



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2011 JUN -9 P 4: 11

AGENDA ITEM

June 9, 2011

For Meeting of 6-15-11

MEMORANDUM

TO: The Commission

SUBMITTED LATE

FROM: Vice Chair Caroline C. Hunter CCH/EW

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

Attached is a draft Notice of Proposed Rulemaking to implement the decision in *Citizens United v. Federal Election Commission*, 558 U.S. __, 130 S. Ct. 876 (2010) for placement on the agenda for June 15, 2011.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 114

[Notice 2011 – XX]

**Independent Expenditures and Electioneering Communications
by Corporations and Labor Organizations**

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules regarding corporate and labor organization funding of expenditures, independent expenditures and electioneering communications. These and other proposed changes are in response to the decision of the Supreme Court in Citizens United v. FEC. The Commission has made no final decision on the issues presented in this rulemaking.

DATES: Comments must be received on or before August 15, 2011. Reply comments must be limited to the issues raised in the initial comments and must be received on or before August 25, 2011. The Commission will hold a hearing on these proposed rules and any modifications or amendments thereto that may be proposed, and will announce the date of the hearing at a later date. Anyone wishing to testify at the

1 hearing must file written comments by the due date and
2 must include a request to testify in the 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 either 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 a paper copy follow-up. Paper comments and a paper
14 copy follow-up of faxed comments should be sent to the
15 Federal Election Commission, Attn.: Robert M. Knop,
16 Assistant General Counsel, 999 E Street, NW.,
17 Washington, DC 20463. All comments must include the
18 full name and postal service address of the commenter or
19 they will not be considered. The Commission will post
20 comments on its Web site at the conclusion of the comment
21 period. The hearing will be held in the Commission's ninth
22 floor hearing room, 999 E Street, NW., Washington, DC
23 20463.

1 **FOR FURTHER**
2 **INFORMATION**
3 **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.

8
9 **SUPPLEMENTARY**
10 **INFORMATION:**

11 The Federal Election Campaign Act of 1971¹ (“the Act”), as amended, prohibits
12 corporations and labor organizations from using general treasury funds to make
13 expenditures in connection with Federal elections. 2 U.S.C. 441b. Expenditure is
14 defined as “(i) any purchase, payment, distribution, loan, advance, deposit, or gift of
15 money or anything of value, made by any person for the purpose of influencing any
16 election for Federal office; and (ii) a written contract, promise, or agreement to make an
17 expenditure.” 2 U.S.C. 431(9)(A); see also 11 CFR 100.111. The prohibition noted
18 above includes “independent expenditures,” which are expenditures expressly advocating
19 the election or defeat of a clearly identified candidate that are not made in concert or
20 cooperation with, or at the request or suggestion of, the clearly identified candidate, the
21 candidate’s authorized political committee, or their agents, or a political party committee
22 and its agents. 2 U.S.C. 431(17); 11 CFR 100.16(a). The Bipartisan Campaign Reform
23 Act of 2002 (“BCRA”) amended the Act in part to also prohibit corporations and labor
24 organizations from using general treasury funds to make electioneering communications.
25 2 U.S.C. 441b. Generally, electioneering communications are broadcast, cable, or

¹ 2 U.S.C. 431 et seq.

1 satellite communications that refer to a clearly identified candidate for Federal office, are
2 publicly distributed within sixty days before a general election or thirty days before a
3 primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i)
4 and (f)(3)(C); 11 CFR 100.29(a)(1)-(3). The Commission's regulations prohibiting
5 independent expenditures and electioneering communications by corporations and labor
6 organizations are found at 11 CFR part 114. The Act and Commission regulations
7 further require the reporting of independent expenditures and electioneering
8 communications. See 2 U.S.C. 434(f); 11 CFR 104.20 and 109.10. Finally, the Act and
9 Commission regulations require communications expressly advocating the election or
10 defeat of a clearly identified candidate, as well as electioneering communications, to
11 include statements disclosing who paid for the communication, and whether the
12 communication was authorized by a Federal candidate or a Federal candidate's
13 authorized political committee or its agents. 2 U.S.C. 441d(a); 11 CFR 110.11.

14 In Citizens United v. FEC, the Supreme Court held that the two statutory
15 provisions prohibiting corporations from making independent expenditures and
16 electioneering communications violate the First Amendment.
17 558 U.S. ___, 130 S. Ct. 876 (2010).² At the same time, the Supreme Court affirmed the
18 validity of the Act's reporting and disclaimer requirements for independent expenditures
19 and electioneering communications at 2 U.S.C. 434(f) and 441d(a)(3) and (d)(2).
20 Citizens United, 130 S. Ct. at 913-16.

² Based on this decision, the James Madison Center for Free Speech filed a Petition for Rulemaking urging the Commission to adopt regulations that conform to the decision in Citizens United and to remove 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.

1 The Commission seeks comment on: (1) eliminating the prohibitions in 11 CFR
2 114.2 and 114.14 on using corporate and labor organization general treasury funds to
3 finance expenditures, independent expenditures and electioneering communications; (2)
4 eliminating 11 CFR 114.15, which permits corporations and labor organizations to make
5 electioneering communications that are not the functional equivalent of express
6 advocacy; (3) eliminating the prohibitions in 11 CFR 114.3 and 114.4 regarding express
7 advocacy in communications to the general public and revising the standards for voter
8 registration and get-out-the-vote (“GOTV”) drives; and (4) revising the Commission’s
9 corporate facilitation rules in 114.2(f).

10 Although Citizens United did not directly address whether labor organizations
11 also have a First Amendment right to use their general treasury funds for independent
12 expenditures and electioneering communications, the Act and Commission regulations
13 treat labor organizations in a similar manner to corporations. See Advisory Opinion
14 2010-11 (Commonsense Ten) at 3 n.3. Because the Court’s Citizens United decision,
15 when addressing corporations, often referred to labor organizations, and provided no
16 basis for treating labor organization communications differently than corporate
17 communications under the First Amendment, the Commission proposes to make the same
18 regulatory changes discussed in this Notice of Proposed Rulemaking for both
19 corporations and labor organizations.

20 I. Background

21 In Citizens United, the Supreme Court held that the Act’s prohibitions on
22 financing independent expenditures or electioneering communications with corporate
23 general treasury funds were unconstitutional. In doing so, the Supreme Court overruled

1 Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) (“Austin”), which
2 had upheld a comparable state law prohibiting independent expenditures by corporations.
3 Citizens United also overruled the part of the Court’s decision upholding BCRA section
4 203’s prohibition on corporate electioneering communications in McConnell v. FEC, 540
5 U.S. 93, 204-06 (2003) (“McConnell”).

6 A. Before BCRA

7 The Act and Commission regulations prohibit corporations and labor
8 organizations from using general treasury funds to make expenditures, including
9 independent expenditures. 2 U.S.C. 441b(a) and (b)(2); 11 CFR 114.2(b)(2). A
10 corporation or labor organization, however, may establish a separate segregated fund
11 (“SSF”). 2 U.S.C. 441b(b)(2)(C); see also 11 CFR 114.5. The funds for a corporation’s
12 or labor organization’s SSF can only be solicited from those within the corporation’s or
13 labor organization’s restricted class (i.e., a corporation’s executive and administrative
14 personnel, stockholders, and the families of these groups, or a labor organization’s
15 members, executive or administrative personnel, and the families of both groups). See
16 also 11 CFR 114.5(f) (establishing that SSFs are subject to the contribution limits for
17 political committees). These SSF funds can then be contributed directly to candidates for
18 federal office and other political committees, and may be used without limitation to pay
19 for independent expenditures to communicate to the general public the corporation’s or
20 labor organization’s views on such candidates.

21 In FEC v. Massachusetts Citizens For Life, Inc. (“MCFL”), the Supreme Court
22 held that incorporated advocacy organizations possessing certain characteristics could not
23 constitutionally be barred from using corporate funds to make independent expenditures.

1 479 U.S. 238 (1986). Specifically, the MCFL Court held unconstitutional the Act’s
2 financing restrictions on corporate independent expenditures as applied to non-profit
3 corporations that (a) were formed for the sole purpose of promoting political ideas, (b)
4 did not engage in business activities, and (c) did not accept contributions from for-profit
5 corporations or labor organizations. Id. at 263-64.

6 In Austin, the Supreme Court upheld prohibitions on the use of general treasury
7 funds for communications that support or oppose any candidate for state office by
8 corporations and labor organizations, relying on the government’s “anti-distortion
9 interest. 494 U.S. at 659. The Supreme Court based this holding on a compelling
10 governmental interest in preventing “the corrosive and distorting effects of immense
11 aggregations of wealth that are accumulated with the help of the corporate form and that
12 have little or no correlation to the public’s support for the corporation’s political ideas.”
13 Id.

14 B. Impact of BCRA

15 When enacting section 203 of BCRA, Congress extended the Act’s restrictions on
16 the use of general treasury funds for corporate and labor organization expenditures
17 (including independent expenditures) under 2 U.S.C. 441b to electioneering
18 communications. 2 U.S.C. 441b(b)(2); see also 2 U.S.C. 434(f)(3). The Commission
19 implemented the electioneering communications provisions of BCRA by modifying
20 sections 104.3, 114.2 and 114.10, and promulgating new regulations at 11 CFR 100.29
21 and 114.14. See Explanation and Justification for Final Rules on Electioneering
22 Communications, 67 FR 65190 (Oct. 22, 2002). In response to a facial challenge to the
23 corporate-funding restrictions, reporting obligations, and disclaimer requirements

1 applicable to electioneering communications, the Supreme Court upheld BCRA’s
2 electioneering communication provisions at 2 U.S.C. 434(f), 441b, and 441d. See
3 McConnell, 540 U.S. at 194, 201-02, 207-08. Specifically, the Supreme Court held that
4 the prohibition on the use of general treasury funds by corporations and labor
5 organizations to pay for electioneering communications in 2 U.S.C. 441b(b)(2) was not
6 unconstitutional, “to the extent that the issue ads broadcast during the 30- and 60-day
7 periods preceding federal primary and general elections are the functional equivalent of
8 express advocacy.” Id. at 206.

9 Subsequently, in Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410, 411-12
10 (2006) (“WRTL I”), the Supreme Court concluded that McConnell did not preclude as-
11 applied challenges to the prohibitions on corporate and labor organization funding of
12 electioneering communications at 2 U.S.C. 441b. The Supreme Court thereafter
13 reviewed an as-applied challenge brought by a non-profit corporation seeking to use its
14 own general treasury funds, which included donations it had received from other
15 corporations, to pay for broadcast advertisements referring to Senator Feingold and
16 Senator Kohl during the electioneering communications window before the 2004 general
17 election in which Senator Feingold, but not Senator Kohl, was on the ballot. See FEC v.
18 Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) (“WRTL II”). The plaintiff argued
19 that these communications were genuine issue ads run as part of a grassroots lobbying
20 campaign on the issue of Senate filibusters of judicial nominations. Id. at 457-61. The
21 WRTL II Court stated that BCRA’s prohibitions on corporate expenditures may be
22 applied constitutionally to either express advocacy, or, within the blackout periods, to its
23 functional equivalent. Id. at 465. The Court held that a communication is the “functional

1 equivalent of express advocacy” only if it is “susceptible of no reasonable interpretation
2 other than as an appeal to vote for or against a specific candidate.” *Id.* at 469. Applying
3 that standard, the Supreme Court held that section 441b(b)(2) was unconstitutional as
4 applied to the plaintiff’s advertisements because the advertisements were not the
5 “functional equivalent of express advocacy.” *Id.* at 476, 480-81. The Commission
6 adopted the regulation at 11 CFR 114.15 in response to the Supreme Court’s ruling in
7 WRTL II.

