



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

OCT - 4 2002

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Acting Associate General Counsel

Mai T. Dinh
Acting Assistant General Counsel

J. Duane Pugh, Jr.
Acting Special Assistant General Counsel

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SUBJECT: Interim Final Rules and Explanation and Justification for Electioneering Communications

AGENDA ITEM

For Meeting of: 10-10-02

SUBMITTED LATE

During the Commission's meeting on September 26, 2002, the Commission discussed the draft Interim Final Rules circulated by the Office of General Counsel, Agenda Doc. 02-68, and amendments to the agenda document offered by various Commissioners. Several amendments were adopted at the table. Attached are the Interim Final Rules that incorporate the amendments approved by the Commission as well as technical and conforming amendments, and, where necessary, added explanation and justification. These Interim Final Rules only include regulatory text and explanation and justification for the Federal Communications Commission database. Materials relating

to other aspects of the Electioneering Communications rulemaking, which were also discussed at the September 26, 2002 meeting, are being circulated under separate cover. The changes from the previous document are highlighted.

Recommendation

The Office of General Counsel recommends that the Commission approve the attached Explanation and Justification and direct the Office of General Counsel to transmit the Interim Final Rules and Explanation and Justification for publication in the *Federal Register*, and to transmit them to Congress.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[Notice 2002-XX]**

4 **FCC Database on Electioneering Communications**

5 **AGENCY:** Federal Election Commission

6 **ACTION:** Interim final rules with requests for comments.

7 **SUMMARY:** The Federal Election Commission is promulgating interim final rules
8 regarding electioneering communications, which are certain television and
9 radio communications that refer to a clearly identified Federal candidate
10 and that are targeted to the relevant electorate ~~within~~ 60 days of prior to a
11 general election or ~~within~~ 30 days prior to of a primary election for Federal
12 office. These interim final rules implement a portion of the Bipartisan
13 Campaign Reform Act of 2002 ("BCRA"), which adds to the Federal
14 Election Campaign Act new provisions regarding "electioneering
15 communications." BCRA defines electioneering communications to mean
16 certain communications that can be received by 50,000 or more persons in
17 the State or district that a candidate seeks to represent. The interim final
18 rules: 1) identify the website of the Federal Communications Commission
19 ("FCC") as the appropriate place to acquire information as to whether a
20 communication will be capable of being received by 50,000 persons;
21 2) allow those who make communications to rely on information on the
22 FCC's website to determine whether their communications will be capable
23 of being received by 50,000 or more persons in a given area; and 3) set out

1 the formulae to be used to determine whether a communication can be
2 received by 50,000 or more persons; and 4) specify three ways that a
3 person can demonstrate that a communication did not reach 50,000
4 persons in a particular Congressional district or State, if the FCC database
5 is silent on the matter. Further information is provided in the
6 Supplementary Information that follows.

7 **DATES:**

8 These rules are effective on [insert date thirty days after the date of
9 publication in the Federal Register, but no later than November 6, 2002].
10 Comments must be received on or before [Insert date 90 days after date of
11 publication in the Federal Register].

12 **ADDRESSES:**

13 All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant
14 General Counsel, and must be submitted in either electronic or written
15 form. Electronic mail comments should be sent to FCCdatabase@fec.gov
16 and must include the full name, electronic mail address, and postal service
17 address of the commenter. Electronic mail comments that do not contain
18 the full name, electronic mail address, and the postal service address of the
19 commenter will not be considered. Faxed comments should be sent to
20 (202) 219-3923, with printed copy follow-up to ensure legibility. Written
21 comments and printed copies of faxed comments should be sent to Federal
22 Election Commission, 999 E Street, NW, Washington, DC 20463.
Commenters are strongly encouraged to submit comments electronically to
ensure timely receipt and consideration. The Commission will make every

1 effort to post public comments on its Website within ten business days of
2 the close of the comment period.

3

1 **FOR FURTHER**
2 **INFORMATION**
3 **CONTACT:**

Ms. Mai T. Dinh, Acting Assistant General Counsel, or Mr. Anthony T.
Buckley, Attorney, 999 E Street, N.W., Washington, DC 20463, (202)
694-1650 or (800) 424-9530.

