures in the face of existing statutory provisions that prohibit non-
22 communicative expenditures by corporations and labor organizations and have not been
23 declared unconstitutional. Does the Commission have jurisdiction to effectively repeal

1 (through non-enforcement) a statute and the implementing regulations that are valid and
2 have not been subject to constitutional challenge? The Commission invites comment on
3 which, if either, of the two approaches reflects the appropriate response to Citizens
4 United and why.

5 Alternative A – Permit Corporations and Labor Organizations to Make
6 Expenditures Except for Coordinated Expenditures and Coordinated
7 Communications

8 The Court in Citizens United stated that “[b]y definition, an independent
9 expenditure is political speech presented to the electorate that is not coordinated with a
10 candidate.” Citizens United, 130 S. Ct. at 910. Alternative A would therefore comply
11 with the Court’s holding by repealing the existing broad prohibition on corporate and
12 labor organization expenditures from general treasury funds, and replace it with a
13 regulation specifically prohibiting only expenditures that are coordinated with a candidate
14 or a political party committee, and coordinated communications.

15 The Commission seeks comment on whether Alternative A would comply with
16 the Citizens United holding. Does the proposal eliminate too much or too little of the
17 prohibition on corporate and labor organization expenditures? Does the proposed
18 alternative provide sufficiently clear guidance as to the types of expenditures
19 corporations and labor organizations may constitutionally make in accordance with
20 Citizens United?

21 The Commission also seeks comment on whether Alternative A should
22 distinguish between expenditures for communications (i.e., political speech) and other
23 types of non-coordinated expenditures. Expenditures for all political speech by

1 corporations and labor organizations would be permitted under Alternative A so long as
2 they are not coordinated with candidates or political parties. Expenditures that are not for
3 communications would also be permitted under Alternative A as long as these
4 expenditures are not coordinated with candidates or political parties. Examples would
5 include but not be limited to (a) payment for transportation of volunteers to campaign
6 events, (b) payment for expenses of voter registration drives, (c) the provision of food to
7 campaign volunteers, or (d) providing babysitting services to enable voters supporting a
8 particular candidate to vote. Should such non-communicative expenditures by
9 corporations and labor organizations continue to be prohibited on the ground that the
10 Citizens United decision did not reach the question and therefore the statutory prohibition
11 still applies? Alternatively, should they be permitted on the ground that the holding of
12 Citizens United may be interpreted to reach beyond communications and permits any
13 corporate or labor organization expenditure that is not coordinated with a candidate?

14 For example, how should the Commission treat corporate or labor organization
15 expenditures for transporting voters to polling places as part of a GOTV campaign
16 supporting or opposing a specific candidate, when not coordinated with any candidate or
17 political party? Such expenses might include the driver's salary, vehicle rental, and fuel,
18 and, if workers were brought in from another geographical area to assist in the efforts, the
19 corporation or labor organization might also be paying for their travel, lodging, and food
20 costs. These payments would be permitted in unlimited amounts under Alternative A.
21 The Commission seeks comment on this approach. Does the Commission have the legal
22 authority to interpret the Court's holding in Citizens United to reach beyond independent
23 expenditures to other types of non-communicative expenditures in the face of conflicting

1 statutory provisions that have not been declared unconstitutional? Must any further
2 expansion of the holding in Citizens United come through as-applied legal challenges?

3 Alternative B - Permit Corporations and Labor Organizations to Make
4 Independent Expenditures but not Coordinated Communications or Non-
5 Communicative Expenditures

6 Alternative B implements Citizens United by amending the prohibition on
7 corporate and labor organization expenditures to permit those entities to make
8 independent expenditures from their general treasury funds for non-coordinated
9 communications, but continues to prohibit non-communicative expenditures and in-kind
10 contributions, including coordinated communications.

11 Alternative B distinguishes expenditures for communications from other types of
12 expenditures. As noted above, the Court in Citizens United stated that “[b]y definition,
13 an independent expenditure is political speech presented to the electorate that is not
14 coordinated with a candidate.” Citizens United, 130 S. Ct. at 910. This language
15 suggests that the rationale of Citizens United applies to corporate and labor organization
16 political speech only and does not apply to non-communicative activity. Indeed, the
17 definition of expenditure, which includes “any purchase, payment, distribution, loan,
18 advance, deposit, or gift of money or anything of value, made by any person for the
19 purpose of influencing any election for Federal office,” 2 U.S.C. 431(9)(A), covers non-
20 communicative activity. The Commission is therefore proposing Alternative B to clearly
21 distinguish between permissible independent expenditures for political speech on the one
22 hand, and types of non-speech and coordinated expenditures by corporations and labor
23 organizations that would continue to be prohibited, on the other. Alternative B would

1 apply the Court’s reasoning to communications generally, but would not apply it to other
2 types of expenditures because Citizens United addressed only, in the words of the Court,
3 “political speech,” 130 S. Ct. at 916, in the form of independent expenditures and
4 electioneering communications.

5 There is a line of judicial decisions, and several Commission actions, that provide
6 authority for drawing a distinction between independent expenditures for independent
7 political speech and non-speech expenditures in this rulemaking. In Buckley v. Valeo,
8 424 U.S. 1 (1976), the Court distinguished between contribution limits, which it upheld,
9 and expenditure limits, which it invalidated. The Court explained that “[t]he expenditure
10 limitations contained in the Act represent substantial rather than merely theoretical
11 restraints on the quantity and diversity of political speech.” 424 U.S. at 19. By contrast,
12 the Court concluded contributions involve only a limited degree of protected speech
13 because they represent a “symbolic expression of support” such that the limitation “does
14 not in any way infringe the contributor’s freedom to discuss candidates and issues.” Id. at
15 21. See MCFL, 479 U.S. at 259-60 (“We have consistently held that restrictions on
16 contributions require less compelling justification than restrictions on independent
17 spending.”). Moreover, in Buckley, the Court also recognized that certain expenditures –
18 namely those that are made in coordination with candidates – are nothing more than
19 “disguised contributions” and receive only the lesser protections afforded to contributions
20 by the constitution. 424 U.S. at 46-47. Finally, although the Buckley Court stated that
21 “the dependence of a communication on the expenditure of money” does not “itself
22 introduce a non speech element,” the Court did acknowledge that the “giving and

1 spending of money” may ultimately involve primarily conduct, rather than speech. Id. at
2 16.

3 The Supreme Court has long distinguished between government restrictions on
4 pure speech and government restrictions on conduct, including expressive conduct. See,
5 e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding State statute despite its
6 incidental limitations on some expressive activity); Spence v. Washington, 418 U.S. 405
7 (1974) (striking down State statute that infringed protected expression); United States v.
8 O’Brien, 391 U.S. 367 (1968) (upholding Federal statute due to non-communicative
9 impact of conduct). While restrictions on pure speech are subject to strict scrutiny by the
10 courts, a “sufficiently important governmental interest in regulating the nonspeech
11 element can justify incidental limits on First Amendment freedoms.” Barnes, 501 U.S. at
12 567 (quoting O’Brien, 391 U.S. at 376).

13 One Federal court has explicitly recognized and applied the distinction between
14 speech and conduct to the expenditure rules administered by the Commission. In FEC v.
15 Christian Coalition, the court considered regulations regarding the coordination of
16 expenditures with campaigns. 52 F. Supp. 2d 45 (D.D.C. 1999). The court stated that
17 “the First Amendment requires different treatment for ‘expressive,’ ‘communicative’ or
18 ‘speech-laden’ coordinated expenditures, which feature the speech of the spender, from
19 coordinated expenditures on non-communicative materials, such as hamburgers or travel
20 expenses for campaign staff.” Id. at 85 n.45. The court limited its analysis to “expressive
21 coordinated expenditures” because “[t]he interest-balancing process may well yield
22 different results for non-expressive coordinated expenditures.” Id. at 91. The
23 Commission’s rules on coordination also distinguish between communications and

1 “expenditures that are not made for communications.” Explanation and Justification for
2 Final Rules on Coordinated and Independent Expenditures, 68 FR 421, 425 (Jan. 3,
3 2003), available at
4 http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf; see Statement
5 of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von
6 Spakovsky, MUR 5564, Alaska Democratic Party, at 7 (acknowledging that the
7 Explanation and Justification for 11 CFR 109.20 “does limit Section 109.20 to
8 expenditures that are not communications”), available at
9 <http://eqs.sdrdc.com/eqsdocsMUR/28044191265.pdf>.¹¹

10 “Independent expenditure” is a term that is defined in the Act and the
11 Commission’s regulations. Congress crafted the statutory definition of “independent
12 expenditure” to reflect the Court’s decision in Buckley. See H.R. DOC. NO. 94-917, at 5
13 (1976). In Buckley, the Court construed the provision “expenditures . . . relative to a
14 clearly identified candidate” as “expenditures for communications that in express terms
15 advocate the election or defeat of a clearly identified candidate for federal office.”¹² 424
16 U.S. at 44 (emphasis added); see also id. at 80.

17 Indeed, the Citizens United Court, in the language quoted above, explicitly
18 referred to the “definition” of “independent expenditure.” The statute defines
19 “independent expenditure” as “an expenditure by a person . . . expressly advocating the
20 election or defeat of a clearly identified candidate.” 2 U.S.C. 431(17). The statute’s use
21 of the phrase “expressly advocating” underscores that the definition of independent

¹¹ Compare 11 CFR 109.20 (concerning a coordinated expenditure that is “not made for a coordinated communication”) with 11 CFR 109.21 (concerning a “communication [that] is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing”).

¹² In this context, the Court was not discussing the definition of expenditure at 2 U.S.C. 431(9), but rather a pre-Buckley provision that was limited by its terms to communicative activity.

1 expenditure is limited to communications. In short, although other activities may indicate
2 support for a candidate, only communications can “expressly advocate.”

3 Furthermore, the Commission has, as a historical matter, consistently understood
4 the statutory definition of “independent expenditure” to apply only to communications.

5 The Commission’s current regulation defines “independent expenditure” as “an
6 expenditure by a person for a communication expressly advocating the election or defeat
7 of a clearly identified candidate.” 11 CFR 100.16(a) (emphasis added). See also 11 CFR
8 100.22 (“Expressly advocating means any communication that . . .”) (emphasis added).

9 The Commission included this language in the original regulation implementing the Act.
10 41 FR 35947 (Aug. 25, 1976). The Explanation and Justification for this regulation
11 explained that the definition parallels the statute “with additional language from Buckley
12 requiring that the expenditure be communicative in nature.” Explanation and
13 Justification for Final Rules on Part 114, H.R. DOC. NO. 95-44, at 54 (1977) (“1977
14 E&J”).

15 Under proposed Alternative B, corporations and labor organizations would be
16 permitted to make expenditures from general treasury funds solely for the type of activity
17 described by the Supreme Court: “political speech presented to the electorate that is not
18 coordinated with a candidate.” Citizens United, 130 S. Ct. at 910. Under this proposed
19 alternative, coordinated communications as well as all non-communicative expenditures
20 would continue to be prohibited, on the ground that the holding in Citizens United did not
21 extend to non-speech expenditures, which were not before the Court.

22 The Commission seeks comment on Alternative B. As noted above, Citizens
23 United referred only to “political speech” in the form of independent expenditures and

1 electioneering communications. The Court did not address conduct. Accordingly, the
2 Commission seeks comment as to whether the decision in Citizens United should be read
3 to apply to non-communicative activities. Does the proposal eliminate too much or too
4 little of the statutory prohibition on corporate and labor organization expenditures? Is
5 Alternative B specific enough as to the types of expenditures corporations and labor
6 organizations may constitutionally make, according to Citizens United? Does the Act
7 contemplate the proposed distinction between political speech and non-expressive
8 political activities? Does Citizens United or other Supreme Court precedent permit or
9 require this distinction? The Commission also seeks comment on whether Alternative B
10 should be modified to preserve more of the existing prohibitions, and if so, which ones
11 should be preserved and why?

12 B. 11 CFR 114.2(b)(2)(ii) and (b)(3) – Prohibition on Corporate and Labor
13 Organization Express Advocacy Communications and Electioneering Communications to
14 Those Outside the Restricted Class

15 Currently, 11 CFR 114.2(b)(2)(ii) prohibits corporations and labor organizations
16 from “making expenditures with respect to a Federal election . . . for communications to
17 those outside the restricted class that expressly advocate the election or defeat of one or
18 more clearly identified candidate(s) or the candidates of a clearly identified political
19 party.” Because the Supreme Court held in Citizens United that corporations and labor
20 organizations have a constitutional right to make expenditures for communications
21 containing express advocacy to those not in their restricted classes, the Commission
22 proposes to remove paragraph (b)(2)(ii).

1 Currently, 11 CFR 114.2(b)(3) prohibits corporations and labor organizations
2 from making payments for electioneering communications to those outside their
3 restricted classes unless permissible under 11 CFR 114.10 or 114.15. This provision does
4 not apply to State party committees and State candidate committees that incorporate
5 under 26 U.S.C. 527(e)(1), provided that (1) the committee is not a political committee as
6 defined in 11 CFR 100.5; (2) the committee incorporated for liability purposes only;
7 (3) the committee does not use any funds donated by corporations or labor organizations
8 to make electioneering communications; and (4) the committee complies with the
9 reporting requirements for electioneering communications at 11 CFR part 104.

10 Because the Supreme Court held in Citizens United that all corporations may
11 make electioneering communications to audiences outside their restricted classes, the
12 Commission proposes to remove paragraph (b)(3) of section 114.2.

13 C. 11 CFR 114.2(f) – Facilitating the making of contributions

14 The Act and Commission regulations prohibit corporations and labor
15 organizations from making contributions to candidates or political committees in
16 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). Corporations
17 and labor organizations are also generally prohibited from facilitating the making of
18 contributions to candidates or political committees. 11 CFR 114.2(f)(1). Facilitating the
19 making of contributions means “using corporate or labor organization resources or
20 facilities to engage in fundraising activities in connection with any Federal election.” Id.
21 Examples of facilitation include (a) ordering or directing subordinates to plan, organize,
22 or carry out a fundraising project as part of their work responsibilities, using corporate or
23 labor organization resources, (b) providing materials for the purpose of transmitting or

1 delivering contributions, such as stamps and envelopes, and (c) using coercion to urge
2 individuals to make contributions. 11 CFR 114.2(f)(2). See Explanation and
3 Justification for Final Rules on Corporate and Labor Organization Activity, 60 FR 64620,
4 64624 (Dec. 14, 1995), available at
5 [http://www.fec.gov/law/cfr/ej_compilation/1995/1995-](http://www.fec.gov/law/cfr/ej_compilation/1995/1995-23_Express_Advocacy_Indep_Exp_and_Coordination.pdf)
6 [23_Express_Advocacy_Indep_Exp_and_Coordination.pdf](http://www.fec.gov/law/cfr/ej_compilation/1995/1995-23_Express_Advocacy_Indep_Exp_and_Coordination.pdf). Additionally, corporations
7 and labor organizations are prohibited from acting as conduits for contributions
8 earmarked to candidates or their authorized committees. 11 CFR 110.6(b)(2)(ii).

9 In light of the holding in Citizens United, the Commission is seeking comment on
10 whether -- and if so, to what extent and how -- its regulations on corporate and labor
11 organization facilitation of contributions should be revised. As discussed above, the
12 Citizens United decision invalidated restrictions on corporate independent expenditures
13 and electioneering communications. However, Citizens United left undisturbed the
14 prohibition on contributions by corporations and labor organizations. The Court noted
15 that “Citizens United has not made direct contributions to candidates, and it has not
16 suggested that the Court should reconsider whether contribution limits should be
17 subjected to rigorous First Amendment scrutiny.” 130 S. Ct. at 909. See also Buckley,
18 424 U.S. at 28-29 (“Significantly, the Act's contribution limitations in themselves do not
19 undermine to any material degree the potential for robust and effective discussion of
20 candidates and campaign issues by individual citizens, associations, the institutional
21 press, candidates, and political parties.”). Absent coordination with a candidate, is
22 facilitating the making of contributions by the corporate and labor organization activities
23 still prohibited by these prohibitions on contributions?

1 Given that Citizens United left the prohibition on contributions by corporations
2 and labor organizations entirely undisturbed, is there any need for the Commission to
3 revise its facilitation regulations? Alternatively, do the Commission’s regulations on
4 facilitating contributions impermissibly restrict activities that are constitutionally
5 protected, when the activities are conducted independent of a candidate or political party
6 committee? Does the Commission have the legal authority to extend the Court’s holding
7 in Citizens United beyond the Act’s identification of the line between activity that is
8 permissible and that which is not?