8 C. Citizens United

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

16 Citizens United filed suit seeking a preliminary injunction, arguing that the ban on
17 corporate electioneering communications at 2 U.S.C. 441b(b)(2) was unconstitutional as
18 applied to payments to make the film available through video-on-demand and that the
19 disclosure and disclaimer requirements at 2 U.S.C. 434(f) and 441d were unconstitutional
20 as applied to payments for the film and for three advertisements for the movie. The
21 District Court denied Citizens United a preliminary injunction and granted the
22 Commission’s motion for summary judgment. See Citizens United v. FEC, 530 F. Supp.
23 2d 274 (D.D.C. 2008).

1 In Citizens United, the Supreme Court invalidated section 441b’s restrictions on
2 corporate independent expenditures and electioneering communications. Id. at 913. The
3 Supreme Court determined that the prohibition on corporate independent expenditures
4 and electioneering communications is a ban on speech, and stated that “political speech
5 must prevail against laws that would suppress it, whether by design or inadvertence.” Id.
6 at 898.

7 In overruling Austin, the Supreme Court concluded the anti-distortion rationale
8 used to warrant restrictions on corporate speech “interferes with the ‘open marketplace of
9 ideas’ protected by the First Amendment.” Id. at 906. Moreover, “[a]ll speakers,
10 including individuals and the media, use money amassed from the economic marketplace
11 to fund their speech, and the First Amendment protects the resulting speech.” Id. at 905.
12 Accordingly, the Supreme Court held that “the rule that political speech cannot be limited
13 based on a speaker’s wealth is a necessary consequence of the premise that the First
14 Amendment generally prohibits the suppression of political speech based on the
15 speaker’s identity.” Id.

16 The Supreme Court further held that, while the government has a compelling
17 interest in preventing corruption or the appearance of corruption, “independent
18 expenditures, including those made by corporations, do not give rise to corruption or the
19 appearance of corruption.” Id. at 909. Separately, the Supreme Court disagreed that
20 corporate independent expenditures can be limited because of an interest in protecting
21 dissenting shareholders from being compelled to fund corporate political speech and held
22 that such disagreements may be corrected by shareholders through the procedures of
23 corporate democracy. Id. at 911. The Supreme Court found no compelling government

1 interest to support the limits on corporations' independent political speech and, thus,
2 invalidated 441b's restrictions with respect to corporate independent expenditures and
3 electioneering communications. Id. at 913.

4 Citizens United also challenged the Act's disclaimer and disclosure provisions at
5 434(f) and 441d as applied to the film and three advertisements for the film. Under the
6 Act, electioneering communications must include a statement identifying the person
7 responsible for payment for the advertisement. 2 U.S.C. 441d(a). Also, any person who
8 spends more than \$10,000 on electioneering communications within a calendar year must
9 file a disclosure statement with the Commission identifying the person making the
10 electioneering communication, the election to which the communication pertains, and the
11 names of contributors who gave \$1000 or more within a specified time period. 2 U.S.C.
12 434(f)(2). The Supreme Court rejected that challenge, noting that "transparency enables
13 the electorate to make informed decisions and give proper weight to different speakers
14 and messages" Citizens United, 130 S. Ct. at 913-16. The Court found that disclaimer
15 and disclosure requirements impose no ceiling on campaign activities, do not prevent
16 anyone from speaking, and advance the public's "interest in knowing who is speaking
17 about a candidate shortly before an election." Id. at 914-15. The Court also noted that
18 "prompt disclosure of expenditures can provide shareholders and citizens with the
19 information needed to hold corporations and elected officials accountable for their
20 positions and supporters." Id. at 916.

21 II. Proposed 11 CFR 104.20 – Reporting electioneering communications

22 BCRA established reporting requirements for persons making disbursements for
23 electioneering communications. See 2 U.S.C. 434(f). Specifically, every person who

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

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

1 104.20. See Explanation and Justification for Final Rules on Electioneering
2 Communications, 72 FR 72899 (Dec. 26, 2007), available at
3 http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf.

4 In Citizens United, the Court invalidated altogether the statutory prohibition on
5 the making of electioneering communications by corporations and labor organizations.
6 Citizens United, 130 S. Ct. at 916. Accordingly, corporations and labor organizations
7 making electioneering communications are no longer subject to the restrictions in 11 CFR
8 114.15. For this reason, as discussed below in Section IX, the Commission is proposing
9 to remove that regulation. Because 11 CFR 114.15 itself is no longer enforceable, the
10 Commission intends to eliminate references to that provision in 11 CFR 104.20 and seeks
11 comment on how to clarify the reporting requirements for electioneering
12 communications. With respect to implementing changes to these provisions of the
13 Commission's regulations, the Commission requests comment on the clarity of current
14 reporting obligations. Are the Commission's forms for reporting these activities clear or
15 should they be amended to provide for these changes?

16 A. 11 CFR 104.20(c) – Contents of electioneering communication disclosure
17 statements

18 Current section 104.20(c) specifies the contents of reports filed by all persons
19 when they make electioneering communications.³ The information that must be reported

³ 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).

1 depends on who is making disbursements for electioneering communications and how
2 that person pays for them. See 11 CFR 104.20 (c)(1)-(9).⁴

3 Current paragraph (c)(2) implements the statutory requirement to report the
4 identification of any “person sharing or exercising direction or control” over the activities
5 of the person who made any disbursements or who executed any contracts to make
6 disbursements for an electioneering communication. See 2 U.S.C. 434(f)(2)(A). The
7 term “persons sharing or exercising direction or control” is defined in the regulations at
8 11 CFR 104.20(a)(3).

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

⁴ 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 calendar year. Current paragraph (c)(7)(ii) differs from current paragraph (c)(7)(i) in that
2 the segregated bank account is not limited to donations solely from individuals.

3 Current paragraph (c)(8) requires the reporting of the name and address of each
4 person who donated an amount aggregating \$1,000 or more within a certain time frame to
5 the person making the electioneering communication if (1) the electioneering
6 communication was not funded exclusively by one of these segregated bank accounts
7 described in paragraph (c)(7), and (2) was not made by a corporation or labor
8 organization pursuant to 11 CFR 114.15.

9 For electioneering communications made by corporations and labor organizations
10 pursuant to 11 CFR 114.15, the rules at 11 CFR 104.20(c)(9) currently specify that
11 information about donors must be reported only if the donations aggregating to \$1,000 or
12 more were “made for the purpose of furthering electioneering communications.” 11 CFR
13 104.20(c)(9). This requirement was intended to provide the “public with information
14 about those persons who actually support the message conveyed by the [electioneering
15 communications] without imposing on corporations and labor organizations the
16 significant burden of disclosing the identities of the vast numbers of customers, investors,
17 or members, who have provided funds for purposes entirely unrelated to the making of
18 [electioneering communications].” 2007 EC E&J, 72 FR at 72911.

19 B. Electioneering Communications Reporting

20 The Commission intends to remove references to current 11 CFR 114.15 and
21 otherwise preserve the Commission’s existing rules at 11 CFR 104.20(c)(7) regarding the
22 use of segregated bank accounts. Removing the references to 11 CFR 114.15 would
23 therefore allow persons making electioneering communications to accept corporate and

1 labor funding in a segregated bank account under paragraph (c)(7)(ii). This change
2 would be consistent with the Commission’s proposal to remove 11 CFR 114.15 itself
3 from the regulations.

4 The Commission intends to remove the references to 11 CFR 114.15 in
5 paragraphs (c)(8) and (c)(9) to reflect that corporations and labor organizations may now
6 make electioneering communications that contain express advocacy or its functional
7 equivalent.

8 III. 11 CFR 109.10 – Reporting independent expenditures

9 As explained in Section IV below, to comply with Citizens United the
10 Commission proposes to revise 11 CFR 114.2(b)(2)(i) and (ii) to permit corporations and
11 labor organizations to make independent expenditures from their general treasury funds.

12 With respect to implementing changes to these provisions of the Commission’s
13 regulations, the Commission requests comment on the clarity of current reporting
14 obligations. Are the Commission’s forms for reporting these activities clear or should
15 they be amended to provide for these changes?

16 IV. Overview of Changes to Part 114 Corporate and Labor Organization Activity

17 Commission regulations implementing the statutory provisions invalidated by
18 Citizens United are no longer valid. These regulations include portions of current
19 11 CFR part 114, which concern corporate and labor organization activity. In this
20 rulemaking, the Commission proposes to amend 11 CFR 114.2, 114.3, and 114.4, to
21 delete 11 CFR 114.10, 114.14, and 114.15, and to add a new 11 CFR 114.16. The
22 Commission also seeks comment on whether to revise 11 CFR 114.2(f).

1 The Commission’s proposed changes to 11 CFR part 114 seek to comply with
2 Citizens United by (1) modifying specific language within sections of part 114 that
3 prohibit corporations and labor organizations from using general treasury funds to
4 finance independent expenditures and electioneering communications and (2) removing
5 language that is superfluous given the permissible uses of general treasury funds under
6 Citizens United. Because Citizens United left intact the ban on corporate and labor
7 organization contributions under 2 U.S.C. 441b, the Commission does not propose to
8 change the provisions in 11 CFR part 114 that implement the contribution ban.

9 Among the Commission’s proposals to comply with Citizens United are
10 alternatives for modifying current 11 CFR 114.2(b)(2)(i), which prohibits corporations
11 and labor organizations from making expenditures, including independent expenditures.
12 The Commission proposes to modify 11 CFR 114.2(b)(2)(i) in one of two ways: (1)
13 narrow the prohibition to allow all expenditures except those that are coordinated with a
14 candidate or a political party committee, including coordinated communications, or (2)
15 narrow the prohibition to allow only communications that are not coordinated with a
16 candidate or a political party committee, while continuing to prohibit non-expressive
17 expenditures. These alternative approaches extend to specific applications of the
18 expenditure prohibition to voter registration and get-out-the-vote (“GOTV”) drives,
19 discussed below in the proposed changes to section 114.3 (with respect to the restricted
20 class) and section 114.4 (with respect to the general public).

21 While the Commission proposes to retain the reporting requirements currently at
22 11 CFR 114.3(b), which requires corporations and labor organizations to report
23 disbursements for communications containing express advocacy made to the restricted

1 class, it recognizes that a communication containing express advocacy may now be made
2 both to the general public and the restricted class, thereby triggering different thresholds
3 for reporting obligations. With respect to 11 CFR 114.4, the Commission proposes to
4 eliminate the prohibition on making express advocacy communications to those outside
5 the restricted class, but would maintain the restrictions on coordinating with candidates
6 and political parties when making communications to those outside the restricted class.
7 Additionally, the Commission proposes to create a new 11 CFR 114.16 that incorporates
8 certain provisions of 11 CFR 114.10. These provisions would state that corporations and
9 labor organizations may make independent expenditures and electioneering
10 communications. These provisions would reference other Commission regulations that
11 now apply to corporations and labor organizations that make such independent
12 expenditures or electioneering communications, including references to the reporting
13 requirements for independent expenditures and electioneering communications under
14 11 CFR 104.4(a), 109.10(b), and 104.20(b), and the disclaimer provisions of 11 CFR
15 110.11. Finally, the Commission proposes to remove 11 CFR 114.10, 114.14, and
16 114.15, which implement exceptions to the general prohibition against corporate and
17 labor organization funding of independent expenditures and electioneering
18 communications, since, given the holding in Citizens United, exceptions to a prohibition
19 that no longer exists are no longer necessary.

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

21 The Commission regulation at 11 CFR 114.2(b) implements 2 U.S.C. 441b(a) by
22 prohibiting corporations and labor organizations from making expenditures, including

1 independent expenditures⁵ (i.e., expenditures for express advocacy⁶ communications to
2 those outside their restricted classes). This rule also prohibits corporations and labor
3 organizations from making payments for electioneering communications to those outside
4 their restricted classes unless certain criteria are met. The Supreme Court’s decision in
5 Citizens United invalidated the prohibitions on corporate independent expenditures and
6 electioneering communications in 2 U.S.C. 441b(a).⁷ Accordingly, certain portions of
7 11 CFR 114.2(b) are no longer valid. Thus, the Commission proposes to revise this
8 regulation to remove the prohibitions on independent expenditures and electioneering
9 communications.

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

12 Current 11 CFR 114.2(b)(2)(i) generally prohibits corporations and labor
13 organizations from making an “expenditure,” as defined in 11 CFR part 100, subpart D.

⁵ 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).

⁶ 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 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.”

⁷ See the discussion above regarding the applicability of the Citizens United holding to labor organizations.

1 With certain exceptions, this prohibition applies to all expenditures whether they are
2 independent, coordinated, or any other form of expenditure, including in-kind
3 contributions.⁸ The Commission is considering two alternatives for revising 11 CFR
4 114.2(b)(2)(i). Both alternatives would permit corporations and labor organizations to
5 make expenditures from their general treasury funds for communications that are not
6 coordinated with a candidate or political party, and both alternatives would maintain the
7 prohibition on corporate and labor organization expenditures for all activities that are
8 coordinated with a candidate or political party as defined in 11 CFR 109.20 or 109.21.
9 The alternatives differ in that Alternative A would permit corporations and labor
10 organizations to make all expenditures from their general treasuries for non-coordinated
11 activities, while Alternative B would maintain the prohibition on non-expressive
12 expenditures by corporations and labor organizations regardless of whether they are
13 coordinated with a candidate or political party. The Commission invites comment on
14 which, if either, of the two proposals would better implement Citizens United and why.

15 Alternative A – Permit Corporations and Labor Organizations to Make
16 Expenditures Except for Coordinated Expenditures and Coordinated
17 Communications

18 The Court in Citizens United stated that “[b]y definition, an independent
19 expenditure is political speech presented to the electorate that is not coordinated with a
20 candidate.” Citizens United, 130 S. Ct. at 910. Alternative A would therefore comply
21 with the Court’s holding by eliminating the existing broad prohibition on corporate and

⁸ An in-kind contribution is an expenditure. See 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 labor organization expenditures from general treasury funds, and replace it with a
2 regulation specifically prohibiting only expenditures that are coordinated with a candidate
3 or a political party committee, and coordinated communications.

4 The Commission seeks comment on whether Alternative A would comply with
5 the Citizens United holding. Does the proposal eliminate too much or too little of the
6 prohibition on corporate and labor organization expenditures? Does the proposed
7 alternative provide clear guidance as to the types of expenditures corporations and labor
8 organizations may constitutionally make in accordance with Citizens United?

9 The Commission also seeks comment on whether Alternative A should
10 distinguish between expenditures for communications and other types of non-coordinated
11 expenditures. Expenditures for all communications by corporations and labor
12 organizations would be permitted under Alternative A so long as they are not coordinated
13 with candidates or political parties. This would include both communications that contain
14 express advocacy, which is one component of the statutory and regulatory definition of
15 an “independent expenditure” (e.g., a television advertisement that urges its audience to
16 vote for a clearly identified Senate candidate who is running for election in the state
17 where the ad is aired), and those that do not contain express advocacy (e.g., a mass
18 mailing that exhorts readers to vote for unspecified candidates who support a particular
19 cause). Does the rationale of Citizens United apply equally to both of these types of
20 communications?

21 Expenditures that are not for communications would also be permitted under
22 Alternative A as long as these expenditures are not in-kind contributions or coordinated
23 with candidates or political party committees. Examples would include payment for

1 transportation of volunteers to campaign events, certain payments for expenses of voter
2 registration drives, or costs to use a venue for a rally or event not coordinated with a
3 candidate or political party. Should such expenditures by corporations and labor
4 organizations continue to be prohibited on the ground that, under Citizens United, the
5 First Amendment does not protect them and therefore the statutory prohibition still
6 applies? On the other hand, do expenditures, by definition, have an expressive element,
7 i.e. because expenditures are made “for the purpose of influencing a Federal election”?
8 Should expenditures such as those described above therefore be permitted on the grounds
9 that, under Citizens United, the First Amendment protects, and the government has no
10 compelling interest in prohibiting, any corporate or labor organization expenditure that is
11 not coordinated with a candidate or political party and does not constitute an in-kind
12 contribution? Did Citizens United reach this question?

13 For example, how should the Commission treat corporate or labor organization
14 expenditures for transporting voters to polling places as part of a get-out-the-vote
15 campaign supporting or opposing a specific candidate, when not coordinated with any
16 candidate or political party? Such expenses might include the driver’s salary, vehicle
17 rental, and fuel, and if workers were brought in from another geographical area to assist
18 in the efforts, the corporation or labor organization might also be paying for their travel,
19 lodging, and food costs. These payments would be permitted under Alternative A.

20 In WRTL II, the Court explained, “Prior to BCRA, corporations were free under
21 federal law to use independent expenditures to engage in political speech so long as that
22 speech did not expressly advocate the election or defeat of a clearly identified candidate.”
23 WRTL II at 457. Given this recognition by the Court in WRTL II, can Citizens United

1 now be read to restrict corporate and labor organization independent political spending
2 outside of statutorily defined “independent expenditures”?

3 In Citizens United, the Court described the statute at issue as an “expenditure
4 ban,” 130 S. Ct. at 891, and a “prohibition on corporate expenditures”. Id. at 894. The
5 Court further described the statute at issue in Austin as a “corporate expenditure
6 restriction[.]” Id. at 903. In light of this language, the Court’s description of the state of
7 the law in 2007 aside, does Alternative A’s removal of the ban on corporate and labor
8 organization expenditures reflect the Court’s holding and rationale? See also EMILY’s
9 List v. FEC, 581 F. 3d 1, 12 (D.C. Cir. 2009) (“But non-profit entities are entitled to
10 make their expenditures-such as advertisements, get-out-the-vote efforts, and voter
11 registration drives-out of a soft-money or general treasury account that is not subject to
12 source and amount limits.”).

13 In Buckley v. Valeo, 424 U.S. 1 (1976), the Court reasoned that expenditure
14 limitations cannot be sustained because spending limits “impose direct quantity
15 restrictions” on political communication and association by persons and groups.

16 A restriction on the amount of money a person or group can spend on
17 political communication during a campaign necessarily reduces the
18 quantity of expression by restricting the number of issues discussed, the
19 depth of their exploration, and the size of the audience reached. This is
20 because virtually every means of communicating ideas in today's mass
21 society requires the expenditure of money. The distribution of the
22 humblest handbill or leaflet entails printing, paper, and circulation costs.
23 Speeches and rallies generally necessitate hiring a hall and publicizing the

1 event. The electorate's increasing dependence on television, radio, and
2 other mass media for news and information has made these expensive
3 modes of communication indispensable instruments of effective political
4 speech.

5 424 U.S. at 18-19.

6 The Court explained, "Being free to engage in unlimited political expression
7 subject to a ceiling on expenditures is like being free to drive an automobile as far and as
8 often as one desires on a single tank of gasoline." Id. at 19 n.18. If the Commission were
9 to exclude only independent expenditures from the ban on corporate and labor
10 organization expenditures, would the Commission be sustaining an expenditure ban?
11 The Commission seeks comments on the approach taken in this alternative.

12 Alternative B - Permit Corporations and Labor Organizations to Make
13 Independent Expenditures but not Coordinated Communications or Non-
14 Communicative Expenditures

15 Alternative B would implement Citizens United by amending the prohibition on
16 corporate and labor organization expenditures to permit those entities to make
17 independent expenditures from their general treasury funds for non-coordinated
18 communications, but would continue to prohibit coordinated communications and non-
19 communicative expenditures, including in-kind contributions.

20 Alternative B proposes to distinguish between expenditures for communications
21 and other types of expenditures. As noted above, the Court in Citizens United stated that
22 "[b]y definition, an independent expenditure is political speech presented to the electorate
23 that is not coordinated with a candidate." Citizens United, 130 S. Ct. at 910. This

1 language indicates that the rationale of Citizens United applies to corporate and labor
2 organization speech, but may not apply to non-communicative activity. Indeed, the
3 definition of expenditure, which includes “any purchase, payment, distribution, loan,
4 advance, deposit, or gift of money or anything of value, made by any person for the
5 purpose of influencing any election for Federal office,” 2 U.S.C. 431(9)(A), covers non-
6 communicative activity. The Commission is therefore proposing Alternative B to clearly
7 distinguish between permissible independent expenditures for speech on the one hand,
8 and types of non-speech and coordinated expenditures that would continue to be
9 prohibited, on the other. Alternative B would apply the Court’s reasoning to
10 communications generally, but would not apply to other types of expenditures under a
11 reading of Citizens United that the Court addressed only electioneering communications
12 and independent expenditures in the form of speech.

13 In Buckley, the Court distinguished between contribution limits, which it upheld,
14 and expenditure limits, which it invalidated. The Court explained that “[t]he expenditure
15 limitations contained in the Act represent substantial rather than merely theoretical
16 restraints on the quantity and diversity of political speech.” 424 U.S. at 19. By contrast,
17 the Court concluded contributions involve only a limited degree of protected speech
18 because they represent a “symbolic expression of support” such that the limitation “does
19 not in any way infringe the contributor’s freedom to discuss candidates and issues.” Id. at
20 21. See MCFL, 479 U.S. at 259-60 (“We have consistently held that restrictions on
21 contributions require less compelling justification than restrictions on independent
22 spending.”). Moreover, in Buckley, the Court also recognized that certain expenditures –
23 namely those that are made in coordination with candidates – are nothing more than

1 “disguised contributions” and receive only the lesser protections afforded to contributions
2 by the constitution. 424 U.S. at 46-47. Finally, although the Buckley Court noted that
3 “the dependence of a communication on the expenditure of money” does not “itself
4 introduce a non-speech element,” the Court did acknowledge that the “giving and
5 spending of money” may ultimately involve primarily conduct, rather than speech. Id. at
6 16.

7 The Supreme Court has long distinguished between government restrictions on
8 pure speech and government restrictions on conduct, including expressive conduct. See,
9 e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Spence v. Washington, 418 U.S.
10 405 (1974); United States v. O’Brien, 391 U.S. 367 (1968). While restrictions on pure
11 speech are subject to strict scrutiny by the courts, a “sufficiently important governmental
12 interest in regulating the nonspeech element can justify incidental limits on First
13 Amendment freedoms.” Barnes, 501 U.S. at 567 (quoting O’Brien, 391 U.S. at 376).

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

1 coordination also distinguish between communications and “expenditures that are not
2 made for communications.” Explanation and Justification for Final Rules on Coordinated
3 and Independent Expenditures, 68 FR 421, 425 (Jan. 3, 2003); see also Statement of
4 Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky,
5 MUR 5564, Alaska Democratic Party, at 7 (acknowledging that the Explanation and
6 Justification for 11 CFR 109.20 “does limit Section 109.20 to expenditures that are not
7 communications” and therefore “presents the difficult task of determining what is and
8 what is not a communication”).

9 “Independent expenditure” is a term that is defined in the Act and the
10 Commission’s regulations. Congress crafted the statutory definition of “independent
11 expenditure” to reflect the Court’s decision in Buckley. See H.R. Doc. No. 94-917, at 5
12 (1976). In Buckley, the Court construed the provision “expenditures . . . relative to a
13 clearly identified candidate” as “expenditures for communications that in express terms
14 advocate the election or defeat of a clearly identified candidate for federal office.”⁹
15 424 U.S. at 44 (emphasis added); see also id. at 80.