9 IV. Proposed 11 CFR 114.3 – Disbursements for communications to the restricted
10 class by corporations and labor organizations in connection with a Federal election

11 Current 11 CFR 114.3 implements certain statutory exceptions to the general ban
12 on contributions and expenditures by corporations and labor organizations. Before
13 Citizens United was decided, corporations and labor organizations could make
14 communications containing express advocacy only to their restricted class. 2 U.S.C.
15 441b(a) and (b)(2)(A). Section 114.3 implements these provisions of the Act, and sets
16 out the requirements and restrictions on those communications to the restricted class,
17 including publications, candidate and party appearances, phone banks, and voter
18 registration and GOTV drives.

19 The Commission’s current regulations at 11 CFR 114.4 set out the restrictions and
20 prohibitions for communications by corporations and labor organizations beyond the
21 restricted class and to the general public. Citizens United held that, under the First
22 Amendment, corporations and labor organizations may make independent expenditures
23 beyond the restricted class to the general public. However, the Act exempts

1 disbursements for communications made by corporations and labor organizations to their
2 restricted class from the definition of expenditure altogether, whether or not the
3 communications contain express advocacy, and, as discussed in greater detail below,
4 establishes different reporting requirements for these communications in 2 U.S.C.
5 431(9)(B)(iii). Because of this statutory distinction between disbursements for express
6 advocacy communications made to the restricted class, which are not expenditures, and
7 disbursements for express advocacy communications made beyond the restricted class,
8 which are expenditures, the Commission proposes to maintain the current structure in
9 which 11 CFR 114.3 addresses disbursements for communications containing express
10 advocacy made to the restricted class, and 11 CFR 114.4 addresses disbursements for
11 communications containing express advocacy made to those outside the restricted class,
12 with certain proposed changes discussed below. The Commission requests comment on
13 this proposal to maintain the current structure. Instead, would combining 11 CFR 114.3
14 and 114.4 be more readily understandable to the public now that corporations and labor
15 organizations can make express advocacy communications beyond the restricted class?
16 Should the Commission maintain the separate regulations as they are now, or separate
17 them in a different way?

18 A. 11 CFR 114.3(a) – General provisions on communications to the restricted class
19 in connection with a Federal election

20 Section 114.3(a) of the Commission’s rules states that corporations and labor
21 organizations may communicate on any subject with their restricted class, including
22 communications containing express advocacy. Section 114.3(a) also states that
23 corporations and labor organizations may coordinate their activities under section 114.3

1 with candidates and political committees, but only to the extent permitted by section
2 114.3. For example, under paragraph (c)(2), corporations and labor organizations may
3 coordinate with a candidate in planning a candidate appearance before members of the
4 restricted class. Paragraph (c)(4), however, prohibits corporations and labor
5 organizations from coordinating voter registration and GOTV drives with candidates,
6 candidates' committees, or political parties. The Commission does not propose any
7 changes to 11 CFR 114.3(a), but seeks comment on this approach.

8 B. 11 CFR 114.3(b) – Reporting of disbursements for express advocacy
9 communications

10 1. Reporting of disbursements for express advocacy communications solely to the
11 restricted class under current 11 CFR 114.3(b)

12 The proposed rules do not change the requirement, currently at 11 CFR 114.3(b),
13 that corporations and labor organizations report disbursements for communications
14 containing express advocacy made to the restricted class in accordance with 11 CFR
15 100.134 and 104.6. The Act exempts express advocacy communications made by
16 corporations and labor organizations to their restricted class from the definition of
17 “expenditure.” 2 U.S.C. 431(9)(B)(iii). However, the Act requires that corporations and
18 labor organizations that make disbursements for express advocacy communications to the
19 restricted class in excess of \$2,000 for any election file quarterly reports in an election
20 year and pre-election reports for any general election. 2 U.S.C. 431(9)(B)(iii);
21 434(a)(4)(A)(i) and (ii). This statutory requirement is implemented in the Commission
22 regulations at current 11 CFR 100.134(a), 104.6(a), and 114.3(b).

1 2. Reporting of disbursements for express advocacy communications beyond the
2 restricted class

3 As discussed in Section VI.B below, proposed 11 CFR 114.16(b) requires
4 corporations and labor organizations that choose to make independent expenditures for
5 communications to persons beyond the restricted class to report these independent
6 expenditures under 2 U.S.C. 434(c). This provision requires that “every person (other
7 than a political committee) who makes independent expenditures in an aggregate amount
8 or value in excess of \$250 during a calendar year” report such expenditures to the
9 Commission. Thus, under 2 U.S.C. 434(c), corporations and labor organizations that
10 make such independent expenditures must now file a report in the first reporting period in
11 which the corporation or labor organization’s independent expenditures exceed the \$250
12 reporting threshold and in any succeeding reporting period during the same calendar year
13 during which the corporation or labor organization makes additional independent
14 expenditures of any amount. These reports must disclose the identity of any person who
15 received any disbursement during the reporting period in an aggregate amount greater
16 than \$200 during the calendar year in connection with an independent expenditure made
17 by the corporation or labor organization. The reports must also disclose, among other
18 things, contributions received by the person making the independent expenditure, the
19 date, amount, and purpose of the independent expenditure, a statement indicating whether
20 the independent expenditure is in support of, or in opposition to the relevant candidate,
21 and a certification that the independent expenditure is not made in cooperation,
22 consultation, or concert with, or at the request of, any candidate, or any authorized
23 committee or agent of such committee. 2 U.S.C. 434(c). Therefore, subsequent to

1 Citizens United, corporations and labor organizations must report all independent
2 expenditures for communications made beyond the restricted class once the \$250 per year
3 threshold is met, and must report disbursements for express advocacy communications to
4 the restricted class once the \$2,000 per election threshold is met. Additional
5 requirements for the reporting of funds given by others to corporations or labor
6 organizations that make independent expenditures or electioneering communications are
7 discussed below, in Sections VIII and IX.

8 The Commission does not propose to change the language of the reporting
9 requirements at current 11 CFR 114.3(b) because Citizens United did not affect the
10 provision of the Act at 2 U.S.C. 431(9)(B)(iii) that exempts disbursements for express
11 advocacy communications to the restricted class from the definition of “expenditure” and
12 establishes the reporting requirement for such communications. The Commission seeks
13 comment on this approach.

14 3. Reporting of express advocacy communications both to the restricted class and
15 outside the restricted class

16 The Commission seeks comment on how spending for communications by a
17 corporation or labor organization directed to both the restricted class and outside the
18 restricted class should be reported. If a corporation or labor organization makes a single
19 disbursement for a communication containing express advocacy that is made both to the
20 general public, which is an independent expenditure, and the restricted class, which is
21 exempt from the definition of expenditure, should the corporation or labor organization
22 allocate the expense between the cost of the communication made to the restricted class
23 and the cost of the communication made beyond the restricted class and report the

1 allocated expenses separately under the two reporting regimes? How would costs be
2 allocated for a broadcast communication, such as a television advertisement, that is not
3 specifically directed at identifiable members of the restricted class? Alternatively, would
4 the fact that the communication went beyond the restricted class result in the entire
5 disbursement being treated as an independent expenditure, which therefore must be
6 reported only under the independent expenditure reporting regime? For items like
7 bumper stickers and T-shirts, when a corporation or labor organization pays for the items
8 and distributes them to members of the restricted class, does the fact that they can be seen
9 beyond the restricted class transform their classification? Given that the statutory
10 provision has not changed, is there a way to reconcile the two reporting regimes for
11 disbursements for communications containing express advocacy made to the restricted
12 class and independent expenditures for communications made to those outside the
13 restricted class?

14 C. 11 CFR 114.3(c)(1) and (2) – Publications and candidate appearances

15 Section 114.3(c) governs several of the types of communications that may be
16 made to the restricted class: publications; candidate and party appearances; phone banks;
17 and voter registration and GOTV drives, and sets forth certain requirements and
18 restrictions that apply to each. Paragraph 114.3(c)(1) states that a corporation or labor
19 organization may distribute printed materials expressly advocating the election or defeat
20 of a clearly identified candidate or candidates of a political party to its restricted class,
21 provided that certain requirements and restrictions are met. The provision requires that
22 the material be produced at the expense of the corporation or labor organization, reflect
23 the views of the corporation or the labor organization, and not be a republication or

1 reproduction of campaign materials prepared by the candidate, candidate’s committee, or
2 candidate’s authorized agents.

3 Paragraph 114.3(c)(2) provides that corporations and labor organizations may
4 invite a candidate, a candidate’s representative, or a party representative to address the
5 restricted class at meetings, conventions, and other functions of the corporation or labor
6 organization. Paragraph 114.3(c)(2) currently provides that the candidate, the candidate’s
7 representative, or the party representative may ask for and accept contributions to his or
8 her campaign or party, and may ask that contributions to the corporation or labor
9 organization’s SSF be designated for the candidate’s campaign or party. Paragraph
10 114.3(c)(2) prohibits officers, directors, or other representatives of the corporation or
11 labor organization from collecting contributions on behalf of the candidate or party
12 committee. Finally, the provision addresses news media coverage of these appearances.

13 The Commission does not propose to change the provisions of 11 CFR
14 114.3(c)(1) and (2). The Commission seeks comment on this approach.

15 D. 11 CFR 114.3(c)(3) – Phone banks

16 Section 114.3(c)(3) specifically provides that corporations and labor organizations
17 may establish and operate phone banks to urge members of their restricted class to
18 register and/or vote for a particular candidate or candidates, or to register with a
19 particular political party. Because corporations and labor organizations may continue to
20 establish and operate such phone banks, the Commission does not propose to change this
21 provision. However, because Citizens United struck down the prohibition on express
22 advocacy communications by corporations and labor organizations beyond the restricted
23 class, the Commission seeks comment on whether a separate provision expressly

1 permitting corporations and labor organizations to use phone banks to urge members of
2 the restricted class to register or vote for a particular candidate or candidates is still
3 necessary. Would retaining the separate provision create an impression that corporations
4 and labor organizations are prohibited from establishing and operating a phone bank
5 aimed at persons beyond the restricted class? Are there any costs associated with a phone
6 bank such as payment for provision of transportation and food to phone bank volunteers,
7 as discussed in Section III.A above, that lack a sufficient nexus to the communicative
8 activity such that they should continue to be prohibited as non-communicative
9 expenditures? The Commission seeks comment on whether to remove or modify
10 paragraph (c)(3) of section 114.3.

11 E. Proposed 11 CFR 114.3(c)(4) – Voter registration and get-out-the-vote drives

12 Current 11 CFR 114.3(c)(4) provides that a corporation or a labor organization
13 may conduct nonpartisan voter registration and GOTV drives “aimed at its restricted
14 class.” Section 114.3(c)(4) states that voter registration and GOTV drives include
15 providing transportation to the place of registration and to the polls. The current
16 provision further permits such drives to include communications containing express
17 advocacy, “such as urging individuals to register with a particular political party or to
18 vote for a particular candidate or candidates.” 11 CFR 114.3(c)(4). However, the current
19 provision prohibits corporations and labor organizations from withholding or refusing to
20 give information and other assistance regarding registering or voting “on the basis of
21 support for or opposition to particular candidates, or a particular political party.” Id.

22 The Commission is proposing two alternatives to revise paragraph (c)(4). Both
23 alternatives would make a technical change to remove the language stating that urging

1 individuals to register with a given party constitutes express advocacy because such
2 activity may, but does not necessarily, involve expressly advocating the election or defeat
3 of one or more clearly identified candidates. Alternative A also repeals the existing
4 requirement that corporations or labor organizations not withhold or refuse to give
5 information or other assistance on the basis of support for, or opposition to, particular
6 candidates or a particular political party, but maintain the exemption from the definition
7 of “contribution or expenditure” under 2 U.S.C. 441b(b)(2)(B) for voter registration and
8 GOTV drives that adhere fully to the statutory requirement. Alternative B does not make
9 any changes to current 11 CFR 114.3(c)(4), except the technical change, and therefore
10 retains the current prohibition on withholding or refusing to give information and other
11 assistance regarding registering or voting “on the basis of support for or opposition to
12 particular candidates, or a particular political party.” The Commission invites comment
13 on which, if either, of the two proposals better adheres to the existing statutory structure
14 and complies with Citizens United and why.

15

1 Alternative A – Repeal requirement that corporations and labor organizations not
2 withhold or refuse to provide assistance on the basis of support for, or opposition
3 to, particular candidates or a particular party

4 This alternative would repeal the prohibition on withholding or refusing to
5 provide information or other assistance regarding registering or voting based on support
6 for or opposition to particular candidates, or a particular party. Instead, Alternative A
7 only prohibits corporations and labor organizations from conducting voter registration or
8 GOTV drives if the activity is coordinated with a candidate or a political party. As
9 discussed in Section III.A above, one approach to revising the Commission’s regulations
10 to comply with the decision in Citizens United would be to eliminate the existing broad
11 prohibition on corporate and labor organization expenditures, and instead prohibit only
12 those expenditures that are coordinated with a candidate or a political party. Similarly,
13 Alternative A provides that corporations and labor organizations may conduct voter
14 registration and GOTV drives, so long as they were not coordinated with a candidate or
15 political party.

16 Alternative A, however, maintains the statutory exception to the definition of
17 “contribution or expenditure” for voter registration and GOTV drives. See 2 U.S.C.
18 441b(b)(2)(B). Under existing rules, corporations and labor organizations do not have to
19 report to the Commission disbursements for voter registration and GOTV drives that
20 meet the conditions of the statutory exception, since such disbursements are neither
21 contributions nor expenditures. While voter registration and GOTV drives are
22 permissible under Alternative A regardless of whether the drives meet the conditions of
23 the statutory exception, corporations or labor organizations conducting drives that do

1 meet those conditions are not required to report disbursements for those drives. Thus,
2 Alternative A states that disbursements for voter registration and GOTV drives are not
3 contributions or expenditures if the drive is conducted in such a manner that the
4 corporation or labor organization does not withhold or refuse to provide information or
5 other assistance regarding registering or voting on the basis of support for or opposition
6 to particular candidates or a particular political party, consistent with the statutory
7 exception in 2 U.S.C. 441b(b)(2)(B).

8 The Commission also notes the significance of this reporting regime for the
9 Commission’s choice of alternatives for amending section 114.4. Corporations and labor
10 organizations are not required to report disbursements associated with qualifying voter
11 registration or GOTV drives, such as driver salaries and the cost of fuel, while persons
12 who file reports with the Commission must report all expenditures for communications
13 (both independent expenditures and electioneering communications). The statute thus
14 implicitly distinguishes between communications and voter registration and GOTV
15 drives.

16 The Commission requests comment on this approach. Does Alternative A comply
17 with Citizens United? Does the proposal eliminate too much or too little in implementing
18 the remaining prohibitions on corporate and labor organization expenditures? Is
19 Alternative A’s uniform treatment of all expenditures consistent with the statutory
20 distinction, described above, between the treatment of communications and other
21 activities?

22

1 Alternative B – Retain existing regulation at 11 CFR 114.3(c)(4)

2 Alternative B makes no changes to the existing regulation at 11 CFR 114.3(c)(4)
3 other than the technical change discussed above. As discussed in Section III.A above,
4 one alternative for revising the Commission’s regulations to comply with the decision in
5 Citizens United would be to specifically exclude expenditures for communications (i.e.,
6 “independent expenditures”) from the broader prohibition on expenditures, with the result
7 being that certain corporate and labor organization expenditures that do not involve
8 communications would remain prohibited. Like proposed Alternative B for 11 CFR
9 114.2(b)(2)(i) discussed above, Alternative B for 11 CFR 114.3(c)(4) also distinguishes
10 between speech and non-speech activity.

11 In promulgating the current regulation at 11 CFR 114.3(c)(4), the Commission
12 distinguished between the “‘pure speech’ aspects of the drives [that] may be partisan,”
13 and the non-speech activity aspects of the drives, which “must be conducted in a
14 nonpartisan manner.” 1977 E&J at 105. The Commission’s implementation of the
15 nonpartisan requirement of 2 U.S.C. 441b(b)(2)(B) reflects this distinction between “pure
16 speech” and non-speech elements of voter registration and GOTV drives. In Alternative
17 B, the Commission would continue to regulate the nonspeech aspects of voter registration
18 and GOTV drives in order to implement 2 U.S.C. 441b because Citizens United did not
19 address the prohibition on corporate and labor organization disbursements that do not
20 involve political speech in the form of independent expenditures and electioneering
21 communications. Alternative B reflects the principle that, as the Supreme Court has
22 stated, “It is possible to find some kernel of expression in almost every activity a person
23 undertakes . . . but such a kernel is not sufficient to bring the activity within the

1 protection of the First Amendment.” Dallas v. Stanglin, 490 U.S. 19, 25 (1989). These
2 expenses might include but not be limited to the driver’s salary, vehicle rental and fuel,
3 and travel, lodging, and food costs in instances where volunteers or workers were
4 required to travel in order to participate in the voter registration or GOTV drive. These
5 expenses might also include office leasing and other general office costs, as well as child
6 care costs for voter registration and GOTV workers and for voters.