16 Indeed, the Citizens United Court, in the language quoted above, explicitly
17 referred to the “definition” of “independent expenditure.” The statute defines
18 “independent expenditure” as “an expenditure by a person . . . expressly advocating the
19 election or defeat of a clearly identified candidate.” 2 U.S.C. 431(17). The statute’s use
20 of the phrase “expressly advocating” underscores that the definition of independent
21 expenditure is limited to communications. In short, although other activities may indicate
22 support for a candidate, only communications can “expressly advocate.” The

⁹ 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 Commission seeks comment on whether a court has ever afforded an expenditure other
2 than a communication the same level of protection as an “independent expenditure.”

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 v. Valeo 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).

14 As noted above, Citizens United concerned electioneering communications and
15 independent expenditures in the form of “political speech”. The Court did not address
16 conduct. Accordingly, the Commission seeks comment as to whether the decision in
17 Citizens United should be read to apply to non-communicative activities.

18 Under proposed Alternative B, corporations and labor organizations would be
19 permitted to make expenditures from general treasury funds solely for the type of activity
20 described by the Supreme Court: “political speech presented to the electorate that is not
21 coordinated with a candidate.” Under this proposed alternative, coordinated
22 communications as well as all non-communicative expenditures would continue to be

1 prohibited, on the grounds that the holding in Citizens United did not extend to non-
2 speech expenditures, which were not before the Court.

3 The Commission seeks comment on whether Alternative B is consistent with the
4 Citizens United decision. Does the proposal eliminate too much or too little of the
5 statutory prohibition on corporate and labor organization expenditures? Is Alternative B
6 specific enough as to the types of expenditures corporations and labor organizations may
7 constitutionally make, according to Citizens United? Does the Act contemplate the
8 proposed distinction between speech and non-speech expenditures? Does Citizens
9 United or other Supreme Court precedent permit or require this distinction? Would
10 sustaining a ban on non-speech expenditures further the government’s interest in
11 preventing corruption or the appearance of corruption? The Commission also seeks
12 comment on whether Alternative B should be modified to preserve more of the existing
13 rules.

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

17 Currently, 11 CFR 114.2(b)(2)(ii) prohibits corporations and labor organizations
18 from “making expenditures with respect to a Federal election . . . for communications to
19 those outside their restricted class that expressly advocate the election or defeat of one or
20 more clearly identified candidate(s) or the candidates of a clearly identified political
21 party.” Because the Supreme Court held in Citizens United that corporations and labor
22 organizations may constitutionally make expenditures for communications containing

1 express advocacy to those not in their restricted classes, the Commission proposes to
2 remove paragraph (b)(2)(ii).

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

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

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

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

1 fundraising project as part of their work responsibilities, using corporate or labor
2 organization resources, (b) providing materials for the purpose of transmitting or
3 delivering contributions, such as stamps and envelopes, and (c) using coercion to urge
4 individuals to make contributions. 11 CFR 114.2(f)(2). See Explanation and
5 Justification for Final Rules on Corporate and Labor Organization Activity, 60 FR 64620,
6 64624 (Dec. 14, 1995).

7 In light of the holding in Citizens United, the Commission is seeking comment on
8 whether its regulations on corporate and labor organization facilitation should be revised.
9 As discussed above, the Citizens United decision invalidated restrictions on corporate
10 independent expenditures and electioneering communications. However, the Court noted
11 that “Citizens United has not made direct contributions to candidates, and it has not
12 suggested that the Court should reconsider whether contribution limits should be
13 subjected to rigorous First Amendment scrutiny.” 130 S. Ct. at 909. See also Buckley,
14 424 U.S. at 28-29 (“Significantly, the Act’s contribution limitations in themselves do not
15 undermine to any material degree the potential for robust and effective discussion of
16 candidates and campaign issues by individual citizens, associations, the institutional
17 press, candidates, and political parties.”). Absent prearrangement and coordination, are
18 the corporate and labor organization activities prohibited by these provisions “direct
19 contributions” under the Act? See Buckley, 424 U.S. at 47 (“The absence of
20 prearrangement and coordination of an expenditure with the candidate or his agents not
21 only undermines the value of the expenditure to the candidate, but also alleviates the
22 danger that expenditures will be given as quid pro quo for improper commitments from
23 the candidate.”) If the basis for the regulation is the provision of the Act held

1 unconstitutional in Citizens United, in the absence of “prearrangement and coordination”
2 of this and related activity with a candidate, does the Commission have legal authority, in
3 light of the holding of Citizens United, to retain this restriction?

4 “Facilitation” is designed to result in the receipt of direct contributions by
5 Federal candidates and political committees. Citizens United left undisturbed the
6 prohibition on contributions by corporations and labor organizations. While removing
7 the prohibitions on corporate and labor organization independent expenditures and
8 electioneering communications as required by Citizens United, should the Commission
9 also revise this provision of the Commission’s regulations? Do the Commission’s
10 facilitation regulations impermissibly restrict activities that are constitutionally protected,
11 when the activities are conducted independent of a candidate or political party
12 committee? If so, do these regulations need to be modified to fully implement Citizens
13 United or do the current regulations continue to satisfy the Act in identifying the line
14 between conduct that is permissible and that which is not? On the other hand, if the basis
15 for this regulation is the Act’s prohibition on corporate and labor organization
16 contributions, given that Citizens United left undisturbed the prohibition on contributions
17 by corporations and labor organizations, should the Commission revise 11 CFR 114.2(f)?

18 In a related context, should the Commission revise 11 CFR 110.6(b)(2)(ii), which
19 provides that any person who is prohibited from making contributions or expenditures in
20 connection with an election for Federal office is prohibited from acting as a conduit for
21 contributions earmarked to candidates or their authorized committees? While removing
22 the prohibitions on corporate and labor organizations independent expenditures and

1 electioneering communications as required by Citizens United, should the Commission
2 also revise this provision of the Commission’s regulations?

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

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

13 The Commission’s current regulations at 11 CFR 114.4 set out the restrictions and
14 prohibitions for communications by corporations and labor organizations beyond the
15 restricted class, both to employees outside the restricted class, and to the general public.
16 Citizens United held, consistent with the First Amendment, that corporations and labor
17 organizations may not be prohibited from making independent expenditures beyond the
18 restricted class. However, the Act exempts communications made by corporations and
19 labor organizations to their restricted class from the definition of expenditure, whether or
20 not they contain express advocacy, and, as discussed in greater detail below, establishes
21 different reporting requirements for these communications in 2 U.S.C. 431(9)(B)(iii).
22 Because of this statutory distinction between express advocacy communications to the
23 restricted class and express advocacy communications made beyond the restricted class,

1 the Commission proposes to maintain the current structure in which 11 CFR 114.3
2 addresses disbursements for communications made to the restricted class, and 11 CFR
3 114.4 addresses disbursements for communications made to those outside the restricted
4 class, with certain proposed changes discussed below. The Commission requests
5 comment on this approach. Would combining 11 CFR 114.3 and 114.4 be more readily
6 understandable to the public now that corporations and labor organizations can make
7 express advocacy communications beyond the restricted class? Should the Commission
8 maintain the separate regulations as they are now, or divide them in a different way?

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

11 The Commission does not propose any changes to 11 CFR 114.3(a). That
12 provision states that corporations and labor organizations may communicate on any
13 subject with their restricted class, including communications containing express
14 advocacy. Section 114.3(a) also states that corporations and labor organizations may
15 coordinate their activities under section 114.3 with candidates and political committees,
16 but only to the extent permitted by section 114.3. For example, under paragraph (c)(2),
17 corporations and labor organizations may coordinate with a candidate in planning a
18 candidate appearance before members of the restricted class. Paragraph (c)(4), however,
19 prohibits corporations and labor organizations from coordinating voter registration and
20 GOTV drives with candidates, candidates' committees, or political parties.

21 B. 11 CFR 114.3(b) – Reporting of express advocacy communications

22 1. Reporting of express advocacy communications solely to the restricted class

1 The proposed rules would not change the requirement, currently at 11 CFR
2 114.3(b), that corporations and labor organizations report disbursements for
3 communications containing express advocacy made to the restricted class in accordance
4 with 11 CFR 100.134 and 104.6. The Act exempts express advocacy communications
5 made by corporations and labor organizations to their restricted class from the definition
6 of “expenditure.” 2 U.S.C. 431(9)(B)(iii). However, the Act requires that corporations
7 and labor organizations that make disbursements for express advocacy communications
8 to the restricted class in excess of \$2,000 for any election file quarterly reports in an
9 election year and pre-election reports for any general election. 2 U.S.C. 431(9)(B)(iii);
10 434(a)(4)(A)(i) and (ii). This statutory requirement is implemented in the Commission
11 regulations at current 11 CFR 100.134(a), 104.6(a), and 114.3(b).

12 2. Reporting of express advocacy communications beyond the restricted class

13 As discussed in Section VI below, proposed 11 CFR 114.16(b) would require
14 corporations and labor organizations that choose to make independent expenditures for
15 communications to persons beyond the restricted class to report these independent
16 expenditures under 2 U.S.C. 434(c). This provision requires that “every person (other
17 than a political committee) who makes independent expenditures in an aggregate amount
18 or value in excess of \$250 during a calendar year” report such expenditures to the
19 Commission. Thus, under 2 U.S.C. 434(c), corporations and labor organizations that
20 make such independent expenditures must now file a report in the first reporting period in
21 which independent expenditures exceed the \$250 reporting threshold and in any
22 succeeding reporting period during the same calendar year during which the corporation
23 or labor organization makes additional independent expenditures of any amount. These

1 reports must disclose the identity of any person who receives any disbursement during
2 the reporting period in an aggregate amount greater than \$200 during the calendar year in
3 connection with an independent expenditure made by the corporation or labor
4 organization. The reports must also disclose, among other things, certain contributions
5 received by the person making the independent expenditure, the date, amount, and
6 purpose of the independent expenditure, a statement indicating whether the independent
7 expenditure is in support of, or in opposition to a candidate, and a certification that the
8 independent expenditure is not made in cooperation, consultation, or concert with, or at
9 the request of, any candidate, or any authorized committee or agent of such committee.
10 2 U.S.C. 434(c). Therefore, after Citizens United, corporations and labor organizations
11 must report independent expenditures made beyond the restricted class once the \$250 per
12 year threshold is met, and must report express advocacy communications to the restricted
13 class once the \$2,000 per election threshold is met.

14 The Commission does not propose to change the language of the reporting
15 requirements at current 11 CFR 114.3(b) because Citizens United did not affect the
16 provision of the Act at 2 U.S.C. 431(9)(B)(iii) that exempts express advocacy
17 communications to the restricted class from the definition of “expenditure” and
18 establishes the reporting requirement for such communications. Therefore, the
19 Commission may not need to change its reporting regulations under that statutory
20 provision. The Commission requests comment on this approach.

21 3. Reporting of express advocacy communications both to the restricted class and
22 outside the restricted class

1 The Commission seeks comment on how spending for communications by a
2 corporation or labor organization directed both to the restricted class and outside the
3 restricted class should be reported. If a corporation or labor organization makes a single
4 disbursement for a communication containing express advocacy that is made both to the
5 general public, which is an independent expenditure, and the restricted class, which is
6 exempt from the definition of expenditure, should the corporation or labor organization
7 allocate the expense between the cost of the communication made to the restricted class
8 and the cost of the communication made beyond the restricted class and report the
9 allocated expenses separately under the two reporting regimes? How would costs be
10 allocated for a broadcast communication, such as a television advertisement, that is not
11 specifically directed at identifiable members of the restricted class? Alternatively, would
12 the fact that the communication went beyond the restricted class mean that the entire
13 disbursement is an independent expenditure, and therefore must be reported only under
14 the independent expenditure reporting regime? For items like bumper stickers and T-
15 shirts, when a corporation or labor organization pays for the items and distributes them to
16 members of the restricted class, does the fact that they can be seen beyond the restricted
17 class transform their classification? Given that the statutory provision has not changed, is
18 there a better way to reconcile the two reporting regimes for disbursements for
19 communications containing express advocacy made to the restricted class and
20 independent expenditures for communications made to those outside the restricted class?

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

22 Section 114.3(c) governs several of the types of communications that may be
23 made to the restricted class: publications; candidate and party appearances; phone banks;

1 and voter registration and get-out-the-vote (“GOTV”) drives, and sets forth certain
2 requirements and restrictions that apply to each. Paragraph (c)(1) states that a
3 corporation or labor organization may distribute printed materials expressly advocating
4 the election or defeat of a clearly identified candidate or candidates of a political party to
5 its restricted class, provided that certain requirements and restrictions are met. The
6 provision requires that the material be produced at the expense of the corporation or labor
7 organization, reflect the views of the corporation or the labor organization, and may not
8 be a republication or reproduction of campaign materials prepared by the candidate,
9 candidate’s committee, or candidate’s authorized agents.

10 Paragraph (c)(2) permits corporations and labor organizations to invite a
11 candidate, candidate’s representative, or party representative to address the restricted
12 class at meetings, conventions, and other functions of the corporation or labor
13 organization. Section 114.3(c)(2) currently permits the candidate, candidate’s
14 representative, or party representative to ask for and accept contributions to his or her
15 campaign or party, and to ask that contributions to the corporation or labor organization’s
16 separate segregated fund be designated for his or her campaign or party. Paragraph (c)(2)
17 prohibits officers, directors, or other representatives of the corporation or labor
18 organization from collecting contributions on behalf of the candidate or party committee.
19 Finally, the provision addresses news media coverage of these appearances.

20 The Commission does not propose to change the provisions of 11 CFR
21 114.3(c)(1) and (2).

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

1 Section 114.3(c)(3) specifically permits corporations and labor organizations to
2 establish and operate phone banks to urge members of their restricted class to register
3 and/or vote for a particular candidate or candidates, or to register with a particular
4 political party. Because corporations and labor organizations may continue to establish
5 and operate such phone banks, the Commission does not propose to change this
6 provision. However, because Citizens United struck down the prohibition on express
7 advocacy communications by corporations and labor organizations beyond the restricted
8 class, is it still necessary to have a separate provision expressly permitting corporations
9 and labor organizations to use phone banks to urge members of the restricted class to
10 register or vote for a particular candidate or candidates? Are there any costs associated
11 with a phone bank that lack a sufficient nexus to the communicative activity such that
12 they should continue to be prohibited as non-communicative expenditures? The
13 Commission requests comments on whether to remove paragraph (c)(3) from section
14 114.3.

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

16 Current 11 CFR 114.3(c)(4) permits a corporation or a labor organization to
17 conduct voter registration and GOTV drives “aimed at its restricted class.” It states that
18 voter registration and GOTV drives include providing transportation to the place of
19 registration and to the polls. The current provision further permits such drives to include
20 communications containing express advocacy, “such as urging individuals to register
21 with a particular political party or to vote for a particular candidate.” 11 CFR
22 114.3(c)(4). The current provision prohibits corporations and labor organizations from
23 withholding or refusing to give information and other assistance regarding registering or

1 voting “on the basis of support for or opposition to particular candidates, or a particular
2 political party.” Id.

3 The Commission is proposing two alternatives to revise paragraph (c)(4). Both
4 alternatives would make a technical change to remove the language stating that urging
5 individuals to register with a given party constitutes express advocacy because such
6 language may, but does not necessarily, involve expressly advocating the election or
7 defeat of one or more clearly identified candidates. Alternative A would also remove the
8 existing requirement that corporations or labor organizations not withhold or refuse to
9 give information or other assistance on the basis of support for, or opposition to,
10 particular candidates or a particular political party, but maintain the exemption from the
11 definition of “contribution or expenditure” under 2 U.S.C. 441b(b)(2)(B) for voter
12 registration and GOTV drives that meet that requirement. Alternative B would not make
13 any changes to current 11 CFR 114.3(c)(4) except the technical change. The
14 Commission invites comment on which, if either, of the two proposals better complies
15 with Citizens United and why. Alternative A – Remove requirement that corporations
16 and labor organizations not withhold or refuse to provide assistance on the basis of
17 support for, or opposition to, particular candidates or a particular party

18 This alternative would remove the prohibition on withholding or refusing to
19 provide information or other assistance regarding registering or voting based on support
20 for or opposition to particular candidates, or a particular party. Instead, Alternative A
21 would only prohibit corporations and labor organizations from conducting voter
22 registration or GOTV drives and that are coordinated with a candidate or political party.
23 As discussed in Section III.A above, one approach to revising the Commission’s

1 regulations to comply with the decision in Citizens United would be to eliminate the
2 existing broad prohibition on corporate and labor organization expenditures, and instead
3 prohibit only those expenditures that are coordinated with a candidate or a political party
4 committee and coordinated communications. Similarly, Alternative A would permit
5 corporations and labor organizations to conduct voter registration and GOTV drives
6 without restriction, so long as they were not coordinated with a candidate or political
7 party.

8 Alternative A would, however, maintain the statutory exception to the definition
9 of “contribution or expenditure” for nonpartisan voter registration and GOTV drives. See
10 2 U.S.C. 441b(b)(2)(B). Thus, Alternative A would state that disbursements for voter
11 registration and GOTV drives are not contributions or expenditures if the drive is
12 conducted in such a manner that the corporation or labor organization does not withhold
13 or refuse to provide information or other assistance regarding registering or voting on the
14 basis of support for or opposition to particular candidates or a particular political party.

15 The Commission requests comment on this proposal. Does Alternative A
16 appropriately comply with Citizens United? Does the proposal eliminate too much or too
17 little in implementing the remaining prohibitions on corporate and labor organization
18 expenditures?

19 Additionally, corporations and labor organizations are not currently required to
20 report certain expenditures, such as driver salaries and the cost of fuel, because they are
21 neither communications containing express advocacy nor electioneering communications.
22 Is this consistent with the uniform treatment of all expenditures under Alternative A?

1 Should this reporting regime inform the Commission’s choice of alternatives for
2 amending section 114.4?

3 In WRTL II the Court explained that “‘First Amendment freedoms need breathing
4 space to survive.’” WRTL II, at 468-469, 127 S.Ct. 2652 (quoting NAACP v. Button,
5 371 U.S. 415, 433, (1963)). In Citizens United, the Court rejected an interpretation of the
6 law that required an “intricate case-by-case determination” to verify whether political
7 speech is banned, given that a corporation has a constitutional right to speak. 130 S.Ct. at
8 892. By not weighing the expressive elements of expenditures, does Alternative A avoid
9 the need for intricate case-by-case determinations?

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

11 Alternative B would make no changes to the existing regulation at 11 CFR
12 114.3(c)(4) other than the technical change discussed above. As discussed in Section
13 III.A above, one alternative for revising the Commission’s regulations to comply with the
14 decision in Citizens United would be to specifically exclude expenditures for
15 communications from the broader prohibition on expenditures, while still prohibiting
16 corporate and labor organization expenditures such as in-kind contributions, coordinated
17 expenditures, or expenditures that do not involve communications. Like proposed
18 Alternative B for 11 CFR 114.2(b)(2)(i), Alternative B for 11 CFR 114.3(c)(4) would
19 also distinguish between speech and non-speech activity.

20 In promulgating the current regulation at 11 CFR 114.3(c)(4), the Commission
21 distinguished between the “‘pure speech’ aspects of the drives [that] may be partisan,”
22 and the non-speech activity aspects of the drives, which “must be conducted in a
23 nonpartisan manner.” Explanation and Justification for Final Rules on Part 114,

1 H.R. DOC. NO. 95-44, at 105 (1977) (“1977 E&J”). The Commission’s implementation
2 of the nonpartisan requirement of 2 U.S.C. 441b(b)(2)(B) reflects this distinction between
3 “pure speech” and non-speech elements of voter registration and GOTV drives.
4 Because Alternative B takes the approach that Citizens United did not overturn the
5 prohibition on corporate and labor organization expenditures that do not involve political
6 speech, under Alternative B the Commission would still be obligated to regulate the
7 nonspeech aspects of voter registration and GOTV drives in order to implement
8 2 U.S.C. 441b. Alternative B reflects the principle that, as the Supreme Court has
9 articulated, “[i]t is possible to find some kernel of expression in almost every activity a
10 person undertakes . . . but such a kernel is not sufficient to bring the activity within the
11 protection of the First Amendment.” Dallas v. Stanglin, 490 U.S. 19, 25 (1989). These
12 expenses might include the driver’s salary, vehicle rental, and fuel, and travel, lodging,
13 and food costs if workers on the drive were brought in from other locations to participate
14 in the voter registration or GOTV drive.

15 In Alternative B, as in Alternative A, a corporation or labor organization would
16 continue to be able to make voter registration or GOTV communications, including
17 express advocacy, to the restricted class under 11 CFR 114.3(c)(4). Furthermore, as in
18 Alternative A, in Alternative B voter registration and GOTV drives conducted in
19 accordance with proposed 11 CFR 114.3(c)(4) would remain exempt from the definition
20 of “expenditure” under 2 U.S.C. 441b(b)(2)(B). However, under Alternative B,
21 corporations and labor organizations would remain prohibited from engaging in non-
22 communicative activities related to voter registration and GOTV drives other than those
23 conducted in accordance with proposed 11 CFR 114.3(c)(4).

1 The Commission requests comments on this approach. Is Alternative B consistent
2 with the holdings in Citizens United and Buckley? Is it appropriate to interpret these
3 holdings as related to speech and therefore not to extend these holdings to these types of
4 conduct? Alternatively, do all aspects of voter registration and GOTV drives possess
5 inherently communicative qualities that would not warrant a lower standard of
6 constitutional scrutiny? The Commission seeks comment on where voter registration and
7 GOTV drives fall on the spectrum ranging from speech to conduct. Are these activities
8 “imbued with elements of communication”?

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

11 Current 11 CFR 114.4 sets out a number of exceptions to the prohibitions on
12 corporations and labor organizations making expenditures. The regulation permits
13 certain communications and activities directed beyond the restricted class, both to
14 employees outside the restricted class and the general public. This section also permits
15 certain communications made to those outside the restricted class to be coordinated, to a
16 limited extent, with candidates. Specifically, section 114.4(b) covers candidate and party
17 appearances on corporate or labor organization premises or at a meeting, convention, or
18 other function that are attended by employees beyond the restricted class. Section
19 114.4(c) identifies the types of communications that may be made to the general public,
20 namely: (1) voter registration and voting communications; (2) official registration and
21 voting information; (3) voting records; (4) voter guides; (5) endorsements; (6) candidate
22 appearances on educational institution premises; and (7) electioneering communications,
23 and the relevant requirements and restrictions that apply to each. The proposed changes

1 to 11 CFR 114.4 would eliminate the prohibition on express advocacy communications
2 made beyond the restricted class, but would maintain the restrictions on coordination
3 with candidates and political parties in communications beyond the restricted class.

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

5 Current 11 CFR 114.4(a) states that any communications that a corporation or
6 labor organization may make to the general public may also be made to the restricted
7 class, and to employees outside the restricted class. Paragraph (a) also sets out the
8 structure of the rest of section 114.4. Finally, paragraph (a) indicates that
9 communications described in section 114.4 may be coordinated with candidates and
10 political committees only to the extent permitted in section 114.4. The Commission is
11 proposing minor changes to the wording of paragraph (a) to clarify the meaning of the
12 provisions.