7 In Alternative B, as in Alternative A, a corporation or labor organization
8 continues to be able to make voter registration or GOTV communications, including
9 express advocacy, to its restricted class under 11 CFR 114.3(c)(4). Furthermore, as in
10 Alternative A, in Alternative B voter registration and GOTV drives conducted in
11 accordance with 11 CFR 114.3(c)(4) remain exempt from the definition of “contribution
12 or expenditure” under 2 U.S.C. 441b(b)(2)(B). However, under Alternative B,
13 corporations and labor organizations remain prohibited from engaging in non-
14 communicative activities related to voter registration and GOTV drives other than those
15 conducted in accordance with 11 CFR 114.3(c)(4).

16 The Commission requests comment on this approach. Is Alternative B consistent
17 with the holdings in Citizens United? Is it appropriate to interpret these holdings as
18 relating only to political speech and therefore not reaching non-communicative conduct?

19 V. Proposed 11 CFR 114.4 – Disbursements for communications by corporations
20 and labor organizations beyond the restricted class in connection with a Federal election

21 Current 11 CFR 114.4 sets out a number of exceptions to the prohibitions on
22 corporations and labor organizations making expenditures. The regulation permits
23 certain communications and activities directed beyond the restricted class, both to

1 employees outside the restricted class and the general public. This section also permits
2 certain communications made to those outside the restricted class to be coordinated, to a
3 limited extent, with candidates. Specifically, section 114.4(b) covers candidate and party
4 appearances on corporate or labor organization premises or at a meeting, convention, or
5 other function that are attended by employees beyond the restricted class.

6 Notwithstanding that prior to Citizens United, corporations and labor organizations were
7 prohibited from making independent expenditures and electioneering communications,
8 current section 114.4(c) identifies seven types of communications that even then
9 corporations and labor organizations could make to the general public, namely: (1) voter
10 registration and voting communications; (2) official registration and voting information;
11 (3) voting records; (4) voter guides; (5) endorsements; (6) candidate appearances on
12 educational institution premises; and (7) electioneering communications, and the relevant
13 requirements and restrictions that apply to each. The proposed changes to 11 CFR 114.4
14 eliminate the prohibition on express advocacy communications made beyond the
15 restricted class, but maintain the restrictions on coordination with candidates and political
16 parties in communications beyond the restricted class.

17 A. Proposed 11 CFR 114.4(a) – General

18 Current 11 CFR 114.4(a) states that any communications that a corporation or
19 labor organization may make to the general public may also be made to the restricted
20 class and to employees outside the restricted class. Paragraph (a) also sets out the
21 structure of the rest of section 114.4. Finally, paragraph (a) provides that
22 communications described in section 114.4 may be coordinated with candidates and
23 political committees only to the extent permitted in section 114.4. The Commission is

1 proposing minor changes to the wording of paragraph (a) to clarify the meaning of the
2 provisions.

3 B. Proposed 11 CFR 114.4(b) – Communications by a corporation or labor
4 organization involving candidate and party appearances to employees beyond its
5 restricted class

6 Current 11 CFR 114.4(b)(1) sets forth the circumstances under which a
7 corporation may coordinate with a candidate or political party to make communications
8 to employees beyond the restricted class by providing that candidates, candidates’
9 representatives, or representatives of political parties may appear on corporate premises
10 or at meetings, conventions, or other corporate functions. Current 11 CFR 114.4(b)(2)
11 applies these regulations and restrictions to labor organizations. The Commission
12 proposes to reorganize current 11 CFR 114.4(b)(1) and (b)(2) by consolidating the
13 provisions into proposed 11 CFR 114.4(b). The proposed reorganization moves the
14 language regarding labor organizations currently located in paragraph (b)(2) to paragraph
15 (b)(1), which is redesignated at 11 CFR 114.4(b). Current paragraphs (b)(1)(i) through
16 (b)(1)(viii) are redesignated as paragraphs (b)(1) through (b)(8), and would apply to both
17 corporations and labor organizations. The Commission does not propose to make any
18 other changes to the language of 11 CFR 114.4(b), other than this reorganization.

19 Current 11 CFR 114.4(b)(1)(v) and (b)(2)(ii) prohibit corporations and labor
20 organizations from expressly advocating the election or defeat of a clearly identified
21 candidate or candidate of a clearly identified political party “in conjunction with” a
22 candidate, candidate representative, or party representative appearance described under
23 current paragraph (b) of section 114.4. Because the activities governed by paragraph (b)

1 involve contact and discussion with candidates and political parties, they do not involve
2 the independent political speech addressed by Citizens United. Expenditures for
3 appearances coordinated with candidates and political parties would therefore constitute
4 in-kind contributions by a corporation or labor organization. 2 U.S.C. 441a(a)(7)(B)(i)
5 and (ii); see also 11 CFR 109.20.

6 Because section 114.4(b) implements the Act's contribution ban, which was left
7 undisturbed by Citizens United, the Commission does not propose any substantive
8 changes to this provision but seeks comment on this proposal. The Commission also
9 notes that the rule at section 114.4(b) applies to appearances attended by the "restricted
10 class and other employees of the corporation, and their families," while 114.4(c) applies
11 to communications to the general public. Though not reflected in the statute, this
12 distinction follows Congressional intent to allow some corporate and labor activity
13 beyond the restricted class that would otherwise be a prohibited in-kind contribution. See
14 1977 E&J at 105 ("This provision is based on traditional types of 'good government'
15 programs established by corporations for all employees and the traditional practice of
16 candidates touring the facilities to shake hands with employees. In the conference
17 debates, Congressman Wiggins and Hays agreed that the bill would allow such activities
18 to continue if the programs were conducted on an equitable and non-partisan basis.").
19 The proposed rule retains this distinction. Are the implications of this distinction clear
20 subsequent to Citizens United? Although Citizens United permits express advocacy
21 communications to the general public, in-kind contributions remain prohibited. Should
22 the Commission modify the rule to make it clear that the use of corporate facilities for
23 events attended by the general public is still prohibited?

1 C. Proposed 11 CFR 114.4(c) – Communications by a corporation or labor
2 organization to the general public

3 Current 11 CFR 114.4(c) addresses communications by corporations and labor
4 organizations to the general public, and currently includes specific provisions on seven
5 types of communications, listed above, that corporations and labor organizations may
6 make to the general public. Each of the provisions within paragraph (c) prohibits
7 coordinating the communication with a candidate or a candidate’s committee or agent,
8 with the exception of paragraph (c)(7) addressing candidate appearances on incorporated
9 non-profit educational institution premises and paragraph (c)(8) regarding electioneering
10 communications. The Commission proposes to restructure paragraph (c) by adding a
11 general prohibition to paragraph (c)(1) stating that a corporation or labor organization
12 must not act in cooperation, consultation, or concert with or at the request or suggestion
13 of a candidate, a candidate’s committee or agent, or a political party committee or its
14 agent regarding the preparation, contents, and distribution of any of the specific types of
15 communications described at proposed 11 CFR 114.4(c)(2) through (c)(6). This
16 language would replace the repetition of the prohibitions on coordination contained in
17 each of the specific paragraphs at current 11 CFR 114.4(c)(2) through (c)(6). The
18 Commission seeks comment on this approach.

19 1. Repeal of express advocacy prohibition

20 Proposed 11 CFR 114.4(c)(1) removes the current language specifically
21 recognizing the right of “qualified nonprofit corporations” (“QNCs”) under 11 CFR
22 114.10(c) to include express advocacy in any communication made to the general public.
23 See Section VI below. After Citizens United, all corporations and labor organizations

1 may include express advocacy in any communication made to the general public so long
2 as the communication is not coordinated with candidates or political parties. Hence, this
3 language is now superfluous.

4 Current 11 CFR 114.4(c)(2) through (c)(6) govern several types of
5 communications that corporations and labor organizations may make to the general
6 public and set out the conditions under which corporations and labor organizations may
7 make them. These communications are: voter registration and GOTV communications;
8 official voter registration and voting information; voting records; voter guides; and
9 endorsements. Proposed 11 CFR 114.4(c)(1) includes a reference to 11 CFR 114.16 to
10 make clear that corporations and labor organizations are no longer limited to the specific
11 types of communications in these paragraphs. Nonetheless, the Commission proposes to
12 retain these paragraphs to provide specific information about election-related
13 communications that corporations and labor organizations may make. Furthermore, all
14 five of these paragraphs currently prohibit corporations or labor organizations from
15 expressly advocating the election or defeat of clearly identified candidates in these
16 communications. Proposed 11 CFR 114.4(c)(2) through (6) eliminates the prohibition on
17 express advocacy contained in each of the current paragraphs when these
18 communications are not coordinated with any candidate or political party. The
19 Commission requests comment on these proposed deletions.

20 2. Proposed 11 CFR 114.4(c)(2) – Voter registration and GOTV
21 communications

22 Current 11 CFR 114.4(c)(2) contains a list of media through which corporations
23 and labor organizations may make registration and voting communications to the general

1 public. The list currently includes: posters; billboards; broadcasting media; newspapers;
2 newsletters; brochures; and “similar means of communication with the general public.”
3 11 CFR 114.4(c)(2). The Commission proposes to add mail, Internet communications,
4 emails, text messages, and telephone calls to the list. These changes are intended to
5 reflect additional common means of political communication. The Commission requests
6 comment on these proposed additions. Are there any other methods of communications
7 that should be specifically included in the list? Alternatively, is a list of media through
8 which corporations and labor organizations may make registration and voting
9 communications to the general public necessary at all? Instead, should the Commission
10 modify the regulation to simply state generically that such communications to the general
11 public are permissible?

12 3. Proposed 11 CFR 114.4(c)(5) – Voter guides

13 Current 11 CFR 114.4(c)(5) sets forth certain requirements for and restrictions on
14 the preparation and distribution of voter guides by corporations and labor organizations to
15 the general public. This provision currently requires that voter guides present the
16 positions of two or more candidates on campaign issues. It further requires that all
17 candidates for a particular seat or office be given an equal opportunity to respond, and
18 prohibits a corporation or labor organization from giving greater prominence to any one
19 candidate or substantially more space for a candidate’s responses, and from including an
20 electioneering message in the voter guide or accompanying materials. Paragraph (c)(5)
21 would be revised by repealing the requirement that the voter guide contain the positions
22 of two or more candidates, or that all candidates for a particular office or seat be
23 permitted to respond. The prohibitions on giving one candidate more prominence or

1 space on electioneering communications would also be removed. The Commission
2 proposes these deletions to conform its voter guide rules to the holding in Citizens United
3 that corporations and labor organizations may expressly advocate the election or defeat of
4 candidates in communications to the general public that are not coordinated with
5 candidates. The Commission requests comment on these proposed changes.

6 4. Proposed 11 CFR 114.4(c)(6) – Endorsements

7 Current 11 CFR 114.4(c)(6) permits corporations and labor organization to
8 endorse candidates, and sets out certain requirements and restrictions on such
9 endorsements. Current 11 CFR 114.4(c)(6) permits a corporation or labor organization to
10 communicate the endorsement only to its restricted class through specific types of
11 publications, and prohibits these publications from being distributed to the general public
12 over a de minimis amount. Current 11 CFR 114.4(c)(6) then sets out the circumstances
13 under which a corporation and labor organization may announce the endorsement to the
14 general public. The Commission proposes to remove these restrictions on the manner of
15 announcing a corporation or labor organization’s endorsement of a candidate in proposed
16 11 CFR 114.4(c)(6) to comply with the decision in Citizens United. The Commission
17 requests comment on these proposed deletions.

18 5. Proposed 11 CFR 114.4(c)(7) – Candidate appearances on education institution
19 premises

20 The Commission does not propose any changes to the text of current 11 CFR
21 114.4(c)(7). This paragraph permits candidate appearances on the premises of
22 incorporated nonprofit educational institutions at no charge or a less than the usual or
23 normal charge. Current 11 CFR 114.4(c)(7)(ii) prohibits incorporated educational

1 institutions from expressly advocating the election or defeat of candidates in conjunction
2 with candidate or political committee appearances for which the educational institution
3 provided access to the premises at no charge or at less than the usual and normal
4 charge.¹³ Paragraph (c)(7)(ii) also prohibits incorporated educational institutions from
5 favoring any one candidate or political party in allowing appearances on the educational
6 institutions premises at no charge or a less than the usual or normal charge. Corporations
7 are generally prohibited from making contributions to, or giving anything of value to, a
8 Federal candidate, which includes free or below usual and normal charge use of facilities.
9 2 U.S.C. 441b(a) and (b)(2); see also 11 CFR 100.52(d) and 114.2(a). Because
10 incorporated educational institutions' ability to permit candidate appearances on their
11 premises for no charge or at less than usual and normal charge is an exception to the
12 general prohibition on corporate in-kind contributions, which was not affected by
13 Citizens United, the Commission does not propose any changes to this provision. The
14 Commission requests comment on this approach.

15 6. Proposed 11 CFR 114.4(c)(8) – Electioneering communications

16 Current 11 CFR 114.4(c)(8) permits corporations and labor organizations to make
17 electioneering communications to the general public only to the extent permitted under
18 current 11 CFR 114.15. Section 114.15 was promulgated in response to the Court's
19 decision in Wisconsin Right to Life. Section 114.15 permits corporations and labor
20 organizations to make electioneering communications, unless the communication is
21 susceptible of no reasonable interpretation other than as an appeal to vote for or against a
22 clearly identified Federal candidate.

¹³ A corresponding provision governing candidate appearances on the premises of unincorporated public nonprofit education institutions is located at 11 CFR 110.12.

1 Current 11 CFR 114.4(c)(8) further permits QNCs to make electioneering
2 communications in accordance with current 11 CFR 114.10. Section 114.10(d)(2), in
3 turn, permits QNCs to make any electioneering communication. Because Citizens United
4 struck down the prohibition on corporations and labor organizations making
5 electioneering communications, the exception to the prohibition on electioneering
6 communications at 11 CFR 114.4(c)(8) is superfluous. Therefore, the Commission
7 proposes to eliminate current 11 CFR 114.4(c)(8) in its entirety to comply with the
8 Supreme Court’s decision in Citizens United. The Commission seeks comment on this
9 approach.

10 D. Proposed 11 CFR 114.4(d) – Voter registration and GOTV drives

11 Current 11 CFR 114.4(d) permits corporations and labor organizations to conduct
12 voter registration and GOTV drives aimed at the general public. It states that registration
13 and GOTV drives include providing transportation to the place of registration and to the
14 polls. The current provision prohibits such drives from including communications
15 containing express advocacy and states that the drives may not be coordinated with any
16 candidate or political party. The current provision prohibits corporations or labor
17 organizations from withholding or refusing to give information and other assistance
18 regarding registering or voting on the basis of support for, or opposition to, particular
19 candidates or a particular political party; from directing the drives primarily at individuals
20 based on registration with a particular party; and from paying individuals conducting
21 such drives on the basis of number of individuals registered or transported to the polls
22 who support a particular candidate or candidates or political party. In light of Citizens
23 United, the Commission is proposing two alternatives to revise the provision currently

1 located at 11 CFR 114.4(d). Both Alternatives A and B repeal the prohibition on
2 communications expressly advocating the election or defeat of candidates or political
3 parties made in connection with a voter registration or GOTV drive. Alternative A,
4 however, as discussed in more detail below, also repeals all of the existing requirements
5 and prohibitions regarding voter registration and GOTV drives, with the exception of the
6 prohibition on coordination with candidates or political parties. Alternative A maintains
7 the exemption from the definition of “expenditure” under 2 U.S.C. 431(9)(B)(ii) and
8 11 CFR 100.133 for voter registration and GOTV drives that meet the existing
9 requirements and prohibitions. In contrast, as discussed in more detail below, Alternative
10 B retains current 11 CFR 114.4(d), except that it removes the prohibition on express
11 advocacy currently at 11 CFR 114.4(d)(1). The Commission invites comment on which,
12 if either, of the two proposals better implements Citizens United and why.

13 Alternative A – Repeal all restrictions on voter registration and GOTV drives
14 except for the prohibition on coordinating with candidates and political parties

15 This alternative removes all the requirements for and restrictions on voter
16 registration and GOTV drives at current 11 CFR 114.4(d)(3) through (6), with the
17 exception of the prohibition on coordinating drives with candidates or political parties,
18 currently at 11 CFR 114.4(d)(2). As discussed in Sections III.A and IV.E above, one
19 approach to revising the Commission’s regulations to comply with the decision in
20 Citizens United would be to eliminate the existing prohibition on corporate and labor
21 organization expenditures, and instead prohibit only those expenditures that are
22 coordinated with a candidate or a political party committee or are in-kind contributions.
23 Similarly, under Alternative A, corporations and labor organizations may conduct voter

1 registration and GOTV drives, as long as they are not coordinated with a candidate or
2 political party.