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

16 Current 11 CFR 114.4(b)(1) sets forth the circumstances under which a
17 corporation may coordinate with a candidate or party committee to make
18 communications to employees beyond the restricted class by permitting candidates,
19 candidates' representatives, or representatives of political parties to appear on corporate
20 premises or at meetings, conventions, or other corporate functions. Current 11 CFR
21 114.4(b)(2) applies these regulations and restrictions to labor organizations. The
22 Commission proposes to reorganize current 11 CFR 114.4(b)(1) and (b)(2) by
23 consolidating the provisions into proposed 11 CFR 114.4(b). The proposed

1 reorganization would move the language regarding labor organizations currently located
2 in paragraph (b)(2) to paragraph (b)(1), which would be redesignated as 11 CFR
3 114.4(b). Current paragraphs (b)(1)(i) through (b)(1)(viii) would be redesignated as
4 paragraphs (b)(1) through (b)(8), and would apply to both corporations and labor
5 organizations.

6 The Commission does not propose to make any other changes to the language of
7 proposed 11 CFR 114.4(b), other than this reorganization. Current 11 CFR
8 114.4(b)(1)(v) and (b)(2)(ii) prohibit corporations and labor organizations from expressly
9 advocating the election or defeat of a clearly identified candidate or candidate of a clearly
10 identified political party “in conjunction with” a candidate, candidate representative, or
11 party representative appearance described under current paragraph (b) of section 114.4.
12 Expenditures for appearances coordinated with candidates and political parties may
13 therefore constitute in-kind contributions under the Act. 2 U.S.C. 441a(a)(7)(B)(i) and
14 (ii); see also 11 CFR 109.20.

15 Because section 114.4(b) implements the Act’s contribution ban, which was
16 left undisturbed by Citizens United, the Commission does not propose any substantive
17 changes to this provision. The Commission seeks comment on this approach, and
18 whether the activities covered by section 114.4(b) involve independent political speech
19 addressed by Citizens United. The Commission also notes that the rule at section
20 114.4(b) applies to appearances attended by the “restricted class and other employees of
21 the corporation, and their families,” while section 114.4(c) applies to communications to
22 the general public. Though not reflected in the statute, this distinction follows
23 Congressional intent to allow some corporate and labor organization activity beyond the

1 restricted class that would otherwise be a prohibited in-kind contribution. See 1977 E&J,
2 H.R. DOC. NO. 94-44 at 105 (“This provision is based on traditional types of ‘good
3 government’ programs established by corporations for all employees and the traditional
4 practice of candidates touring the facilities to shake hands with employees. In the
5 conference debates, Congressman Wiggins and Hays agreed that the bill would allow
6 such activities to continue if the programs were conducted on an equitable and non-
7 partisan basis.”).

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

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

1 language would replace the repetition of the prohibitions on coordination contained in
2 each of the specific paragraphs at current 11 CFR 114.4(c)(2) through (c)(6).

3 1. Removal of express advocacy prohibition

4 Proposed 11 CFR 114.4(c)(1) would remove the current language specifically
5 permitting qualified nonprofit corporations under 11 CFR 114.10(c) to include express
6 advocacy in any communication made to the general public. After Citizens United, all
7 corporations and labor organizations may include express advocacy in any
8 communication made to the general public that is not coordinated with candidates or
9 political parties. Hence, this language is now superfluous.

10 Current 11 CFR 114.4(c)(2) through (c)(6) govern several types of
11 communications that corporations and labor organizations may make to the general
12 public and set out the conditions under which corporations and labor organizations may
13 make them. These communications are: voter registration and GOTV communications;
14 official voter registration and voting information; voting records; voter guides; and
15 endorsements. All five of these paragraphs currently prohibit corporations or labor
16 organizations from expressly advocating the election or defeat of clearly identified
17 candidates in these communications. Proposed 11 CFR 114.4(c)(2) through (6) would
18 eliminate the prohibition on express advocacy contained in each of the current paragraphs
19 when these communications are not coordinated with any candidate or political party.
20 The Commission requests comment on these proposed deletions.

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

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

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

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

1 that corporations and labor organizations may expressly advocate the election or defeat of
2 candidates, and may make electioneering communications to the general public, that are
3 not coordinated with candidates. The Commission requests comments on these proposed
4 changes.

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

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

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

19 The Commission does not propose any changes to the text of current 11 CFR
20 114.4(c)(7). This paragraph addresses candidate appearances on the premises of
21 incorporated nonprofit educational institutions. Current 11 CFR 114.4(c)(7)(ii) prohibits
22 incorporated educational institutions from expressly advocating the election or defeat of
23 candidates in conjunction with candidate or political committee appearances for which

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

13 6. Proposed 11 CFR 114.4(c)(8) – Electioneering communications to the
14 general public

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

¹⁰ 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 qualified nonprofit corporations
2 (“QNCs”) to make electioneering communications to the general public in accordance
3 with current 11 CFR 114.10. Section 114.10(d)(2) permits QNCs to make any
4 electioneering communication. Because Citizens United struck down the prohibition on
5 corporations and labor organizations making electioneering communications, the
6 exception to the prohibition on electioneering communications at 11 CFR 114.4(c)(8) is
7 no longer necessary. Therefore, the Commission proposes to eliminate current 11 CFR
8 114.4(c)(8) in its entirety to comply with the Supreme Court’s decision in Citizens
9 United.

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. The Commission is
23 proposing two alternatives to revise the provision currently located at

1 11 CFR 114.4(d). Both Alternatives A and B would remove 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, would also remove all of the existing requirements and prohibitions regarding
5 voter registration and GOTV drives, with the exception of the prohibition on coordination
6 with candidates or political parties. Alternative A would maintain the exemption from
7 the definition of “expenditure” under 2 U.S.C. 431(9)(B)(ii) and 11 CFR 100.133 for
8 voter registration and GOTV drives that meet the existing requirements and prohibitions.
9 In contrast, Alternative B would retain current 11 CFR 114.4(d), except that it would
10 remove the prohibition on express advocacy currently at 11 CFR 114.4(d)(1). The
11 Commission has not made any determination as to which of these proposed alternatives it
12 should adopt in the final rules. The Commission invites comment on which, if either, of
13 the two proposals better implements Citizens United and why.

14 Alternative A – Remove all restrictions on voter drives except for the prohibition
15 on coordinating with candidates and political parties

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

1 communications. Similarly, Alternative A would permit corporations and labor
2 organizations to conduct voter registration and GOTV drives without restriction, as long
3 as they were not coordinated with a candidate or political party.

4 Alternative A would, however, maintain the statutory exemption at 2 U.S.C.
5 431(9)(B)(ii) for voter registration and GOTV drives. Proposed Alternative A would
6 state that disbursements for voter registration and GOTV drives are not expenditures if
7 the drive meets the requirements for, and restrictions on, voter registration and GOTV
8 drives that are currently located at 11 CFR 114.4(d)(1) and (3)-(6). These requirements
9 would include the prohibition on express advocacy, as well as the prohibition on
10 withholding or refusing to provide information or other assistance regarding registration
11 or voting on the basis of support for, or opposition to, particular candidates or a particular
12 political party.

13 The Commission requests comment on this proposal. Does this alternative
14 appropriately comply with Citizens United? Does the proposal eliminate too much or too
15 little in implementing the remaining prohibitions on corporate and labor organization
16 expenditures?

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

19 Alternative B would make no changes to the existing regulation at 11 CFR
20 114.4(d), except to remove the prohibition on corporations and labor organizations
21 making communications expressly advocating the election or defeat of clearly identified
22 candidates currently at 11 CFR 114.4(d)(1). As discussed in Sections III.A and IV.E
23 above, Alternative B excludes expenditures for communications from the prohibition on

1 expenditures, while still prohibiting other corporate and labor organization expenditures,
2 such as in-kind contributions, coordinated expenditures, and expenditures that are not for
3 communications.

4 After Citizens United, corporations and labor organizations are no longer
5 prohibited from making independent communications. Because Alternative B concludes
6 that Citizens United left in place the prohibition on corporate and labor organization
7 expenditures that do not involve communications, under this alternative, the Commission
8 would continue to implement the statutory restrictions on the nonspeech aspects of voter
9 registration and GOTV drives, such as the costs associated with driving voters to
10 registration sites or the polls or “providing babysitting services to enable voters to go to
11 the polls.” 1977 E&J, H.R. DOC. No. 95-44, at 106. Therefore, under Alternative B,
12 three current provisions would remain in effect: (1) directing voter drives at individuals
13 based on party affiliation; (2) withholding or refusing to provide information or other
14 assistance regarding registration or voting on the basis of support for, or opposition to,
15 particular candidates or a particular political party; and (3) paying individuals conducting
16 voter drives based on the number of individuals registered or transported to support a
17 particular candidate or political party. Voter registration and GOTV drives conducted in
18 accordance with proposed Alternative B would remain exempt from the definition of
19 “expenditure” under 2 U.S.C. 431(9)(B)(ii).

20 The current rule at 11 CFR 114.4, like the rule at 114.3, recognizes the difference
21 between expenditures for communications and for non-communicative activities. Current
22 114.4(c)(2) specifically allows for voter registration or GOTV communications to the
23 general public, provided that the communications do not contain express advocacy, while

1 current 114.4(d), following 2 U.S.C. 441b(b)(2)(B), exempts voter registration and
2 GOTV drives conducted in a nonpartisan manner from the definition of expenditure. In
3 Alternative B, as in Alternative A, a corporation or labor organization would be able to
4 make voter registration or GOTV communications, including express advocacy, to the
5 general public under proposed 11 CFR 114.4(c)(2). Furthermore, as in Alternative A, in
6 Alternative B voter registration and GOTV drives conducted in accordance with
7 proposed 11 CFR 114.4(d) would remain exempt from the definition of “expenditure”
8 under 2 U.S.C. 441b(b)(2)(B). However, under Alternative B corporations and labor
9 organizations would remain prohibited from engaging in non-communicative activities
10 related to voter registration and GOTV drives other than those conducted in accordance
11 with proposed 11 CFR 114.4(d). The Commission request comments on this proposal.
12

1 E. Unchanged provisions of current 11 CFR 114.4

2 The Commission is not proposing any changes to current 11 CFR 114.4(e) or (f).
3 Current 11 CFR 114.4(e) states that incorporated membership organizations, incorporated
4 trade associations, incorporated cooperatives, and corporations without capital stock may
5 permit candidate and party representative appearances before members and employees
6 and their families on the organization’s premises, or at a meeting, convention, or other
7 function of the organization, in accordance with proposed 11 CFR 114.4(c)(1) through
8 (c)(8). The Commission requests comments on this approach.

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

14 VIII. Proposed removal of 11 CFR 114.10 – Nonprofit corporations exempt from the
15 prohibitions on making independent expenditures and electioneering
16 communications; and proposed 11 CFR 114.16 – Independent expenditures and
17 electioneering communications made by corporations and labor organizations

18 The Commission promulgated 11 CFR 114.10 in response to the Supreme Court’s
19 decision in FEC v. Massachusetts Citizens For Life, 479 U.S. 238 (1986) (“MCFL”) and,
20 in part, to the Supreme Court’s decision in Austin v. Michigan Chamber of Commerce,
21 494 U.S. 652 (1990). In MCFL, the Court considered the application of the independent
22 expenditure prohibition in 2 U.S.C. 441b to MCFL, a nonprofit corporation organized to
23 promote specific ideological beliefs. The Court concluded that, because MCFL did not

1 have the potential to corrupt the electoral process, it did not implicate the concerns that
2 prompted regulation of corporations by Congress. See MCFL, 479 U.S. at 259. The
3 rules at 11 CFR 114.10 created a regulatory exception to the independent expenditure ban
4 in section 441b for organizations with the same characteristics as MCFL, referred to as
5 “qualified nonprofit corporations” or “QNCs.” After Congress enacted BCRA’s
6 electioneering communications provisions in 2002, the Commission added an exception
7 in 11 CFR 114.10 for QNCs making electioneering communications. Because Citizens
8 United struck down the statutory bans on independent expenditures and electioneering
9 communications for all corporations and labor organizations, the regulatory exceptions
10 for QNCs are now superfluous. Therefore, the Commission proposes to remove 11 CFR
11 114.10 in its entirety.