3 Alternative A, however, maintains the statutory exemption from the definition of
4 “expenditure” at 2 U.S.C. 431(9)(B)(ii) for voter registration and GOTV drives. Under
5 the Commission’s existing rules, corporations and labor organizations do not have to
6 report to the Commission disbursements for voter registration and GOTV drives that
7 meet the conditions of the statutory exception, since such disbursements are neither
8 contributions nor expenditures. While voter registration and GOTV drives are
9 permissible under Alternative A regardless of whether the drives meet the conditions of
10 the statutory exception, corporations or labor organizations conducting drives that do
11 meet those conditions are not required to report disbursements for those drives. Proposed
12 Alternative A thus states that disbursements for voter registration and GOTV drives are
13 not expenditures if the drives meet the requirements for, and restrictions on, voter
14 registration and GOTV drives that are currently stated in 11 CFR 114.4(d)(1) and (3)-(6).
15 These requirements include the prohibition on express advocacy, as well as the
16 prohibition on withholding or refusing to provide information or other assistance
17 regarding registration or voting on the basis of support for, or opposition to, particular
18 candidates or a particular political party.

19 Alternative B – Retain existing regulation at 11 CFR 114.4(d) except for the
20 prohibition on express advocacy

21 Alternative B makes no changes to the existing regulation at 11 CFR 114.4(d),
22 except to remove the prohibition on corporations and labor organizations making
23 communications expressly advocating the election or defeat of clearly identified

1 candidates currently at 11 CFR 114.4(d)(1). As discussed in Sections III.A and IV.E
2 above, Alternative B excludes expenditures for communications from the prohibition on
3 expenditures, while still prohibiting other corporate and labor organization expenditures
4 that are not for communications, as well as other expenditures such as in-kind
5 contributions and coordinated expenditures.

6 After Citizens United, corporations and labor organizations are no longer
7 prohibited from making independent communications. Because Citizens United did not
8 affect the Act’s prohibition on corporate and labor organization expenditures that do not
9 involve communications, Alternative B implements the Act’s restrictions on the
10 nonspeech aspects of voter registration and GOTV drives, such as the costs associated
11 with driving voters to registration sites or the polls or “providing babysitting services to
12 enable voters to go to the polls.” 1977 E&J at 106. Therefore, under Alternative B, three
13 current prohibitions remain in effect: (1) directing voter drives at individuals based on
14 party affiliation; (2) withholding or refusing to provide information or other assistance
15 regarding registration or voting on the basis of support for, or opposition to, particular
16 candidates or a particular political party; and (3) paying individuals conducting voter
17 drives based on the number of individuals registered or transported who support a
18 particular candidate or political party. Voter registration and GOTV drives conducted in
19 accordance with proposed Alternative B remain exempt from the definition of
20 “expenditure” under 2 U.S.C. 431(9)(B)(ii).

21 The current rule at 11 CFR 114.4, like the rule at 114.3, recognizes the difference
22 between expenditures for communications and for non-communicative activities. Current
23 114.4(c)(2) specifically allows for voter registration or GOTV communications to the

1 general public, provided that the communications do not contain express advocacy, while
2 current 114.4(d), following 2 U.S.C. 441b(b)(2)(B), exempts voter registration and
3 GOTV drives conducted in a nonpartisan manner from the definition of expenditure.
4 Alternative B, as with Alternative A, provides that a corporation or labor organization
5 may make voter registration or GOTV communications, including express advocacy, to
6 the general public under proposed 11 CFR 114.4(c)(2). Furthermore, as in Alternative A,
7 in Alternative B voter registration and GOTV drives conducted in accordance with
8 proposed 11 CFR 114.4(d) remain exempt from the definition of “expenditure” under
9 2 U.S.C. 441b(b)(2)(B). However, under Alternative B, corporations and labor
10 organizations remain prohibited from engaging in non-communicative activities related
11 to voter registration and GOTV drives other than those conducted in accordance with
12 proposed 11 CFR 114.4(d).

13 The Commission requests comment on these proposals. Which of the proposed
14 alternatives better reflects the Court’s reasoning in Citizens United? Does either proposal
15 eliminate too much or too little in implementing the remaining prohibitions on corporate
16 and labor organization expenditures?

17 E. Unchanged provisions of current 11 CFR 114.4

18 The Commission is not proposing any changes to current 11 CFR 114.4(e) or (f).
19 Current 11 CFR 114.4(e) states that incorporated membership organizations, incorporated
20 trade associations, incorporated cooperatives, and corporations without capital stock may
21 permit candidate and party representative appearances before members and employees
22 and their families on the organization’s premises, or at a meeting, convention, or other

1 function of the organization, in accordance with 11 CFR 114.4(c)(1) through (c)(8). The
2 Commission requests comment on this approach.

3 Current 11 CFR 114.4(f) addresses candidate debates staged or funded by non-
4 profit organizations described in 11 CFR 110.13 using funding from corporations and
5 labor organizations. The Commission is not proposing any changes to this provision, but
6 invites comment as to whether any revisions are needed to comply with the Citizens
7 United opinion.

8 VI. Proposed repeal of 11 CFR 114.10 – Nonprofit corporations exempt from the
9 prohibitions on making independent expenditures and electioneering
10 communications; and proposed 11 CFR 114.16 – Independent expenditures and
11 electioneering communications made by corporations and labor organizations

12 The Commission promulgated 11 CFR 114.10 in response to the Supreme Court’s
13 decision in MCFL and, in part, to the Supreme Court’s decision in Austin. In MCFL, the
14 Court considered the application of the independent expenditure prohibition in 2 U.S.C.
15 441b to a nonprofit corporation organized to promote specific ideological beliefs. The
16 Court concluded that, because the plaintiff nonprofit corporation in MCFL did not have
17 the potential to corrupt the electoral process, it did not implicate the concerns that
18 prompted regulation of corporations by Congress with respect to campaign finance. See
19 MCFL, 479 U.S. at 259. In response to MCFL, the Commission adopted 11 CFR 114.10,
20 creating a regulatory exception to the independent expenditure ban in section 441b for
21 organizations with the same characteristics as MCFL, referred to as “qualified nonprofit
22 corporations” or “QNCs.” After Congress enacted BCRA’s electioneering
23 communications provisions in 2002, the Commission created an exception in 11 CFR

1 114.10 for QNCs making electioneering communications. Because Citizens United
2 struck down the statutory bans on independent expenditures and electioneering
3 communications for all corporations and labor organizations, the regulatory exceptions
4 for QNCs are now superfluous. Therefore, the Commission proposes to remove 11 CFR
5 114.10 in its entirety. The Commission seeks comment on this approach.

6 The Commission further proposes to adopt a new regulation at 11 CFR 114.16
7 that would explicitly recognize the right of all corporations and labor organizations to
8 make independent expenditures and electioneering communications. As discussed
9 below, proposed 11 CFR 114.16 is modeled on parts of current 11 CFR 114.10 and
10 addresses the following issues: (1) the reporting requirements for QNCs making
11 independent expenditures or electioneering communications at 11 CFR 114.10(e); (2) the
12 solicitation disclaimer requirement at 11 CFR 114.10(f); (3) the non-authorization
13 disclaimer requirement at 11 CFR 114.10(g); (4) the provision in 11 CFR 114.10(h)
14 permitting QNCs to establish segregated bank accounts for disbursements for
15 electioneering communications; and (5) 11 CFR 114.10(i), which states that nothing in
16 section 114.10 authorizes any organization exempt from taxation under 26 U.S.C. 501(a)
17 to carry out any activity that it is prohibited from undertaking by the Internal Revenue
18 Code. The Commission seeks comment on this approach.

19 A. Independent expenditures and electioneering communications by corporations and
20 labor organizations

21 Current 11 CFR 114.10(d) specifically permits QNCs to make independent
22 expenditures and electioneering communications. Because Citizens United made
23 independent expenditures and electioneering communications permissible for all

1 corporations and labor organizations, proposed 11 CFR 114.16(a) expands current
2 11 CFR 114.10(d) to cover all corporations and labor organizations. As discussed above,
3 the Commission seeks comment on whether it would it be helpful for corporations and
4 labor organizations to have a regulation explicitly permitting them to make independent
5 expenditures and electioneering communications. Should the regulation instead more
6 broadly state that corporations and labor organizations may make any communication in
7 connection with an election so long as it is not a coordinated communication under
8 11 CFR 109.21? Alternatively, would it be more appropriate to simply remove the
9 current prohibitions in 11 CFR 114.2(b)(2) and (b)(3) on corporations and labor
10 organizations making disbursements for independent expenditures and electioneering
11 communications from general treasury funds?

12 B. Reporting independent expenditures and electioneering communications

13 Current 11 CFR 114.10(e)(2) sets forth the reporting requirements for QNCs
14 making independent expenditures and electioneering communications. Proposed 11 CFR
15 114.16(b) modifies the language of current 11 CFR 114.10(e)(2) to include independent
16 expenditures and electioneering communications made by all corporations and labor
17 organizations. Proposed 11 CFR 114.16(b)(1) states that corporations and labor
18 organizations that make independent expenditures aggregating in excess of \$250 with
19 respect to a given election in a calendar year must file reports according to 11 CFR part
20 104. Section 104.4(a) requires that “every person that is not a political committee must
21 report independent expenditures in accordance with paragraphs (e) and (f) of this section
22 and 11 CFR 109.10” (emphasis added). Proposed 11 CFR 114.16(b)(2) states that
23 corporations or labor organizations that make electioneering communications aggregating

1 in excess of \$10,000 in a calendar year must file statements as required by 11 CFR
2 104.20(b). Section 104.20(b), in turn, requires that “every person who has made an
3 electioneering communication . . . aggregating in excess of \$10,000 during any calendar
4 year” file a statement on FEC Form 9, disclosing information set out in paragraph (c) of
5 that section (emphasis added). Given that the definition of “person” already covers
6 corporations and labor organizations, is it necessary to have an additional regulation that
7 states that corporations and labor organizations are subject to these requirements? See
8 2 U.S.C. 431(11); 11 CFR 100.10.

9 C. Solicitation; disclosure of use of contributions for political purposes

10 Current 11 CFR 114.10(f) requires that solicitations for donations by QNCs
11 disclose to potential donors that their donations may be used for political purposes, such
12 as supporting or opposing candidates. Similarly, proposed 11 CFR 114.16(c) retains this
13 requirement, but expands it to cover any corporation or labor organization. The
14 requirement at current section 114.10(f) derives from the Supreme Court’s decision in
15 MCFL. Explanation and Justification for Final Rules on Express Advocacy; Independent
16 Expenditures; Corporate and Labor Organization Expenditures, 60 FR 35292, 35303
17 (July 6, 1995), available at [http://www.fec.gov/law/cfr/ej_compilation/1995/1995-](http://www.fec.gov/law/cfr/ej_compilation/1995/1995-10_Express_Advocacy_Indep_Exp_MCFL_Corps.pdf)
18 [10_Express_Advocacy_Indep_Exp_MCFL_Corps.pdf](http://www.fec.gov/law/cfr/ej_compilation/1995/1995-10_Express_Advocacy_Indep_Exp_MCFL_Corps.pdf). In holding the prohibition on
19 independent expenditures unconstitutional as applied to QNCs, the Supreme Court said
20 “[t]he rationale for regulation is not compelling with respect to independent expenditures
21 by [MCFL]” because “[i]ndividuals who contribute to appellee are fully aware of its
22 political purposes, and in fact contribute precisely because they support those purposes.”
23 MCFL, 479 U.S. at 260-61. “Given a contributor’s awareness of the political activity of

1 [MCFL], as well as the readily available remedy of refusing further donations, the
2 interest [of] protecting contributors is simply insufficient to support § 441b’s restriction
3 on the independent spending of MCFL.” Id. at 262 (emphasis added).

4 In Citizens United, the Court upheld the disclaimer requirements of 2 U.S.C.
5 441d(d)(2) and the reporting requirements of 2 U.S.C. 434(f). In analyzing the
6 disclaimer requirements, the Court stated that “[t]he disclaimers required by [BCRA]
7 § 311 ‘provide the electorate with information,’ McConnell, 540 U.S. at 196, and ‘insure
8 that the voters are fully informed’ about the person or group who is speaking, Buckley,
9 424 U.S. at 76.” Citizens United, 130 S. Ct. at 915 (additional citation omitted).

10 Regarding reporting requirements, the Court cited its previous explanation that
11 “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”
12 Id. The Court further stated that “[t]he First Amendment protects political speech; and
13 disclosure permits citizens and shareholders to react to the speech of corporate entities in
14 a proper way. This transparency enables the electorate to make informed decisions and
15 give proper weight to different speakers and messages.” Id. at 916.

16 The Supreme Court’s decision in Citizens United striking down the independent
17 expenditure and electioneering communications ban in section 441b has rendered the
18 QNC exception unnecessary. Nevertheless, is the solicitation disclosure requirement in
19 MCFL still important in ensuring that those solicited have the necessary information to
20 make informed decisions about how their donations may be used? Does the Court’s
21 opinion in Citizens United regarding disclosure and disclaimers mean that the
22 Commission may and should continue to have a specific requirement for QNCs that they
23 provide disclosure to potential donors and contributors? If so, should the rules at 11 CFR

1 114.10(c) defining “QNC” be retained? The Commission also seeks comment on
2 whether to extend the solicitation disclosure requirements currently applicable to QNCs
3 to all corporations and labor organizations. Should the Commission require corporations
4 and labor organizations to disclose that the funds received may be used specifically for
5 independent expenditures or electioneering communications, as opposed to “political
6 purposes” generally?

7 Alternatively, because Citizens United struck down the statutory bans on
8 independent expenditures and electioneering communications for all corporations and
9 labor organizations, is the solicitation disclaimer requirement for QNC’s now
10 superfluous? Should the Commission instead remove 11 CFR 114.10 in its entirety and
11 not incorporate the solicitation disclaimer requirement into proposed section 114.16, and
12 if so, why?

13 D. Non-authorization notice

14 Current 11 CFR 114.10(g) requires that QNCs comply with the disclaimer
15 requirements of 11 CFR 110.11. As discussed in Section IV.C above, the Court in
16 Citizens United upheld the disclaimer provisions of 2 U.S.C. 441d. 130 S. Ct. at 914-16.
17 Section 441d(a) requires that certain communications include statements identifying the
18 person who paid for the communication and whether the communication is authorized by
19 any candidate or candidate’s committee, and sets out the requirements for such
20 statements. These communications include all public communications by any person that
21 expressly advocate the election or defeat of a clearly identified candidate, and all
22 electioneering communications by any person. 2 U.S.C. 441d(a). The Act defines
23 “person” to include corporations and labor organizations. 2 U.S.C. 431(11).

1 Section 110.11 implements the requirements of 2 U.S.C. 441d. Because the
2 requirements of 2 U.S.C. 441d and 11 CFR 110.11 apply to public communications
3 containing express advocacy and electioneering communications made by any person, the
4 provision now applies automatically to public communications containing express
5 advocacy and electioneering communications by corporations and labor organizations.
6 Therefore, if a corporation or labor organization makes an independent expenditure or
7 electioneering communication as permitted after Citizens United, the communication
8 must include a statement identifying, among other things, the name and address of the
9 corporation or labor organization that paid for the communication. Proposed 11 CFR
10 114.16(d) would follow current 11 CFR 114.10(g), but would modify it to require that all
11 corporations and labor organizations comply with 11 CFR 110.11. Although the
12 requirements at 2 U.S.C. 441d and 11 CFR 110.11 already apply to corporations and
13 labor organizations, should proposed section 114.16 explicitly state that all corporations
14 and labor organizations must comply with the requirements of 11 CFR 110.11?

15 E. Segregated bank account

16 The Commission proposes a regulation to affirmatively state that a corporation or
17 labor organization may establish a segregated bank account for funds to be used for the
18 making of electioneering communications. This regulation would not affect other
19 restrictions and limitations applicable to those that make electioneering communications.
20 Instead, it would clarify that corporations and labor organizations that may make
21 electioneering communications may do so using a segregated bank account. Current
22 11 CFR 114.10(h) states that a QNC may, but is not required to, establish a segregated
23 bank account into which it deposits only funds donated or otherwise provided by

1 individuals, as described in 11 CFR part 104, from which it makes disbursements for
2 electioneering communications. Proposed 11 CFR 114.16(e) adopts this language and
3 expands it to state that any corporation or labor organization may establish such an
4 account.¹⁴ The current regulation at 11 CFR 114.10(h) implements 2 U.S.C. 434(f)(2)(E)
5 and (F), which sets out the reporting requirements for every person making
6 disbursements for electioneering communications paid out of segregated bank accounts.
7 Aside from this reporting requirement, however, the Act does not otherwise affirmatively
8 state that a person may set up such segregated bank account. Furthermore, 11 CFR
9 114.10(h) is the only place in the current regulations that affirmatively states that a
10 person may, but is not required to, set up such a segregated bank account, and this
11 regulation is limited to QNCs.