12 The Commission further proposes to adopt a new regulation at 11 CFR 114.16
13 that would explicitly permit all corporations and labor organizations to make independent
14 expenditures and electioneering communications. As discussed below, proposed 11 CFR
15 114.16 is modeled on parts of current 11 CFR 114.10. These include: (1) the reporting
16 requirements for QNCs making independent expenditures or electioneering
17 communications at 11 CFR 114.16(e); (2) the solicitation disclaimer requirement at
18 11 CFR 114.10(f); (3) non-authorization disclaimer requirement at 11 CFR 114.10(g); (4)
19 the provision in 11 CFR 114.10(h) permitting QNCs to establish segregated bank
20 accounts for disbursements for electioneering communications; and (5) 11 CFR
21 114.10(i), which states that nothing in section 114.10 authorizes any organization exempt
22 from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from

1 undertaking by the Internal Revenue Code. The Commission seeks comment as to
2 whether any or all of these proposed regulations is necessary.

3 A. Independent expenditures and electioneering communications by corporations and
4 labor organizations

5 Current 11 CFR 114.10(d) specifically permits QNCs to make independent
6 expenditures and electioneering communications. Because Citizens United made
7 independent expenditures and electioneering communications permissible for all
8 corporations and labor organizations, proposed 11 CFR 114.16(a) would expand current
9 11 CFR 114.10(d) to cover all corporations and labor organizations. As discussed above,
10 the Commission seeks comments on whether it would it be helpful for corporations and
11 labor organizations to have a regulation explicitly permitting them to make independent
12 expenditures and electioneering communications. Should the regulation instead more
13 broadly state that corporations and labor organizations may make any communication in
14 connection with an election so long as it is not a coordinated communication under
15 11 CFR 109.21? Alternatively, is it sufficient to remove the current prohibitions in
16 11 CFR 114.2(b)(2) and (b)(3) on corporations and labor organizations making
17 disbursements for independent expenditures and electioneering communications from
18 general treasury funds?

19 B. Reporting independent expenditures and electioneering communications

20 Current 11 CFR 114.10(e)(2) sets forth the reporting requirements for QNCs
21 making independent expenditures and electioneering communications. Proposed 11 CFR
22 114.16(b) would adopt and expand this language to cover independent expenditures and
23 electioneering communications made by all corporations and labor organizations.

1 Proposed 11 CFR 114.16(b)(1) would state that corporations and labor organizations that
2 make independent expenditures aggregating in excess of \$250 with respect to a given
3 election in a calendar year must file reports according to 11 CFR part 104. Section
4 104.4(a) requires that “every person that is not a political committee must report
5 independent expenditures in accordance with paragraphs (e) and (f) of this section and
6 11 CFR 109.10” (emphasis added). Proposed 11 CFR 114.16(b)(2) would state that
7 corporations or labor organizations that make electioneering communications aggregating
8 in excess of \$10,000 in a calendar year must file statements as required by 11 CFR
9 104.20(b). Section 104.20(b), in turn, requires that “every person who has made an
10 electioneering communication . . . aggregating in excess of \$10,000 during any calendar
11 year” file a statement on FEC Form 9, containing information set out in paragraph (c) of
12 that section (emphasis added). Given that the requirements at 11 CFR 104.4 and 104.20
13 already cover corporations and labor organizations, is it necessary to have an additional
14 regulation that states that corporations and labor organizations are subject to these
15 requirements?

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

17 Current 11 CFR 114.10(f) requires that solicitations for donations by QNCs
18 disclose to potential donors that their donations may be used for political purposes, such
19 as supporting or opposing candidates. Similarly, proposed 11 CFR 114.16(c) would
20 incorporate this requirement, but would expand it to cover solicitations for donations that
21 may be used for political purposes where the solicitations are made by any corporation or
22 labor organization. The requirement at current section 114.10(f) derives from the
23 Supreme Court’s decision in MCFL. Explanation and Justification for Final Rules on

1 Express Advocacy; Independent Expenditures; Corporate and Labor Organization
2 Expenditures, 60 FR 35292, 35303 (July 6, 1995). In holding the prohibition on
3 independent expenditures unconstitutional as applied to QNCs, the Supreme Court said
4 “[t]he rationale for regulation is not compelling with respect to independent expenditures
5 by [MCFL]” because “[i]ndividuals who contribute to appellee are fully aware of its
6 political purposes, and in fact contribute precisely because they support those purposes.”
7 MCFL, 479 U.S. at 260-61. “Given a contributor’s awareness of the political activity of
8 [MCFL], as well as the readily available remedy of refusing further donations, the
9 interest [of] protecting contributors is simply insufficient to support § 441b’s restriction
10 on the independent spending of MCFL.” Id. at 262 (emphasis added.)

11 In Citizens United, the Court upheld the disclaimer requirements of 2 U.S.C.
12 441d(d)(2) and the disclosure requirements of 2 U.S.C. 434(f). In analyzing the
13 disclaimer requirements, the Court stated that “[t]he disclaimers required by [BCRA]
14 § 311 ‘provide the electorate with information,’ McConnell, 540 U.S. at 196, and ‘insure
15 that the voters are fully informed’ about the person or group who is speaking, Buckley,
16 424 U.S. at 76.” Citizens United, 130 S. Ct. at 915 (additional citation omitted).
17 Regarding disclosure requirements, the Court cited its previous explanation that
18 “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”
19 Id. The Court further stated that “[t]he First Amendment protects political speech; and
20 disclosure permits citizens and shareholders to react to the speech of corporate entities in
21 a proper way. This transparency enables the electorate to make informed decisions and
22 give proper weight to different speakers and messages.” Id. at 916.

1 Although the Supreme Court’s decision in Citizens United striking down the
2 independent expenditure and electioneering communications ban in section 441b may
3 well have rendered the QNC exception unnecessary, is the solicitation disclosure
4 requirement in MCFL still important in ensuring that the electorate has the information
5 necessary to make informed decisions? The Commission seeks comment as to whether
6 any or all of these proposed regulations is necessary. If the statutory basis for such a
7 requirement remains sound, does language in the Court’s opinion in Citizens United
8 regarding disclosure and disclaimers mean that the Commission may and should continue
9 to require QNCs to provide disclosure to potential donors? If so, should the rules at
10 11 CFR 114.10(c) defining “QNC” be retained so that these entities will be apprised of
11 this requirement? Should the Commission establish a broader disclosure requirement so
12 that all corporations and labor organizations must disclose to those they solicit that any
13 money given to the corporation or labor organization may be used for political purposes,
14 such as making communications supporting or opposing candidates? In the alternative,
15 should the Commission require corporations and labor organizations to state in such
16 disclosures that the funds received may be used specifically for independent expenditures
17 or electioneering communications, as opposed to “political purposes” generally?

18 Alternatively, because Citizens United struck down the statutory bans on
19 independent expenditures and electioneering communications for all corporations and
20 labor organizations, is the regulatory requirement that QNC include a solicitation
21 disclaimer now superfluous? Should the Commission instead remove 11 CFR 114.10(f)
22 in its entirety and not incorporate it into proposed section 114.16?

23

1 D. Non-authorization notice

2 Current 11 CFR 114.10(g) requires that QNCs comply with the disclaimer
3 requirements of 11 CFR 110.11. As discussed in Section IV.C above, the Court in
4 Citizens United upheld the disclaimer provisions of 2 U.S.C. 441d. 130 S. Ct. at 914-16.
5 Section 441d(a) requires that certain communications include statements identifying the
6 person who paid for the communication and whether the communication is authorized by
7 any candidate or candidate's committee, and sets out the requirements for such
8 statements. These communications include all public communications by any person that
9 expressly advocate the election or defeat of a clearly identified candidate, and all
10 electioneering communications by any person. 2 U.S.C. 441d(a). The Act defines
11 "person" to include corporations and labor organizations. 2 U.S.C. 431(11).

12 Section 110.11 implements the requirements of 2 U.S.C. 441d. Because the
13 requirements of 2 U.S.C. 441d and 11 CFR 110.11 apply to public communications
14 containing express advocacy and electioneering communications made by any person, the
15 provision applies automatically to corporations and labor organizations following
16 Citizens United. Therefore, if a corporation or labor organization makes an independent
17 expenditure or electioneering communication as permitted after Citizens United, the
18 communication must include a statement identifying, among other things, the name and
19 address of the corporation or labor organization that paid for the communication.
20 Proposed 11 CFR 114.16(d) would follow current 11 CFR 114.10(g), but would expand it
21 to require that all corporations and labor organizations comply with 11 CFR 110.11.
22 Although the requirements at 2 U.S.C. 441d and 11 CFR 110.11 already apply to
23 corporations and labor organizations, should proposed section 114.16 explicitly state that

1 all corporations and labor organizations must comply with the requirements of 11 CFR
2 110.11?

3 E. Segregated bank account

4 The Commission proposes a regulation to affirmatively state that a corporation or
5 labor organization may establish a segregated bank account for the making of
6 electioneering communications. Current 11 CFR 114.10(h) states that a QNC may, but is
7 not required to, establish a segregated bank account into which it deposits only funds
8 donated or otherwise provided by individuals, as described in 11 CFR part 104, from
9 which it makes disbursements for electioneering communications. Proposed 11 CFR
10 114.16(e) would adopt this language and expand it to state that any corporation or labor
11 organization may establish such an account.¹¹ The current regulation at 11 CFR
12 114.10(h) implements 2 U.S.C. 434(f)(2)(E) and (F), which sets out the reporting
13 requirements for every person making disbursements for electioneering communications
14 paid out of segregated bank accounts. Aside from this reporting requirement, however,
15 the Act does not otherwise affirmatively state that a person may set up such segregated
16 bank account. Furthermore, 11 CFR 114.10(h) is the only place in the current regulations
17 that affirmatively states that a person may, but is not required to, set up such a segregated
18 bank account, and this regulation is limited to QNCs.

19 The Commission requests comment on the proposed regulation affirmatively
20 stating that any corporation or labor organization may, but is not required to, set up a
21 segregated bank account for the purpose of making electioneering communications, as
22 described in 2 U.S.C. 434(f)(2)(E). Is such a regulation necessary, given that the

¹¹ This provision applies to corporation and labor organizations but not to political committees, because political committees do not make electioneering communications. 2 U.S.C. 434(f)(3).

1 reporting requirements in the Act already contemplate the existence of such a segregated
2 bank account? Should the Commission adopt a broader regulation that would permit, but
3 not require, any person to set up such an account?

4 Finally the Commission requests comments on whether it would be advisable and
5 appropriate to promulgate a regulation allowing all persons other than political
6 committees to set up and use segregated bank accounts for making independent
7 expenditures. Would such a proposal provide sufficient disclosure? Section
8 434(f)(2)(E), which establishes the reporting requirements for disbursements for
9 electioneering communications made from the segregated bank accounts, only requires
10 the reporting entity to report the names and addresses of those whose contributions to that
11 segregated bank account aggregated \$1,000 or more to that segregated bank account
12 within a certain timeframe. If the Commission were to adopt a regulation allowing
13 similar segregated bank accounts for making independent expenditures parallel to the
14 bank accounts used for electioneering communications, how should the reporting
15 requirements of 2 U.S.C. 434(c) and 434(f)(2)(E) govern such an account?

16 F. Activities prohibited by the Internal Revenue Code

17 Current 11 CFR 114.10(i) states that nothing in section 114.10 shall be construed
18 to authorize any organization exempt from taxation under 26 U.S.C. 501(a) to carry out
19 any activity that it is prohibited from undertaking by the Internal Revenue Code. The
20 Commission proposes to move this provision to new section 114.16(f). The language
21 referring specifically to QNCs would be removed, for the reasons discussed above. The
22 Commission requests comments on this proposed change.

1 The Commission requests comments on proposed section 114.16. Because
2 Citizens United struck down the statutory bans on independent expenditures and
3 electioneering communications for all corporations and labor organizations, are the
4 regulatory exceptions for QNCs now superfluous? Rather than moving the provisions to
5 proposed section 114.16, should the Commission instead remove 11 CFR 114.10 in its
6 entirety?

7 IX. Proposed removal of 11 CFR 114.14 and 114.15

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

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

1 express advocacy. 551 U.S. 449, 456-57 (2007). The Court further defined the
2 “functional equivalent” of express advocacy to mean that the communication is
3 “susceptible of no reasonable interpretation other than as an appeal to vote for or against
4 a specific candidate. Id. at 469-70.

5 In response to the Court’s decision in WRTL II, the Commission promulgated
6 11 CFR 114.15. Explanation and Justification for Final Rules on Electioneering
7 Communications, 72 FR 72899, 72902 (Dec. 26, 2007) (“2007 EC E&J”). Current
8 section 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 a communication that does not meet the safe harbor is nonetheless permissible.
14 The regulation also requires corporations and labor organizations that make
15 electioneering communications aggregating in excess of \$10,000 in a calendar year to
16 report them in accordance with 11 CFR 104.20.

17 To comply with the Court’s decision in WRTL II, 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 electioneering
4 communications. Because 11 CFR 114.14 is a prophylactic regulation designed to
5 prohibit corporations and labor organizations from doing through other persons what the
6 corporation or labor organization could not do directly, the decision in Citizens United
7 could be interpreted to have rendered the prohibition in 11 CFR 114.14 unnecessary. The
8 Commission therefore seeks comment on removing the prohibition in this section
9 altogether.

10 On the other hand, the Commission also seeks comment on whether it would be
11 appropriate to retain section 114.14 because Citizens United did not address the ban on
12 corporate contributions, including “any direct or indirect payment . . . to any candidate,
13 campaign committee, or political party or organization . . . or for any applicable
14 electioneering communication.” 2 U.S.C. 441b(b)(2). In considering this issue, the
15 Commission notes that section 434(f) of the Act requires that entities that make
16 electioneering communications report certain information to the Commission, including
17 the identity of persons who have provided funds to segregated bank accounts for the
18 purpose of making electioneering communications. 2 U.S.C. 434(f). The Commission
19 promulgated 11 CFR 104.20(c)(7) to implement this statutory requirement. Explanation
20 and Justification for Final Rules on Bipartisan Campaign Reform Act of 2002 Reporting,
21 68 FR 404, 413 (Jan. 3, 2003). In doing so, the Commission interpreted the statute to
22 treat funds provided for the purpose of making electioneering communications as
23 “donations,” rather than as “contributions” under the Act. Id. Should this same reading

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

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

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

19 The Commission certifies that the attached proposed rules, if adopted, would not
20 have a significant economic impact on a substantial number of small entities. There are
21 two bases for this certification. First, there are few small entities that would be affected
22 by these proposed rules. The Commission's proposed revisions may affect some for-
23 profit corporations, labor organizations, individuals, and some non-profit organizations.

1 Individuals and labor organizations are not “small entities” under 5 U.S.C. 601(6). Many
2 non-profit organizations that might use general treasury funds to make independent
3 expenditures or electioneering communications are not “small organizations” under
4 5 U.S.C. 601(4) because they are not financed by a small identifiable group of
5 individuals, but rather rely on contributions from a large number of individuals to fund
6 operations and activities.

7 Second, the proposed rules would not have a significant economic impact on the
8 small entities affected by this rulemaking. Overall, the proposed rules would relieve a
9 funding restriction that the current rules place on some corporations and labor
10 organizations. The proposed rules would allow small entities to engage in activity they
11 were previously prohibited from funding with corporation or labor organization funds.
12 Thus, while one effect of the proposed rule would be to increase substantially the number
13 of corporations and labor organizations that use general treasury funds to make
14 independent expenditures or electioneering communications, these entities will do so
15 voluntarily and not because of any new federal requirement to do so. Although they
16 would incur some costs in complying with the obligation to report independent
17 expenditures and electioneering communications, these costs would not be very great and
18 thus would not have a significant economic impact on the small entities affected by this
19 rulemaking. In fact, the obligation for corporations and labor organizations to report
20 electioneering communications should not be burdensome because the trigger to report
21 electioneering communications remains high. Further, because qualified non-profit
22 corporations would continue to be able to make independent expenditures and
23 electioneering communications just as they have done before, their reporting obligations

Draft B

1 will not change or become more burdensome because of this rulemaking. Therefore, the
2 attached rule would not have a significant economic impact on a substantial number of
3 small entities.

4 **List of Subjects**

5 11 CFR Part 114

6 Business and industry, elections, labor.

7

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 (7) * * *

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

22 (ii) If the disbursements were paid exclusively from a segregated bank
23 account established to pay for electioneering communications,

1 consisting of funds provided by any person permissible under 11
2 ~~CFR 114.15~~, the name and address of each donor who donated an
3 amount aggregating \$1,000 or more to the segregated bank
4 account, aggregating since the first day of the preceding calendar
5 year.

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

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

18 **PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY (2 U.S.C**
19 **431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), and 441b)**

20 1. The authority citation for part 114 continues to read as follows:

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

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

1 **§114.2 Prohibitions on contributions, and expenditures and electioneering**
2 **communications.**

3 * * * * *

4 (b) * * *

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

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

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

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

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

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

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

22 (ii) ~~M~~making expenditures with respect to a Federal election (as defined
23 in 11 CFR 114.1(a)), for communications to those outside the

1 ~~restricted class that expressly advocate the election or defeat of one~~
2 ~~or more clearly identified candidate(s) or the candidates of a~~
3 ~~clearly identified political party.~~

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

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

11 ~~(i) — The committee is not a political committee as defined in 11 CFR~~
12 ~~100.5;~~

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

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

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

18 3. Section 114.3 is amended by revising paragraphs (a), (c) introductory
19 material, and (c)(4) to read as follows:

20 **§ 114.3 Disbursements for communications to the restricted class in connection with**
21 **a Federal election.**

22 (a) General.

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

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

14 * * * * *

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

19 * * * * *

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

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

22 (i) Voter registration and get-out-the-vote drives permitted. A
23 corporation or labor organization may conduct registration and get-

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

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

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

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

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

16 **§ 114.4 Disbursements for communications by corporations and labor organizations**
17 **beyond the restricted class in connection with a Federal election.**

18 (a) General. A corporation or labor organization may communicate beyond the
19 restricted class in accordance with this section. Any communications that a corporation
20 or labor organization may make to the general public under paragraph (c) of this section,
21 and may also be made to the corporation's or labor organization's restricted class and to
22 other employees and their families. Communications ~~which that~~ a corporation or labor
23 organization may make only to its employees (including its restricted class) and their

1 families, but not to the general public, are set forth in paragraph (b) of this section. Any
2 communications that a corporation or labor organization may make to the general public
3 are set forth in paragraph (c) of this section, and may also be made to the corporation's or
4 labor organization's restricted class and to other employees and their families.

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

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

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

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

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

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

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

22 (iv4) The candidate's representative or party representative (other than an
23 officer, director or other representative of a corporation or official,

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

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

1 (vi) No candidate, candidate's representative or party representative shall be
2 provided with more time or a substantially better location than other
3 candidates, candidates' representatives, or party representatives who
4 appear, unless the corporation is able to demonstrate that it is clearly
5 impractical to provide all candidates, candidates' representatives, and
6 party representatives with similar times or locations;

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

12 (viii) Representatives of the news media may be allowed to be present during a
13 candidate, candidate representative, or party representative appearance
14 under this section, in accordance with the procedures set forth at 11 CFR
15 114.3(c)(2)(iv).

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

1 Other guests of the labor organization who are being honored or speaking
2 or participating in the event and representatives of the news media may be
3 present. A labor organization may bar all candidates, candidates'
4 representatives and representatives of political parties from addressing or
5 meeting its restricted class and other employees of the labor organization
6 and their families on the labor organization's premises or at any meeting,
7 convention or other function of the labor organization.

8 (i) — The candidate's representative or party representative (other than
9 an official, member or employee of a labor organization) or the
10 candidate, may ask for contributions to his or her campaign or
11 party, or ask that contributions to the separate segregated fund of
12 the labor organization be designated for his or her campaign or
13 party. The candidate, candidate's representative or party
14 representative shall not accept contributions before, during or after
15 the appearance while at the meeting, convention or other function
16 of the labor organization, but may leave campaign materials or
17 envelopes for members of the audience. No official, member, or
18 employee of a labor organization or its separate segregated fund
19 shall, either orally or in writing, solicit or direct or control
20 contributions by members of the audience to any candidate or party
21 representative under this section, and shall not facilitate the making
22 of contributions to any such candidate or party. See 11 CFR
23 114.2(f).

1 (ii) ~~A labor organization or its separate segregated fund shall not, in~~
2 ~~conjunction with any candidate or party representative appearance~~
3 ~~under this section, expressly advocate the election or defeat of any~~
4 ~~clearly identified candidate(s), and shall not promote or encourage~~
5 ~~express advocacy by its members or employees.~~

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

7 (1) General. A corporation or labor organization may make the
8 communications described in paragraphs (c)(2) through (c)(5) of this
9 section to the general public. The general public includes anyone who is
10 not in the corporation's or labor organization's restricted class. The
11 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 (c) 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~~

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

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

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

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

(6) Endorsements. A corporation or labor organization may endorse a
candidate, and may communicate the endorsement to its restricted class or
to the general public. ~~through the publications described in 11 CFR~~
~~114.3(c)(1) or during a candidate appearance under 11 CFR 114.3(c)(2),~~
~~provided that no more than a de minimis number of copies of the~~
~~publication which includes the endorsement are circulated beyond the~~
~~restricted class. The corporation or labor organization may publicly~~
~~announce the endorsement and state the reasons therefore, in accordance~~
~~with the conditions set forth in paragraphs (c)(6) (i) and (ii) of this section.~~
The Internal Revenue Code and regulations promulgated thereunder
should be consulted regarding restrictions or prohibitions on endorsements
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
16 26 U.S.C. 501(c)(3), such as a school, college or university, may
17 make its facilities available to any candidate or political committee
18 in the ordinary course of business and at the usual and normal
19 charge. In this event, the requirements of paragraph (c)(7)(ii) of
20 this section are not applicable.

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

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

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

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

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

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

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

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

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

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

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

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

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

9 (iii~~4~~) These services shall be made available without regard to the
10 voter's political preference. Information and other assistance
11 regarding registering or voting, including transportation and other
12 services offered, shall not be withheld or refused on the basis of
13 support for or opposition to particular candidates or a particular
14 political party.

15 (iv~~5~~) Individuals conducting the registration or get-out-the-vote drive
16 shall not be paid on the basis of the number of individuals
17 registered or transported who support one or more particular
18 candidates or political party.

19 (v~~6~~) The corporation or labor organization shall notify those receiving
20 information or assistance of the requirements of paragraph (d)(~~4~~)
21 of this section. The notification shall be made in writing at the
22 time of the registration or get-out-the-vote drive.

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

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

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

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

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

22 (43) These services shall be made available without regard to the voter's
23 political preference. Information and other assistance regarding

1 registering or voting, including transportation and other services offered,
2 shall not be withheld or refused on the basis of support for or opposition to
3 particular candidates or a particular political party.

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

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

11 5. Section 114.10 is removed and reserved.

12 **§ 114.10 [Removed and reserved].**

13 6. Section 114.14 is removed and reserved.

14 **§ 114.14 [Removed and reserved].**

15 7. Section 114.15 is removed and reserved.

16 **§ 114.15 [Removed and reserved].**

17 8. Section 114.16 is added to read as follows:

18 Section 114.16 is added to read as follows:

19 **§ 114.16 Independent expenditures and electioneering communications made by**
20 **corporations and labor organizations.**

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

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