12 The Commission requests comment on the proposed regulation affirmatively
13 stating that any corporation or labor organization may, but is not required to, set up a
14 segregated bank account for the purpose of making electioneering communications, as
15 described in 2 U.S.C. 434(f)(2)(E). Is such a regulation necessary, given that the
16 reporting requirements in the Act already contemplate the existence of such a segregated
17 bank account? Should the Commission adopt a broader regulation that would permit, but
18 not require, any person (other than a political committee) to set up such an account?
19 Alternatively, should the Commission require corporations and labor organizations that
20 make independent expenditures and electioneering communications to use a segregated
21 bank account?

¹⁴ This provision applies to corporation and labor organizations but not to political committees, because such spending by political committees is reported as an expenditure and therefore is not an electioneering communication. 2 U.S.C. 434(f)(3); 11 CFR 104.20(b).

1 Finally, as discussed further in Section IX below, the Commission requests
2 comment on whether it would be advisable and appropriate to promulgate a regulation
3 allowing all persons other than political committees to set up and use segregated bank
4 accounts for funds used to make independent expenditures. If persons using segregated
5 bank accounts were only required to disclose information about those who donated to
6 such a segregated bank account, would such a proposal provide sufficient reporting?
7 Section 434(c) requires that every person (other than a political committee) that makes
8 independent expenditures totaling more than \$250 during a calendar year file a report
9 disclosing the identification of each person who has made a contribution during the
10 reporting period, whose contribution or contributions aggregate in excess of \$200 during
11 the calendar year. Section 434(f)(2)(E), which establishes the reporting requirements for
12 disbursements for electioneering communications made from the segregated bank
13 accounts, requires the reporting entity to report only the names and addresses of
14 contributors whose contributions to that segregated bank account aggregated \$1,000 or
15 more within a certain timeframe. If the Commission were to adopt a regulation allowing
16 similar segregated bank accounts for making independent expenditures parallel to the
17 bank accounts used for electioneering communications, how would the reporting
18 requirements of 2 U.S.C. 434(c) and 434(f)(2)(E) operate together? Should reporting be
19 required beginning from the time that an individual contributor satisfies either of these
20 two reporting requirements, irrespective of which requirement is reached first?

21 F. Activities prohibited by the Internal Revenue Code

22 Current 11 CFR 114.10(i) states that nothing in section 114.10 shall be construed
23 to authorize any organization exempt from taxation under 26 U.S.C. 501(a) to carry out

1 any activity that it is prohibited from undertaking by the Internal Revenue Code. The
2 Commission proposes to move this provision to new section 114.16(f). The language
3 referring specifically to QNCs would be removed, for the reasons discussed above. The
4 Commission requests comment on this proposed change.

5 VII. Proposed repeal of 11 CFR 114.14 and 114.15

6 The Commission proposes to repeal existing 11 CFR 114.14 and 114.15 in their
7 entirety. Together, these sections prohibit corporations and labor organizations from
8 providing general treasury funds to other persons to make electioneering communications
9 that are the functional equivalent of express advocacy.

10 Prior to WRTL and Citizens United, corporations and labor organizations were
11 prohibited from making electioneering communications outside the restricted class, either
12 directly, or by providing funds to other persons for the purpose of making electioneering
13 communications. 2 U.S.C. 441b(b)(2); 11 CFR 114.14 (2003). In promulgating 11 CFR
14 114.14, the Commission explained that the purpose of the rule was to prevent “any
15 instance of a corporation or labor organization providing funds out of their general
16 treasury funds to pay for an electioneering communication, including through a non-
17 Federal account.” Explanation and Justification for Final Rules on Electioneering
18 Communications, 67 FR 65190, 65207 (Oct. 23, 2002) (“2002 EC E&J”), available at
19 http://www.fec.gov/pdf/nprm/electioneering_comm/fr67n205p65189.pdf. In WRTL, the
20 Court held that the statutory prohibition on corporations and labor organizations making
21 electioneering communications outside the restricted class was unconstitutional as
22 applied to electioneering communications that were not the “functional equivalent” of
23 express advocacy. 551 U.S. 449, 456-57 (2007). The Court further defined the

1 “functional equivalent” of express advocacy to mean that the communication is
2 “susceptible of no reasonable interpretation other than as an appeal to vote for or against
3 a specific candidate.” Id. at 469-70.

4 In response to the Court’s decision in WRTL, the Commission promulgated
5 11 CFR 114.15. Explanation and Justification for Final Rules on Electioneering
6 Communications, 72 FR 72899, 72902 (Dec. 26, 2007) (“2007 EC E&J”), available at
7 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf. Current section
8 114.15 permits corporations and labor organizations to make electioneering
9 communications outside the restricted class, unless the communication is susceptible of
10 no reasonable interpretation other than as an appeal to vote for or against a clearly
11 identified Federal candidate. The regulation also contains a safe harbor for when an
12 electioneering communication is permissible, and sets out criteria to use in considering
13 whether an electioneering communication that does not meet the safe harbor is
14 nonetheless permissible. The regulation also requires corporations and labor
15 organizations that make electioneering communications aggregating in excess of \$10,000
16 in a calendar year to report them in accordance with 11 CFR 104.20.

17 To comply with the Court’s decision in WRTL, the Commission also made
18 changes to 11 CFR 114.14, limiting the prohibition to providing funds for those
19 electioneering communications that were impermissible under 11 CFR 114.15. 2007 EC
20 E&J, 72 FR at 72912. Because corporations and labor organizations were still prohibited
21 from using general treasury funds to make electioneering communications that were the
22 functional equivalent of express advocacy, however, the Commission maintained the

1 prophylactic prohibition on corporations and labor organizations providing funds to other
2 persons for such impermissible electioneering communications. 11 CFR 114.14.

3 The Court held in Citizens United that corporations may make all electioneering
4 communications, including those that are the functional equivalent of express advocacy.
5 Because 11 CFR 114.14 is a prophylactic regulation designed to prohibit corporations
6 and labor organizations from doing through other persons what the corporation or labor
7 organization could not do directly, the decision in Citizens United could be interpreted to
8 have rendered the prohibition in 11 CFR 114.14 unnecessary. The Commission therefore
9 seeks comment on removing the prohibition in this section altogether.

10 On the other hand, the Commission also seeks comment on whether 11 CFR
11 114.14 should be retained to better fulfill the Court’s support for disclosure of spending
12 on political speech which “enables the electorate to make informed decisions and give
13 proper weight to different speakers and messages.” Citizens United, 130 S. Ct. at 916. In
14 considering this issue, the Commission notes that section 434(f) of the Act requires
15 entities that make electioneering communications to report certain information to the
16 Commission, including the identification of persons who have provided funds to
17 segregated bank accounts for the purpose of making electioneering communications.
18 2 U.S.C. 434(f). The Commission promulgated 11 CFR 104.20(c)(7) to implement this
19 statutory requirement. Explanation and Justification for Final Rules on Bipartisan
20 Campaign Reform Act of 2002 Reporting, 68 FR 404, 413 (Jan. 3, 2003), available at
21 http://www.fec.gov/pdf/nprm/consolidated_reporting/fr68n002p00403.pdf. In doing so,
22 the Commission interpreted the statute to treat funds provided for the purpose of making
23 electioneering communications as “donations,” rather than as “contributions” under the

1 Act. Id. Should this same reading of section 434(f) apply to corporate and labor
2 organizations funds provided to other persons for the purpose of making electioneering
3 communications? If such funds are donations, they would not violate the prohibition on
4 corporate and labor organization contributions in section 441b(a) of the Act. The
5 Commission seeks comment on the relationship between the treatment of funds provided
6 by individuals to other persons for electioneering communications as donations in
7 11 CFR 104.20(c)(7) and the treatment of funds provided by corporations and labor
8 organizations to other persons for electioneering communications as contributions in
9 2 U.S.C. 441b(b)(2).

10 Current section 114.14 prohibits corporations and labor organizations from
11 providing funds to other persons for the purpose of making electioneering
12 communications, unless the electioneering communication is permissible under section
13 114.15. If the prohibition in 11 CFR 114.14 is removed as proposed, the exception to the
14 section 114.14 prohibition at 11 CFR 114.15 would be superfluous. Thus, the
15 Commission proposes to remove section 114.15 as well. The Commission seeks
16 comment on whether any portion of 11 CFR 114.15 should be retained. Is the exception,
17 the safe harbor, or the rules of interpretation at 11 CFR 114.15 relevant to any remaining
18 valid Commission regulations, such that they should not be removed?

19 VIII. Proposed 11 CFR 104.20 – Reporting electioneering communications

20 BCRA established reporting requirements for persons making disbursements for
21 electioneering communications. See 2 U.S.C. 434(f). Specifically, every person who
22 makes a disbursement for the cost of electioneering communications aggregating in
23 excess of \$10,000 in a calendar year must file a reporting statement. 2 U.S.C. 434(f)(1).

1 These statements must include, among other things: (1) the identification of the person
2 making the disbursement for the electioneering communication, as well as the
3 identification of any person sharing or exercising direction or control over the activities
4 of such person, (2) if the person is not an individual, the principal place of business of the
5 person, (3) the amount of each disbursement over \$200 for the electioneering
6 communication, and (4) all identified candidates referred to in the electioneering
7 communication as well as the election in which those candidates are running for office.
8 2 U.S.C. 434(f)(2)(A)-(D). If the disbursements were paid out of a segregated bank
9 account, the statements must also include the names and addresses of those who donated
10 \$1,000 or more to that account “during the period beginning on the first day of the
11 preceding calendar year and ending on the disclosure date.” 2 U.S.C. 434(f)(2)(E).
12 Alternatively, if the disbursements were not paid out of a segregated bank account, the
13 statements must include the names and addresses of those who donated \$1,000 or more to
14 the person making the disbursement for the electioneering communication during that
15 period. 2 U.S.C. 434(f)(2)(F).

16 The Commission originally promulgated 11 CFR 104.20 in 2002 to implement
17 BCRA. In 2007, however, the Supreme Court in WRTL exempted electioneering
18 communications that do not include the functional equivalent of express advocacy from
19 the general prohibition on corporate funding of electioneering communications. In
20 response to WRTL, the Commission revised its electioneering communications
21 regulations as well as the electioneering communications reporting provision at 11 CFR
22 104.20. See Explanation and Justification for Final Rules on Electioneering

1 Communications, 72 FR 72899 (Dec. 26, 2007), available at
2 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf.

3 In Citizens United, the Court invalidated altogether the statutory prohibition on
4 the making of electioneering communications by corporations and labor organizations.
5 Citizens United, 130 S. Ct. at 916. Accordingly, corporations and labor organizations
6 making electioneering communications are no longer subject to the restrictions in 11 CFR
7 114.15, which appear to have been rendered superfluous. For this reason, as discussed in
8 Section VII, the Commission is proposing to remove that regulation. However, the Court
9 did uphold BCRA’s reporting requirements for electioneering communications contained
10 in sections 434(f) and 441d of the Act. Because 11 CFR 114.15 itself is no longer
11 enforceable, the Commission seeks comment on whether, and if so, how, to revise the
12 reporting requirements for electioneering communications at 11 CFR 104.20.

13 A. 11 CFR 104.20(c) – Contents of electioneering communication disclosure
14 statements

15 Current section 104.20(c) specifies the contents of reports filed by all persons
16 when they make electioneering communications.¹⁵ The information that must be reported
17 depends on who is making disbursements for electioneering communications and how
18 that person pays for them. See 11 CFR 104.20 (c)(1)-(9).¹⁶

19 Current paragraph (c)(2) implements the statutory requirement to report the
20 identification of any “person sharing or exercising direction or control” over the activities

¹⁵ Political committees do not file these reports because such spending by political committees is reported as an expenditure. 2 U.S.C. 434(f)(3); see also 11 CFR 104.20(b).

¹⁶ Paragraphs (c)(7)(i) and (c)(8) were promulgated as part of the implementation of the electioneering communication provisions of BCRA. After the Court’s decision in WRTL, the Commission added paragraphs (c)(7)(ii) and (c)(9), and slightly revised paragraphs (c)(7)(i) and (c)(8), to implement the Court’s decision.

1 of the person who made any disbursements or who executed any contracts to make
2 disbursements for an electioneering communication. See 2 U.S.C. 434(f)(2)(A). The
3 term “persons sharing or exercising direction or control” is defined in the regulations at
4 11 CFR 104.20(a)(3).

5 Under current paragraph (c)(7)(i), if a person pays for electioneering
6 communications exclusively from a segregated bank account that accepts funds only
7 from individuals who are United States citizens, or who are lawfully admitted for
8 permanent residence under 8 U.S.C. 1101(a)(20), then the electioneering communications
9 may contain the functional equivalent of express advocacy, and the person paying for the
10 electioneering communication must report the name and address of each person whose
11 donations aggregated \$1,000 or more to that segregated bank account since the first day
12 of the preceding calendar year. Similarly, current paragraph (c)(7)(ii) provides that if a
13 person paying for electioneering communications does so solely from a segregated bank
14 account established to pay for electioneering communications that do not contain the
15 functional equivalent of express advocacy, then the person paying for the electioneering
16 communication must report the name and address of each donor to that segregated
17 account whose donations aggregated \$1,000 or more since the first day of the preceding
18 calendar year. Current paragraph (c)(7)(ii) differs from current paragraph (c)(7)(i) in that
19 the segregated bank account is not limited to donations solely from individuals.

20 Current paragraph (c)(8) requires the reporting of the name and address of each
21 person who donated an amount aggregating \$1,000 or more within a certain time frame to
22 the person making the electioneering communication if (1) the electioneering
23 communication was not funded exclusively by one of these segregated bank accounts

1 described in paragraph (c)(7), and (2) was not made by a corporation or labor
2 organization pursuant to 11 CFR 114.15.

3 For electioneering communications made by corporations and labor organizations
4 pursuant to 11 CFR 114.15, the rules at 11 CFR 104.20(c)(9) currently specify that
5 information about donors must be reported only if the donations aggregating to \$1,000 or
6 more were “made for the purpose of furthering electioneering communications.” 11 CFR
7 104.20(c)(9). This requirement was intended to provide the “public with information
8 about those persons who actually support the message conveyed by the [electioneering
9 communications] without imposing on corporations and labor organizations the
10 significant burden of disclosing the identities of the vast numbers of customers, investors,
11 or members, who have provided funds for purposes entirely unrelated to the making of
12 [electioneering communications].” 2007 EC E&J, 72 FR at 72911.

13 B. Proposed Alternatives for Electioneering Communications Reporting

14 The Commission seeks comment on alternative approaches for implementing the
15 reporting requirements for corporations and labor organizations following the Citizens
16 United decision. Both alternatives remove references to current 11 CFR 114.15 and
17 otherwise preserve the Commission’s existing rules at 11 CFR 104.20(c)(7) regarding the
18 use of segregated bank accounts. Paragraphs (c)(7)(i) and (c)(7)(ii) would continue to
19 differ from each other in that the segregated bank account in paragraph (c)(7)(ii) is not
20 limited to donations solely from individuals. Removing the references to 11 CFR 114.15
21 would therefore allow persons making electioneering communications to accept
22 corporate and labor funding in a segregated bank account under paragraph (c)(7)(ii). This

1 change would be consistent with the Commission’s proposal to remove 11 CFR 114.15
2 itself from the regulations.

3 Under Alternative A, those corporations and labor organizations making
4 electioneering communications without the use of a segregated account must report
5 information about donors to the Commission if the donation “was made for the purpose
6 of furthering electioneering communications.” Alternative B, in contrast, requires a
7 corporation or labor organization that makes electioneering communications to report
8 information about donors in the same manner as any other person who makes
9 electioneering communications.

10 Proposed Alternative A for 11 CFR 104.20(c)

11 Proposed Alternative A removes the references to 11 CFR 114.15 in paragraphs
12 (c)(8) and (c)(9) to reflect that corporations and labor organizations may now make
13 electioneering communications that contain express advocacy or its functional equivalent.
14 Under Alternative A, proposed paragraph (c)(9) continues to require disclosure of only
15 those donations made “for the purpose of furthering electioneering communications” for
16 corporations and labor organizations that make electioneering communications without
17 using a segregated bank account. The Commission requests comment on the approach
18 taken in Alternative A for proposed paragraphs (c)(8) and (c)(9). Would the proposed
19 revisions provide the public with sufficient information regarding the individuals or
20 entities providing funds for electioneering communications? Would the proposed rules
21 provide the information Congress intended to make public as to the individuals or entities
22 funding electioneering communications? Are the proposed rules consistent with the
23 reporting requirements of the Act located at 2 U.S.C. 434(f)?

1 Proposed Alternative B for 11 CFR 104.20(c)

2 Proposed Alternative B also removes all references to 11 CFR 114.15 throughout
3 proposed 104.20(c). Alternative B retains the language in paragraph (c)(8) that any
4 person that does not use a segregated bank account to make electioneering
5 communications reports to the Commission all donors from whom the person making the
6 electioneering communication receives \$1000 or more within the relevant time frame,
7 regardless of whether the donor intended the funds to be used for making electioneering
8 communications. In Alternative B, paragraph (c)(9) would be removed as superfluous
9 because corporations or labor organizations, like any other person making electioneering
10 communications, may either use the segregated bank accounts described in paragraph
11 (c)(7) and thereby only report donors whose funds were donated to the account, or, if the
12 funds are not placed in a segregated bank account, report all donors from whom they
13 receive \$1,000 or more within the relevant time frame.

14 Alternative B would follow the statutory framework in that if disbursements for
15 electioneering communications are made from a segregated bank account, the person
16 making the electioneering communication reports all contributors of \$1,000 or more to
17 that account. Alternatively, if the disbursements are not made from a segregated
18 account, the person reports all contributors of \$1,000 or more to the person making the
19 electioneering communication. See 2 U.S.C. 434(f)(2)(E) and (F). By giving
20 corporations and labor organizations this choice, any burden of disclosing the identities
21 of the sizeable numbers of persons who have provided funds for purposes entirely
22 unrelated to the making of electioneering communications may be avoided by setting up
23 the segregated bank accounts described in paragraph (c)(7).

1 The Commission requests comment on proposed Alternative B and whether it
2 would provide an adequate and clear reporting regime for those who are making, or are
3 funding those who are making, electioneering communications. Specifically, is there any
4 basis after Citizens United to retain paragraph (c)(9) and thereby treat corporations and
5 labor organizations differently from other persons making electioneering
6 communications? The Commission also seeks comment on whether there is some other
7 alternative that would ensure adequate and clear reporting of those who make and fund
8 electioneering communications.

9 The Commission also seeks comment on whether it should revise the definition of
10 “persons sharing or exercising direction or control” located at 11 CFR 104.20(a)(3). In
11 light of Citizens United, does the current regulation adequately capture all of the persons
12 in corporations or labor organizations who may share or exercise direction or control in
13 making electioneering communications, and if not, what categories should be added?

14 IX. Proposed 11 CFR 109.10 – Reporting independent expenditures

15 The Act at 2 U.S.C. 434(c)(1) requires persons who make independent
16 expenditures exceeding \$250 per calendar year to report the identification of each person
17 who makes a contribution to the person making the independent expenditure during the
18 reporting period if the contributor’s total contributions exceed \$200 in a calendar year.
19 See 2 U.S.C. 434(b)(3)(A). Section 434(c)(2)(C) further requires that such persons also
20 report the identification of any person who makes a contribution in excess of \$200 “for
21 the purpose of furthering an independent expenditure.”

22 The Commission’s regulation at 11 CFR 109.10 sets forth the reporting
23 requirements for persons, other than political committees, that make independent

1 expenditures. Currently, 11 CFR 109.10(e)(1)(vi) requires persons who make
2 independent expenditures to report the identification of each person who made a
3 contribution in excess of \$200 to the person filing the report, “which contribution was
4 made for the purpose of furthering the reported independent expenditure.” The current
5 regulation does not reference the general reporting requirement at 2 U.S.C. 434(c)(1). It
6 also does not specifically state that those persons who make the independent expenditures
7 must disclose the identification of any person from whom he or she receives funds in
8 excess of \$200 that qualify as a “contribution” under the Act. See 2 U.S.C. 431(8)(A)
9 and 434(b)(3)(A).

10 The Commission seeks comment on whether it should make any changes to 11
11 CFR 109.10 due to Citizens United. The regulation applies to all “persons” other than
12 political committees, which automatically requires corporations and labor organizations
13 to report independent expenditures.¹⁷

14 The Commission requests comment on whether the statute contemplates more
15 extensive reporting than the current rules require, and, if so, whether the Commission
16 should revise its regulation at 11 CFR 109.10(e)(1)(vi) to track the statutory language
17 more closely. Should the Commission require the reporting of, among other things, the
18 name and address of all persons who made contributions in excess of \$200 to the person
19 making the independent expenditure, regardless of the purpose of the contribution? Do
20 the current regulations give effect to the requirement at 2 U.S.C. 434(c)(1) that persons
21 making independent expenditures report all contributors who give over \$200 in a
22 calendar year? Alternatively, should the narrower reporting provision of 2 U.S.C.

¹⁷ The definition of the term “person” in section 431(11) of the Act includes corporations and labor organizations. See also 11 CFR 100.10.

1 434(c)(2)(C) control? Is there another standard the Commission should adopt? If so,
2 what should it be and why?

3 The Commission also requests comment on whether it would be appropriate and
4 advisable to add a requirement to 11 CFR 109.10 to require reporting of the identification
5 of those who share or exercise control over the independent expenditures and over those
6 persons making the independent expenditures, similar to the Commission's current
7 regulations regarding electioneering communications at 11 CFR 104.20. If so, the
8 Commission requests comment on whether and why the definition of those persons who
9 share or exercise direction or control should be the same for the making of independent
10 expenditures and electioneering communications, or whether the definition should be
11 different.

12 Finally, the Commission requests comment on whether it would be advisable and
13 appropriate for the independent expenditure rule to be amended to provide that all
14 persons other than political committees may set up and use segregated bank accounts for
15 making independent expenditures, similar to the Commission's regulations regarding
16 electioneering communications in 104.20(c), as discussed above. Would such a proposal
17 provide clear and adequate reporting? Would it be consistent with the statutory reporting
18 requirements of 2 U.S.C. 434(c) that are silent with respect to the creation of segregated
19 bank accounts for independent expenditures?

20 X. 11 CFR 110.20 – Foreign nationals

21 The Commission also seeks comment on whether, or to what extent, Citizens
22 United has any implications for the prohibition on contributions, expenditures, and other

1 activities by foreign nationals at 11 CFR 110.20, and on a proposed amendment to this
2 regulation.

3 A. Background

4 The Act prohibits foreign nationals from making “a contribution or donation of
5 money . . . in connection with a Federal, State or local election,” or “an expenditure,
6 independent expenditure, or disbursement for an electioneering communication.”

7 2 U.S.C. 441e(a)(1). This prohibition applies whether the contribution, donation,
8 expenditure, independent expenditure or disbursement is made “directly or indirectly.”

9 Id. A domestic corporation that is owned or controlled by a foreign national is not itself a
10 “foreign national” under 2 U.S.C. 441e so long as the domestic corporation is “organized
11 under or created by the laws of the United States or of any State or other place subject to
12 the jurisdiction of the United States and has its principal place of business within the
13 United States” (“U.S. subsidiary” or “U.S. corporation”).¹⁸

14 Current 11 CFR 110.20 provides in relevant part that foreign nationals may not,
15 “directly or indirectly,” make expenditures or independent expenditures, or
16 disbursements for electioneering communications. 11 CFR 110.20(e) and (f).¹⁹ Current
17 11 CFR 110.20(i), in turn, prohibits foreign nationals from directing, dictating,
18 controlling, or directly or indirectly participating in the decision-making process of any

¹⁸ See 2 U.S.C. 441e(b)(1); 22 U.S.C. 611(b)(2).

¹⁹ The regulation also follows the statute in defining a “foreign national,” in part, by reference to 22 U.S.C. 611(b), a provision of the Foreign Agents Registration Act (“FARA”), which in turn provides that the term “foreign principal” includes “a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.” See 2 U.S.C. 441e(b)(1); 11 CFR 110.20(a)(3)(i). FARA is a disclosure statute requiring those acting as agents of foreign principals in a political or related representational capacity (such as a public relations counsel or publicity agent) to make public disclosure of their relationship with the foreign principal, as well as financial activity in support of those activities.

1 person, including a corporation or labor organization, with regard to such person's
2 Federal or non-Federal election-related activities.

3 Current 11 CFR 110.20 was promulgated in 2002 as a part of the Commission's
4 regulations implementing BCRA, in which Congress expanded and strengthened the
5 then-existing ban on foreign contributions and expenditures in connection with Federal
6 elections, and added a prohibition on soliciting, accepting, or receiving contributions and
7 donations from foreign nationals. In the 2002 rulemaking, the Commission proposed a
8 definition of "foreign national" that generally followed the previous definition at former
9 11 CFR 110.4(a)(4) and incorporated FARA's definition of "foreign principal" at 22
10 U.S.C. 611(b). The Commission did not receive any comments on this proposal, and it
11 adopted the proposed definition as the final rule. See Explanation and Justification for
12 Final Rules on Contribution Limitations and Prohibitions ("Contribution E&J"), 67 FR
13 69928, 69940 (Nov. 19, 2002), available at
14 http://www.fec.gov/pdf/nprm/contribution_lim_pro/fr67n223p69927.pdf.

15 Consistent with Section 441e(b)(1) of the Act, the Commission has previously
16 concluded that domestic corporations whose principal places of business are located in
17 the United States are not foreign nationals even if they are wholly or partially owned by
18 foreign entities. It also concluded that such domestic corporations may establish,
19 administer, and control SSFs so long as the individuals who exercise decision-making
20 authority over the activities of those funds are U.S. citizens or legal residents, and
21 decisions made by those persons are not dictated or directed by any foreign nationals.²⁰

²⁰ SSFs are not funded with corporate treasury funds, but rather are funded exclusively through contributions from permissible sources. See 2 U.S.C. 441b(b)(2)(C).

1 Finally, the Commission has concluded that no foreign parent corporation may contribute
2 to its domestic subsidiary's SSF, directly or through subsidies to the subsidiary.²¹

3 In Citizens United, the Supreme Court did not "reach the question whether the
4 Government has a compelling interest in preventing foreign individuals or associations
5 from influencing our Nation's political process." Citizens United, 130 S. Ct. at 911. The
6 Court acknowledged that 2 U.S.C. 441e provides an independent basis for prohibiting
7 contributions, expenditures, and independent expenditures by foreign nationals, but
8 limited its analysis to 2 U.S.C. 441b.

9 Prior to Citizens United, all corporations, whether foreign or domestic, were
10 prohibited from making expenditures and disbursements for electioneering
11 communications. Accordingly, the Commission's regulations do not address, and were
12 not designed to address, whether, and if so, under what conditions, U.S. subsidiaries of
13 foreign parent corporations are subject to the prohibitions on foreign national
14 expenditures and disbursements for electioneering communications. Because U.S.
15 corporations may now use their own treasury funds to make independent expenditures
16 and disbursements for electioneering communications as a result of Citizens United, the
17 Commission seeks comment on the restrictions in 2 U.S.C. 441e and their potential
18 application to political activities paid for by U.S. subsidiaries of foreign nationals or
19 foreign corporations. In view of Citizens United, should any of the Commission's
20 conclusions be reconsidered, and if so, in what way and why?

21 B. Proposal

²¹ See Advisory Opinions 1978-21 (Budd Citizenship Committee), 1980-100 (Revere Sugar), 1981-36 (Japan Business Association of Southern California), 1989-20 (Kuilima), 1989-29 (GEM), 1990-08 (CIT), 1992-16 (Nansay Hawaii), 1995-15 (Allison Engine PAC), 1999-28 (Bacardi-Martini), 2000-17 (Extendicare), 2006-15 (TransCanada), and 2009-14 (Mercedes-Benz USA/Sterling).

1 The Commission seeks comment on a possible amendment to the regulation to
2 ensure that foreign nationals cannot do through a domestic subsidiary what they are
3 prohibited from doing directly. The proposed rule would prohibit domestic subsidiaries
4 that are owned or controlled by foreign nationals from using treasury funds for
5 independent expenditures or electioneering communications other than communications
6 to the restricted class. The proposal also sets forth the conditions that constitute
7 ownership or control by a foreign national. The proposed rule provides that domestic
8 subsidiaries are controlled or owned by foreign nationals if any of the following
9 conditions is present:

10 (a) more than 50 percent of the corporation's outstanding voting shares are
11 directly or indirectly owned by foreign nationals;

12 (b) a majority of members of the corporation's board of directors are foreign
13 nationals;

14 (c) one or more foreign nationals has the power, individually or in concert with
15 other foreign nationals, to direct, dictate or control, directly or indirectly, the
16 corporation's decision-making process with respect to its interests in the United States; or

17 (d) one or more foreign nationals has the power, individually or in concert with
18 other foreign nationals, to direct, dictate or control, directly or indirectly, the
19 corporation's decision-making process with respect to the corporation's political
20 activities.

21 The proposed rule does not amend the definition of the term "foreign national"
22 and therefore would not result in prohibiting a domestic corporation that is controlled by
23 a foreign parent from establishing, maintaining or controlling a SSF. Is this an

1 appropriate response to Citizens United? The proposal also provides that a foreign
2 national owns or controls a domestic corporation when the foreign national owns or
3 controls over 50 percent of the corporation’s voting stock. Does a 50 percent bright line
4 for ownership of voting stock strike an appropriate balance between permitted and
5 prohibited activity, and if not, what percent should be applied, if any?

6 The Commission also seeks comment on the extent to which the Commission’s
7 regulations should specifically address different ways that foreign national influence
8 could result in “direct[ing], dictat[ing], control[ling], or directly or indirectly
9 participat[ing] in the decision-making process of” a domestic corporation, as prohibited
10 by 11 CFR 110.20(i), where such corporations are (a) created by one or more foreign
11 nationals, (b) owned by one or more foreign nationals, (c) funded by one or more foreign
12 nationals, irrespective of ownership (including loans), or (d) controlled by one or more
13 foreign nationals, irrespective of ownership or funding. Does the proposal provide
14 adequate guidance as to which domestic corporations are owned or controlled by foreign
15 nationals?

16 If the Commission does not adopt this proposal, should the Commission adopt
17 some other regulation specifically addressing the relationships between foreign parent
18 corporations and domestic subsidiaries, or between foreign and domestic partners, or
19 other business combinations, limiting how much control or influence the foreign national
20 may exert over its domestic subsidiary or partner before the latter is also subject to the
21 prohibitions on foreign national expenditures and electioneering communications?
22 Alternatively, since the making of independent expenditures and electioneering
23 communications is distinct from activities sanctioned under prior Commission precedent,

1 should the Commission instead handle issues concerning expenditures by foreign-
2 controlled corporations on a case-by-case basis in enforcement and Advisory Opinions?
3 Would this approach be preferable to adopting a new regulation?

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

6 The Commission certifies that the attached proposed rules, if adopted, would not
7 have a significant economic impact on a substantial number of small entities. There are
8 two bases for this certification. First, there are few small entities that would be affected
9 by these proposed rules. The Commission’s proposed revisions may affect some for-
10 profit corporations, labor organizations, individuals, and some non-profit organizations.
11 Individuals and labor organizations are not “small entities” under 5 U.S.C. 601(6). Many
12 non-profit organizations that might use general treasury funds to make independent
13 expenditures or electioneering communications are not “small organizations” under
14 5 U.S.C. 601(4) because they are not financed by a small identifiable group of
15 individuals, but rather rely on contributions from a large number of individuals to fund
16 operations and activities.

17 Second, the proposed rules would not have a significant economic impact on the
18 small entities affected by this rulemaking. Overall, the proposed rules would relieve a
19 funding restriction that the current rules place on some corporations and labor
20 organizations. The proposed rules would allow small entities to engage in activity they
21 were previously prohibited from funding with corporation or labor organization funds.
22 Thus, while one effect of the proposed rule would be to increase substantially the number
23 of corporations and labor organizations that use general treasury funds to make
24 independent expenditures or electioneering communications, these entities will do so

1 voluntarily and not because of any new Federal requirement to do so. Although they
2 would incur some costs in complying with the obligation to report independent
3 expenditures and electioneering communications, these costs would not be very great and
4 thus would not have a significant economic impact on the small entities affected by this
5 rulemaking. In fact, the obligation for corporations and labor organizations to report
6 electioneering communications should not be burdensome because the trigger to report
7 electioneering communications remains high. Further, because qualified non-profit
8 corporations would continue to be able to make independent expenditures and
9 electioneering communications just as they have done before, their reporting obligations
10 will not change or become more burdensome because of this rulemaking. Therefore, the
11 attached rule would not have a significant economic impact on a substantial number of
12 small entities.

13

1 **List of Subjects**

2 11 CFR Part 104

3 Campaign funds, political committees and parties, reporting and recordkeeping
4 requirements.

5 11 CFR Part 110

6 Campaign funds, political committees and parties.

7 11 CFR Part 114

8 Business and industry, elections, labor.

9

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

4 **PART 104 – REPORTS BY POLITICAL COMMITTEES AND OTHER**
5 **PERSONS (2 U.S.C. 434)**

6 1. The authority citation for part 104 would continue to read as follows:

7 Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a,
8 441a, and 36 U.S.C. 510.

9 2. In section 104.20, paragraphs (c)(7), (c)(8), and (c)(9) would be revised to
10 read as follows:

11 **§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).**

12 (c) Contents of statement. Statements of electioneering communications filed under
13 paragraph (b) of this section shall disclose the following information:

14 * * * * *

15 (7) (i) If the disbursements were paid exclusively from a segregated bank
16 account established to pay for electioneering communications ~~not~~
17 ~~permissible under 11 CFR 114.15~~, consisting of funds provided
18 solely by individuals who are United States citizens, United States
19 nationals, or who are lawfully admitted for permanent residence
20 under 8 U.S.C. 1101(a)(20), the name and address of each donor
21 who donated an amount aggregating \$1,000 or more to the
22 segregated bank account, aggregating since the first day of the
23 preceding calendar year; or

1 (ii) If the disbursements were paid exclusively from a segregated bank
2 account established to pay for electioneering communications,
3 consisting of funds provided by any person permissible under 11
4 CFR 114.15, the name and address of each donor who donated an
5 amount aggregating \$1,000 or more to the segregated bank
6 account, aggregating since the first day of the preceding calendar
7 year.

8 **ALTERNATIVE A for 104.20(c)(8) and (9)**

9 (8) If ~~the~~ any person other than a corporation or labor organization made
10 disbursements for electioneering communications that were not paid
11 exclusively from a segregated bank account described in paragraph (c)(7)
12 of this section ~~and were not made by a corporation or labor organization~~
13 ~~pursuant to 11 CFR 114.15~~, the name and address of each donor who
14 donated an amount aggregating \$1,000 or more to the person making the
15 disbursement, aggregating since the first day of the preceding calendar
16 year.

17 (9) If the disbursements were made by a corporation or labor organization
18 ~~pursuant to 11 CFR 114.15~~, the name and address of each person who
19 made a donation aggregating \$1,000 or more to the corporation or labor
20 organization, aggregating since the first day of the preceding calendar
21 year, which was made for the purpose of furthering electioneering
22 communications.

23 * * * * *

1 **ALTERNATIVE B for 104.20(c)(7), (8), and (9)**

2 (8) If the disbursements were not paid exclusively from a segregated bank
3 account described in paragraph (c)(7) of this section ~~and were not made by~~
4 ~~a corporation or labor organization pursuant to 11 CFR 114.15~~, the name
5 and address of each donor who donated an amount aggregating \$1,000 or
6 more to the person making the disbursement, aggregating since the first
7 day of the preceding calendar year.

8 ~~(9) If the disbursements were made by a corporation or labor organization~~
9 ~~pursuant to 11 CFR 114.15, the name and address of each person who~~
10 ~~made a donation aggregating \$1,000 or more to the corporation or labor~~
11 ~~organization, aggregating since the first day of the preceding calendar~~
12 ~~year, which was made for the purpose of furthering electioneering~~
13 ~~communications.~~

14 * * * * *

15 **PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**
16 **PROHIBITIONS (2 U.S.C 431(8), 431(9), 432(c)(2), 434(i)(3), 438(a)(8), 441a, 441b,**
17 **441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510)**

18 3. The authority citation for part 110 would continue to read as follows:

19 Authority: 2 U.S.C 431(8), 431(9), 432(c)(2), 434(i)(3), 438(a)(8), 441a, 441b,
20 441d, 441e, 441f, 441g, 441h and 36 U.S.C. 510.

21 4. In section 110.20, paragraph (k) would be added to read as follows:

22 **§ 110.20 Prohibition on contributions, donations, expenditures, independent**
23 **expenditures, and disbursements by foreign nationals (2 U.S.C. 441e, 36 U.S.C. 510).**

1 * * * * *

2 (k) Domestic corporation owned or controlled by foreign national

3 (1) Notwithstanding any other provision of this title, a domestic corporation
4 that is owned or controlled by a foreign national is prohibited from:

5 (i) Making expenditures in connection with a Federal election (as
6 defined in 11 CFR 114.1(a)), for communications to those outside
7 the restricted class that expressly advocate the election or defeat of
8 one or more clearly identified candidate(s) or the candidates of a
9 clearly identified political party; and

10 (ii) Making payments for an electioneering communication to those
11 outside the restricted class.

12 (2) Domestic corporation that is owned or controlled by a foreign national
13 means any corporation:

14 (i) In which one or more foreign nationals described in paragraph
15 (a)(1) or (2) of this section directly or indirectly own or control
16 more than 50 percent of the voting shares;

17 (ii) With respect to which the majority of the members of the board of
18 directors are foreign nationals described in paragraph (a)(1) or (2)
19 of this section;

20 (iii) Over which one or more foreign nationals described in paragraph
21 (a)(1) or (2) of this section has the power, individually or in
22 concert with other foreign nationals, to direct, dictate or control,

1 directly or indirectly, the decision-making process of the
2 corporation with respect to its interests in the United States; or
3 (iv) Over which one or more foreign nationals described in paragraph
4 (a)(1) or (2) of this section has the power, individually or in
5 concert with other foreign nationals, to direct, dictate or control,
6 directly or indirectly, the decision-making process of the
7 corporation with respect to activities in connection with any
8 Federal, State, or local election, including –
9 (A) The making of a contribution, donation, expenditure,
10 independent expenditure, or disbursement for an
11 electioneering communication; or
12 (B) the administration of a separate segregated fund established
13 or maintained by the corporation.

14 (3) Any corporation that reports disbursements for electioneering
15 communications pursuant to 11 CFR 104.20 or that reports expenditures
16 for independent expenditures pursuant to 11 CFR 109.10 must include in
17 each report a statement that the corporation is in compliance with the
18 prohibitions described in paragraphs (e), (f), and (k) of this section.

19 * * * * *

20 **PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY (2 U.S.C**
21 **431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), and 441b)**

22 5. The authority citation for part 114 continues to read as follows:

23 Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.

1 6. In section 114.2, paragraph (b) would be revised to read as follows:

2 **§114.2 Prohibitions on contributions, and expenditures ~~and electioneering~~**
3 **communications.**

4 * * * * *

5 (b) * * *

6 **ALTERNATIVE A for 114.2(b)(2)**

7 (2) ~~Except as provided at 11 CFR 114.10,~~ eCorporations and labor
8 organizations are prohibited from:

9 (i) ~~M~~making coordinated expenditures as defined in 11 CFR ~~part 100,~~
10 ~~subpart D-109.20~~ and coordinated communications as defined in
11 11 CFR 109.21;~~;~~ ~~or~~

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

17 **ALTERNATIVE B for 114.2(b)(2)**

18 (2) ~~Except as provided at 11 CFR 114.10,~~ eCorporations and labor
19 organizations are prohibited from:

20 (i) ~~M~~making expenditures as defined in 11 CFR part 100, subpart D,
21 except for payments for communications that are not coordinated
22 communications as defined in 11 CFR 109.21; or

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

6 **ALTERNATIVES A and B for 114.2(b)(3)**

7 (3) ~~—Corporations and labor organizations are prohibited from making~~
8 ~~payments for an electioneering communication to those outside the~~
9 ~~restricted class unless permissible under 11 CFR 114.10 or 114.15.~~
10 ~~However, this paragraph (b)(3) shall not apply to State party committees~~
11 ~~and State candidate committees that incorporate under 26 U.S.C.~~
12 ~~527(e)(1), provided that:~~

13 (i) ~~—The committee is not a political committee as defined in 11 CFR~~
14 ~~100.5;~~

15 (ii) ~~—The committee incorporated for liability purposes only;~~

16 (iii) ~~—The committee does not use any funds donated by corporations or~~
17 ~~labor organizations to make electioneering communications; and~~

18 (iv) ~~—The committee complies with the reporting requirements for~~
19 ~~electioneering communications at 11 CFR part 104.~~

20 7. Section 114.3 is amended by revising paragraphs (a), (c), and (c)(4) to
21 read as follows:

22 **§ 114.3 Disbursements for communications to the restricted class in connection with**
23 **a Federal election.**

1 (a) General.

2 (1) Corporations and labor organizations may make communications on any
3 subject, including communications containing express advocacy, to their
4 restricted class or any part of that class. Corporations and labor
5 organizations may also make the communications permitted under 11 CFR
6 114.4 to their restricted class or any part of that class. The activities
7 permitted under this section may involve election-related coordination
8 with candidates and political committees. only to the extent permitted by
9 this section. See 11 CFR 100.16 and 114.2(c) regarding independent
10 expenditures and coordination with candidates.

11 (2) Incorporated membership organizations, incorporated trade associations,
12 incorporated cooperatives and corporations without capital stock may
13 make communications to their restricted class, or any part of that class as
14 permitted in paragraphs (a)(1) and (c) of this section.

15 * * * * *

16 (c) Communications containing express advocacy. Communications containing
17 express advocacy ~~which~~ that may be made to the restricted class include, but are not
18 limited to, the following examples: ~~set forth in paragraphs (e)(1) through (e)(4) of this~~
19 ~~section.~~

20 * * * * *

21 **ALTERNATIVE A for 114.3(c)(4)**

22 (4) Registration and get-out-the-vote drives.

1 (i) Voter registration and get-out-the-vote drives permitted. A
2 corporation or labor organization may conduct registration and get-
3 out-the-vote drives aimed at its restricted class. Registration and
4 get-out-the-vote drives include providing transportation to the
5 place of registration and to the polls. The corporation or labor
6 organization must not act in cooperation, consultation, or concert
7 with or at the request or suggestion of any candidates, candidates'
8 committees or agents, or political party regarding the planning,
9 organization, timing, or administration of a voter registration or
10 get-out-the-vote drive.

11 (ii) Disbursements for certain voter registration and get-out-the-vote
12 drives not expenditures or contributions. Disbursements for voter
13 registration and get-out-the-vote drives are not contributions or
14 expenditures, provided that the drive is conducted so that
15 information and other assistance regarding registering or voting,
16 including transportation and other services offered, is not withheld
17 or refused on the basis of support for or opposition to particular
18 candidates, or a particular political party. See 2 U.S.C.
19 441b(b)(2)(B). Such drives may include communications
20 containing express advocacy, such as urging individuals to register
21 with a particular party or to vote for a particular candidate or
22 candidates. ~~Information and other assistance regarding registering~~
23 ~~or voting, including transportation and other services offered, shall~~

1 not be withheld or refused on the basis of support for or opposition
2 to particular candidates, or a particular political party.

3 **ALTERNATIVE B for 114.3(c)(4)**

4 (4) Registration and get-out-the-vote drives. A corporation or a labor
5 organization may conduct registration and get-out-the-vote drives aimed at
6 its restricted class. Registration and get-out-the-vote drives include
7 providing transportation to the place of registration and to the polls. Such
8 drives may include communications containing express advocacy, such as
9 urging individuals to register with a particular party or to vote for a
10 particular candidate or candidates. Information and other assistance
11 regarding registering or voting, including transportation and other services
12 offered, shall not be withheld or refused on the basis of support for or
13 opposition to particular candidates, or a particular political party.

14 8. Section 114.4 is amended by revising paragraphs (a), (b), (c)(1), (c)(2),
15 (c)(3)(i), (c)(4), (c)(5), (c)(6) and (d), by redesignating paragraphs (b)(1)(i) – (b)(1)(viii)
16 as paragraphs (b)(1) – (b)(8), and by removing paragraphs (b)(2), (c)(3)(iv), (c)(3)(v),
17 (c)(5)(i), (c)(5)(ii), (c)(6)(i), (c)(6)(ii), and (c)(8) to read as follows:

18 **§ 114.4 Disbursements for communications by corporations and labor organizations**
19 **beyond the restricted class in connection with a Federal election.**

20 (a) General. A corporation or labor organization may communicate beyond the
21 restricted class in accordance with this section. Communications ~~which~~that a
22 corporation or labor organization may make only to its employees (including its restricted
23 class) and their families, but not to the general public, are set forth in paragraph (b) of

1 this section. The communications that a corporation or labor organization may make to
2 the general public set forth in paragraph (c) of this section may also be made to the
3 corporation's or labor organization's restricted class and to other employees and their
4 families. Communications ~~which~~ that a corporation or labor organization may make only
5 to its restricted class are set forth at 11 CFR 114.3. The activities described in paragraphs
6 (b) and (c) of this section may be coordinated with candidates and political committees
7 only to the extent permitted by this section. See 11 CFR 100.16, 109.21, and 114.2(c)
8 regarding independent expenditures and coordination with candidates. Incorporated
9 membership organizations, incorporated trade associations, incorporated cooperatives,
10 and corporations without capital stock will be treated as corporations for the purposes of
11 ~~making communications beyond the restricted class under~~ this section.

12 (b) Communications by a corporation or labor organization involving candidate and
13 party appearances to employees beyond its restricted class.

14 ~~(1) Candidate and party appearances on corporate premises or at a meeting,~~
15 ~~convention or other function.~~ Corporations and labor organizations may
16 permit candidates, candidates' representatives or representatives of
17 political parties on corporate or labor organization premises or at a
18 meeting, convention, or other function of the corporation or labor
19 organization to address or meet its restricted class and other employees of
20 the corporation or labor organization and their families, in accordance
21 with the conditions set forth in paragraphs ~~(b)(1)(i) through (b)(1)(viii)~~
22 ~~(b)(1) through (b)(8)~~ of this section. Other guests of the corporation or
23 labor organization who are being honored or speaking or participating in

1 the event and representatives of the news media may be present. A
2 corporation or labor organization may bar all candidates, candidates'
3 representatives, and representatives of political parties from addressing or
4 meeting its restricted class and other employees of the corporation or labor
5 organization and their families on corporate premises or at any meeting,
6 convention or other function of the corporation or labor organization.

7 (i1) If a candidate for the House or Senate or a candidate's representative is
8 permitted to address or meet employees, all candidates for that seat who
9 request to appear must be given a similar opportunity to appear;

10 (ii2) If a Presidential or Vice Presidential candidate or candidate's
11 representative is permitted to address or meet employees, all candidates
12 for that office who are seeking the nomination or election, and who meet
13 pre-established objective criteria under 11 CFR 110.13(c), and who
14 request to appear must be given a similar opportunity to appear;

15 (iii3) If representatives of a political party are permitted to address or meet
16 employees, representatives of all political parties that had a candidate on
17 the ballot in the last general election or that are actively engaged in
18 placing or will have a candidate or candidates on the ballot in the next
19 general election and who request to appear must be given a similar
20 opportunity to appear;

21 (iv4) The candidate's representative or party representative (other than an
22 officer, director or other representative of a corporation or official,
23 member or employee of a labor organization) or the candidate, may ask

1 for contributions to his or her campaign or party, or ask that contributions
2 to the separate segregated fund of the corporation or labor organization be
3 designated for his or her campaign or party. The candidate, candidate's
4 representative, or party representative shall not accept contributions
5 before, during or after the appearance while at the meeting, convention or
6 other function of the corporation or labor organization, but may leave
7 campaign materials or envelopes for members of the audience. A
8 corporation or labor organization, its restricted class, or other employees
9 of the corporation or labor organization or its separate segregated fund,
10 including any official or member of the labor organization shall not, either
11 orally or in writing, solicit or direct or control contributions by members
12 of the audience to any candidate or party in conjunction with any
13 appearance by any candidate or party representative under this section,
14 and shall not facilitate the making of contributions to any such candidate
15 or party (see 11 CFR 114.2(f));

16 (v5) A corporation or labor organization or its separate segregated fund shall
17 not, in conjunction with any candidate, candidate representative or party
18 representative appearance under this section, expressly advocate the
19 election or defeat of any clearly identified candidate(s) or candidates of a
20 clearly identified political party and shall not promote or encourage
21 express advocacy by employees or labor organization members;

22 (vi6) No candidate, candidate's representative or party representative shall be
23 provided with more time or a substantially better location than other

1 candidates, candidates' representatives, or party representatives who
2 appear, unless the corporation is able to demonstrate that it is clearly
3 impractical to provide all candidates, candidates' representatives, and
4 party representatives with similar times or locations;

5 (vii)7) Coordination with each candidate, candidate's agent, and candidate's
6 authorized committee(s) may include discussions of the structure, format,
7 and timing of the candidate appearance and the candidate's positions on
8 issues, but shall not include discussions of the candidate's plans, projects,
9 or needs relating to the campaign; and

10 (viii)8) Representatives of the news media may be allowed to be present during a
11 candidate, candidate representative, or party representative appearance
12 under this section, in accordance with the procedures set forth at 11 CFR
13 114.3(c)(2)(iv).

14 ~~(2) — Candidate and party appearances on labor organization premises or at a~~
15 ~~meeting, convention or other function. A labor organization may permit~~
16 ~~candidates, candidates' representatives or representatives of political~~
17 ~~parties on the labor organization's premises or at a meeting, convention, or~~
18 ~~other function of the labor organization to address or meet its restricted~~
19 ~~class and other employees of the labor organization, and their families, in~~
20 ~~accordance with the conditions set forth in paragraphs (b)(1) (i) through~~
21 ~~(iii), (vi) through (viii), and paragraphs (b)(2) (i) and (ii) of this section.~~
22 ~~Other guests of the labor organization who are being honored or speaking~~
23 ~~or participating in the event and representatives of the news media may be~~

1 present. A labor organization may bar all candidates, candidates'
2 representatives and representatives of political parties from addressing or
3 meeting its restricted class and other employees of the labor organization
4 and their families on the labor organization's premises or at any meeting,
5 convention or other function of the labor organization.

6 (i) — The candidate's representative or party representative (other than
7 an official, member or employee of a labor organization) or the
8 candidate, may ask for contributions to his or her campaign or
9 party, or ask that contributions to the separate segregated fund of
10 the labor organization be designated for his or her campaign or
11 party. The candidate, candidate's representative or party
12 representative shall not accept contributions before, during or after
13 the appearance while at the meeting, convention or other function
14 of the labor organization, but may leave campaign materials or
15 envelopes for members of the audience. No official, member, or
16 employee of a labor organization or its separate segregated fund
17 shall, either orally or in writing, solicit or direct or control
18 contributions by members of the audience to any candidate or party
19 representative under this section, and shall not facilitate the making
20 of contributions to any such candidate or party. See 11 CFR
21 114.2(f).

22 (ii) — A labor organization or its separate segregated fund shall not, in
23 conjunction with any candidate or party representative appearance

1 ~~under this section, expressly advocate the election or defeat of any~~
2 ~~clearly identified candidate(s), and shall not promote or encourage~~
3 ~~express advocacy by its members or employees.~~

4 (c) Communications by a corporation or labor organization to the general public.

5 (1) General. A corporation or labor organization may make independent
6 expenditures or electioneering communications pursuant to 11 CFR
7 114.16. ~~This section addresses specific the communications,~~ described in
8 paragraphs (c)(2) through (c)(5) of this section, a corporation or labor
9 organization may make to the general public. The general public includes
10 anyone who is not in the corporation's or labor organization's restricted
11 class. The corporation or labor organization must not act in cooperation,
12 consultation, or concert with or at the request or suggestion of any
13 candidates, candidates' committees or agents, or political party committee
14 or party committee's agent regarding the preparation, contents and
15 distribution of any of the communications described in paragraphs (2)
16 through (7) below. ~~The provisions of paragraph (e) of this section shall~~
17 ~~not prevent a qualified nonprofit corporation under 11 CFR 114.10(e)~~
18 ~~from including express advocacy in any communication made to the~~
19 ~~general public under paragraphs (c)(2) through (c)(5)(i) of this section.~~

20 (2) Voter registration and get-out-the-vote~~voting~~ communications. A
21 corporation or labor organization may make voter registration and get-out-
22 the vote communications to the general public, ~~provided that the~~
23 ~~communications do not expressly advocate the election or defeat of any~~

1 ~~clearly identified candidate(s) or candidates of a clearly identified political~~
2 ~~party. The preparation and distribution or registration and get-out-the-vote~~
3 ~~communications shall not be coordinated with any candidate(s) or political~~
4 ~~party.~~ A corporation or labor organization may make communications
5 permitted under this paragraph (c)(2) through posters, billboards,
6 broadcasting media, newspapers, newsletter, brochures, mail, Internet
7 communications, emails, text messages, telephone calls, or similar means
8 of communication with the general public.

9 (3) Official registration and voting information.

10 (i) A corporation or labor organization may distribute to the general
11 public, or reprint in whole and distribute to the general public, any
12 registration or voting information, such as instructional materials,
13 ~~which~~ that has been produced by the official election
14 administrators.

15 (ii) A corporation or labor organization may distribute official
16 registration-by-mail forms to the general public. A corporation or
17 labor organization may distribute absentee ballots to the general
18 public if permitted by the applicable State law.

19 (iii) A corporation or labor organization may donate funds to State or
20 local government agencies responsible for the administration of
21 elections to help defray the costs of printing or distributing voter
22 registration or voting information and forms.

1 ~~(iv) —The corporation or labor organization shall not, in connection with~~
2 ~~any such distribution, expressly advocate the election or defeat of~~
3 ~~any clearly identified candidate(s) or candidates of a clearly~~
4 ~~identified political party and shall not encourage registration with~~
5 ~~any particular political party.~~

6 ~~(v) —The reproduction and distribution of registration or voting~~
7 ~~information and forms shall not be coordinated with any~~
8 ~~candidate(s) or political party.~~

9 (4) Voting records. A corporation or labor organization may prepare and
10 distribute to the general public the voting records of Members of
11 Congress, ~~provided that the voting record and all communications~~
12 ~~distributed with it do not expressly advocate the election or defeat of any~~
13 ~~clearly identified candidate, clearly identified group of candidates or~~
14 ~~candidates of a clearly identified political party. The decision on content~~
15 ~~and the distribution of voting records shall not be coordinated with any~~
16 ~~candidate, group of candidates or political party.~~

17 (5) Voter guides. A corporation or labor organization may prepare and
18 distribute to the general public voter guides ~~consisting of two or more~~
19 ~~candidates' positions on campaign issues, including voter guides obtained~~
20 from a nonprofit organization that is described in 26 U.S.C. 501 (c)(3) or
21 (c)(4), ~~provided that the voter guides comply with either paragraph~~
22 ~~(e)(5)(i) or (e)(5)(ii) (A) through (E) of this section. The sponsor may~~
23 ~~include in the voter guide biographical information on each candidate,~~

1 such as education, employment positions, offices held, and community
2 involvement.

3 ~~(i) The corporation or labor organization must not act in cooperation,~~
4 ~~consultation, or concert with or at the request or suggestion of the~~
5 ~~candidates, the candidates' committees or agents regarding the~~
6 ~~preparation, contents and distribution of the voter guide, and no~~
7 ~~portion of the voter guide may expressly advocate the election or~~
8 ~~defeat of one or more clearly identified candidate(s) or candidates~~
9 ~~of any clearly identified political party.~~

10 ~~(ii) (A) The corporation or labor organization must not act in cooperation,~~
11 ~~consultation, or concert with or at the request or suggestion of the~~
12 ~~candidates, the candidates' committees or agents regarding the~~
13 ~~preparation, contents and distribution of the voter guide;~~

14 ~~(B) All of the candidates for a particular seat or office shall be~~
15 ~~provided an equal opportunity to respond, except that in the~~
16 ~~case of Presidential and Vice Presidential candidates the~~
17 ~~corporation or labor organization may choose to direct the~~
18 ~~questions only to those candidates who—~~

19 ~~(1) Are seeking the nomination of a particular political~~
20 ~~party in a contested primary election; or~~

21 ~~(2) Appear on the general election ballot in the state(s)~~
22 ~~where the voter guide is distributed or appear on the~~

1 ~~general election ballot in enough states to win a~~
2 ~~majority of the electoral votes;~~

3 ~~(C) — No candidate may receive greater prominence in the voter~~
4 ~~guide than other participating candidates, or substantially~~
5 ~~more space for responses;~~

6 ~~(D) — The voter guide and its accompanying materials shall not~~
7 ~~contain an electioneering message; and~~

8 ~~(E) — The voter guide and its accompanying materials shall not~~
9 ~~score or rate the candidates' responses in such a way as to~~
10 ~~convey an electioneering message.~~

11 (6) Endorsements. A corporation or labor organization may endorse a
12 candidate, and may communicate the endorsement to its restricted class or
13 to the general public. ~~through the publications described in 11 CFR~~
14 ~~114.3(c)(1) or during a candidate appearance under 11 CFR 114.3(c)(2),~~
15 ~~provided that no more than a de minimis number of copies of the~~
16 ~~publication which includes the endorsement are circulated beyond the~~
17 ~~restricted class. The corporation or labor organization may publicly~~
18 ~~announce the endorsement and state the reasons therefore, in accordance~~
19 ~~with the conditions set forth in paragraphs (c)(6) (i) and (ii) of this section.~~
20 The Internal Revenue Code and regulations promulgated thereunder
21 should be consulted regarding restrictions or prohibitions on endorsements
22 by nonprofit corporations described in 26 U.S.C. 501(c)(3).

1 (i) ~~The public announcement of the endorsement may be made~~
2 ~~through a press release and press conference. Disbursements for~~
3 ~~the press release and press conference shall be de minimis. The~~
4 ~~disbursements shall be considered de minimis if the press release~~
5 ~~and notice of the press conference is distributed only to the~~
6 ~~representatives of the news media that the corporation or labor~~
7 ~~organization customarily contacts when issuing non-political press~~
8 ~~releases or holding press conferences for other purposes.~~

9 (ii) ~~The public announcement of the endorsement may not be~~
10 ~~coordinated with the candidate, the candidate's agents or the~~
11 ~~candidate's authorized committee(s).~~

12 (7) Candidate appearances on educational institution premises

13 (i) Rental of facilities at usual and normal charge. Any incorporated
14 nonprofit educational institution exempt from Federal taxation
15 under 26 U.S.C. 501(c)(3), such as a school, college or university,
16 may make its facilities available to any candidate or political
17 committee in the ordinary course of business and at the usual and
18 normal charge. In this event, the requirements of paragraph
19 (c)(7)(ii) of this section are not applicable.

20 (ii) Use of facilities at no charge or at less than the usual and normal
21 charge. An incorporated nonprofit educational institution exempt
22 from Federal taxation under 26 U.S.C. 501(c)(3), such as a school,
23 college or university, may sponsor appearances by candidates,

1 candidates' representatives or representatives of political parties at
2 which such individuals address or meet the institution's academic
3 community or the general public (whichever is invited) on the
4 educational institution's premises at no charge or at less than the
5 usual and normal charge, if:

6 (A) The educational institution makes reasonable efforts to
7 ensure that the appearances constitute speeches, question
8 and answer sessions, or similar communications in an
9 academic setting, and makes reasonable efforts to ensure
10 that the appearances are not conducted as campaign rallies
11 or events; and

12 (B) The educational institution does not, in conjunction with
13 the appearance, expressly advocate the election or defeat of
14 any clearly identified candidate(s) or candidates of a clearly
15 identified political party, and does not favor any one
16 candidate or political party over any other in allowing such
17 appearances.

18 ~~(8) Electioneering communications. Any corporation or labor organization~~
19 ~~may make electioneering communications to the general public that are~~
20 ~~permissible under 11 CFR 114.15. Qualified nonprofit corporations, as~~
21 ~~defined in 11 CFR 114.10(c), may make electioneering communications in~~
22 ~~accordance with 11 CFR 114.10(d).~~

23 **ALTERNATIVE A for 114.4(d)**

1 (d) Voter registration and get-out-the-vote drives.

2 (1) Voter registration and get-out-the-vote drives permitted. A corporation or
3 labor organization may support or conduct voter registration and get-out-
4 the-vote drives that are aimed at employees outside its restricted class and
5 the general public ~~in accordance with the conditions set forth in~~
6 ~~paragraphs (d)(1) through (d)(6) of this section.~~ The corporation or labor
7 organization must not act in cooperation, consultation, or concert with or
8 at the request or suggestion of any candidates, candidates' committees or
9 agents, or political party regarding the planning, organization, timing, or
10 administration of a voter registration or get-out-the-vote drive. Voter
11 registration and get-out-the-vote drives include providing transportation to
12 the polls or to the place of registration.

13 (2) Disbursements for certain voter registration and get-out-the-vote drives
14 not expenditures. Voter registration or get-out-the-vote drives that are
15 conducted in accordance with paragraphs (d)(2)(i) through (d)(2)(v) of this
16 section are not expenditures.

17 (i) The corporation or labor organization shall not make any
18 communication expressly advocating the election or defeat of any
19 clearly identified candidate(s) or candidates of a clearly identified
20 political party as part of the voter registration or get-out-the-vote
21 drive.

22 (2) ~~The registration or get-out-the-vote drive shall not be coordinated~~
23 ~~with any candidate(s) or political party.~~

1 (ii3) The registration drive shall not be directed primarily to individuals
2 previously registered with, or intending to register with, the
3 political party favored by the corporation or labor organization.

4 The get-out-the-vote drive shall not be directed primarily to
5 individuals currently registered with the political party favored by
6 the corporation or labor organization.

7 (iii4) These services shall be made available without regard to the
8 voter's political preference. Information and other assistance
9 regarding registering or voting, including transportation and other
10 services offered, shall not be withheld or refused on the basis of
11 support for or opposition to particular candidates or a particular
12 political party.

13 (iv5) Individuals conducting the registration or get-out-the-vote drive
14 shall not be paid on the basis of the number of individuals
15 registered or transported who support one or more particular
16 candidates or political party.

17 (v6) The corporation or labor organization shall notify those receiving
18 information or assistance of the requirements of paragraph (d)(4)
19 of this section. The notification shall be made in writing at the
20 time of the registration or get-out-the-vote drive.

21 **ALTERNATIVE B for 114.4(d)**

22 (d) Voter registration and get-out-the-vote drives. A corporation or labor
23 organization may support or conduct voter registration and get-out-the-vote drives that

1 are aimed at employees outside its restricted class and the general public in accordance
2 with the conditions set forth in paragraphs (d)(1) through (d)(5) of this section. Voter
3 registration and get-out-the-vote drives include providing transportation to the polls or to
4 the place of registration.

5 (1) ~~The corporation or labor organization shall not make any communication~~
6 ~~expressly advocating the election or defeat of any clearly identified~~
7 ~~candidate(s) or candidates of a clearly identified political party as part of~~
8 ~~the voter registration or get-out-the-vote drive.~~

9 (21) ~~The registration or get-out-the-vote drive shall not be coordinated with any~~
10 ~~candidate(s) or political party. The corporation or labor organization must~~
11 ~~not act in cooperation, consultation, or concert with or at the request or~~
12 ~~suggestion of any candidates, candidates' committees or agents, or~~
13 ~~political party regarding the planning, organization, timing, or~~
14 ~~administration of a voter registration or get-out-the-vote drive.~~

15 (32) The registration drive shall not be directed primarily to individuals
16 previously registered with, or intending to register with, the political party
17 favored by the corporation or labor organization. The get-out-the-vote
18 drive shall not be directed primarily to individuals currently registered
19 with the political party favored by the corporation or labor organization.

20 (43) These services shall be made available without regard to the voter's
21 political preference. Information and other assistance regarding
22 registering or voting, including transportation and other services offered,

1 shall not be withheld or refused on the basis of support for or opposition to
2 particular candidates or a particular political party.

3 (54) Individuals conducting the registration or get-out-the-vote drive shall not
4 be paid on the basis of the number of individuals registered or transported
5 who support one or more particular candidates or political party.

6 (65) The corporation or labor organization shall notify those receiving
7 information or assistance of the requirements of paragraph (d)(43) of this
8 section. The notification shall be made in writing at the time of the
9 registration or get-out-the-vote drive.

10 9. Section 114.10 is removed and reserved.

11 **§ 114.10 [Removed and reserved].**

12 10. Section 114.14 is removed and reserved.

13 **§ 114.14 [Removed and reserved].**

14 11. Section 114.15 is removed and reserved.

15 **§ 114.15 [Removed and reserved].**

16 12. Section 114.16 is added to read as follows:

17 **§ 114.16 Independent expenditures and electioneering communications made by**
18 **corporations and labor organizations.**

19 (a) General. Corporations and labor organizations may make independent
20 expenditures, as defined in 11 CFR 100.16, and electioneering communications,
21 as defined in 11 CFR 100.29.

22 (b) Reporting independent expenditures and electioneering communications.

- 1 (1) Corporations and labor organizations that make independent expenditures
2 aggregating in excess of \$250 with respect to a given election in a
3 calendar year shall file reports as required by 11 CFR 104.4(a) and
4 109.10(b).
- 5 (2) Corporations and labor organizations that make electioneering
6 communications aggregating in excess of \$10,000 in a calendar year shall
7 file the statements required by 11 CFR 104.20(b).
- 8 (c) Solicitation; disclosure of use of contributions for political purposes. Whenever
9 a corporation or labor organization solicits donations that may be used for
10 political purposes, the solicitation shall inform potential donors that their
11 donations may be used for political purposes, such as supporting or opposing
12 candidates.
- 13 (d) Non-authorization notice. Corporations or labor organizations making
14 independent expenditures or electioneering communications under this section
15 shall comply with the requirements of 11 CFR 110.11.
- 16 (e) Segregated bank account. A corporation or labor organization may, but is not
17 required to, establish a segregated bank account into which it deposits only funds
18 donated or otherwise provided by individuals, as described in 11 CFR part 104,
19 from which it makes disbursements for electioneering communications.
- 20 (f) Activities prohibited by the Internal Revenue Code. Nothing in this section shall
21 be construed to authorize any organization exempt from taxation under 26 U.S.C.
22 501(a) to carry out any activity that it is prohibited from undertaking by the
23 Internal Revenue Code, 26 U.S.C. 501, et seq.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-P