6 **SUPPLEMENTARY**

7 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155,
8 116 Stat. 81 (Mar. 27, 2002), contains extensive and detailed amendments to the Federal Election
9 Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. Among these amendments are
10 provisions in Title 2 of BCRA that address electioneering communications. The Commission
11 published a Notice of Proposed Rulemaking (“NPRM”) on which these interim final rules are
12 based in the Federal Register on August 7, 2002. 67 FR 51,131 (Aug. 7, 2002). Written
13 comments were due by August 21, 2002 for those who wished to testify or by August 29, 2002
14 for all other commenters. The names of commenters and their comments are available at
15 <http://www.fec.gov/register.htm> under “Electioneering Communications.” The Commission held
16 a public hearing on the NPRM on August 28 and 29, 2002, at which it heard testimony from 12
17 witnesses. Transcripts of the hearing are available at <http://www.fec.gov/register.htm> under
18 “Electioneering Communications.”¹

19 The Electioneering Communications NPRM had several components, including the
20 definition of “electioneering communication”; the prohibitions on corporations and labor
21 organizations from making disbursements for electioneering communications, with limited
22 exceptions; the reporting requirements; and the database that will be developed and maintained

¹ Oral testimony at the Commission’s public hearing and written comments are both considered “comments” in this document.

1 by the Federal Communications Commission ("FCC") to determine whether a communication
2 reaches 50,000 persons in the relevant Congressional district or State.

3 Throughout this rulemaking, the Commission and the FCC have recognized that the
4 creation of the FCC database will be a difficult and complicated undertaking, given the statutory
5 deadline for promulgation of rules implementing BCRA.² For the Commission, the difficulties
6 reside not in the development of the database, but in determining the various ways that
7 communications can be distributed and the options for measuring how many persons can receive
8 them. Therefore, the Commission is separating the final rules addressing the FCC database from
9 the final rules on Electioneering Communications so that it may continue to receive and consider
10 comments and information on the FCC database.

11 Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional
12 Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the
13 Speaker of the House of Representatives and the President of the Senate and publish them in the
14 Federal Register at least 30 calendar days before they take effect. The interim final rules on the
15 FCC database on electioneering communications were transmitted to Congress on
16 September/October >>, 2002.

17

² Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA. The President of the United States signed BCRA into law on March 27, 2002, so the 270-day deadline is December 22, 2002. The interim final rules do not apply to any runoff elections required by the results of the November 5, 2002 general election. 2 U.S.C. 431 note.

1 **Explanation and Justification**

2

3 **Introduction**

4 BCRA at 2 U.S.C. 434(f)(3) defines a new term, "electioneering communications." This
5 term includes broadcast, cable, or satellite communications: (1) that refer to a clearly identified
6 Federal candidate; (2) that are transmitted within certain time periods before a primary or general
7 election; and (3) that are "targeted to the relevant electorate," that is, the relevant Congressional
8 district or State. A communication is "targeted to the relevant electorate" if it can be received by
9 50,000 or more persons in the Congressional district or State.³

10 Pursuant to section 201(b) of BCRA,⁴ the FCC "shall compile and maintain any
11 information [that this Commission] may require to carry out [the electioneering communications
12 disclosure requirements of BCRA,] and shall make such information available to the public on
13 the [FCC's] website." These requirements are necessary to promote compliance with the
14 disclosure and funding requirements in the new law regarding electioneering communications.
15 Those who wish to make communications that meet the content, timing, and medium
16 requirements of the electioneering communication definition, must be able to easily determine
17 whether the radio or television stations, cable systems, or satellite systems on which they wish to
18 publicly distribute their communications will reach 50,000 or more persons in the State (U.S.

³ See the Electioneering Communications Final Rules, which are promulgated in conjunction with these interim final rules, for the implementation of the definition of "electioneering communication."

⁴ This section of BCRA has not been codified.

1 Senate candidates or presidential primary candidates) or Congressional district (U.S. House of
2 Representatives candidates) in which the candidate mentioned in the communication is running-
3 for office.

4
5 11 CFR 100.29(b)(6) – Information Available on the FCC Website

6 In the NPRM, the Commission described some of the search capabilities that will be
7 necessary and some features that would be helpful on the FCC's website, as well as some
8 contemplated for the Commission's own website. The Commission also posed a number of
9 questions related to the techniques for determining whether a communication will reach 50,000
10 or more persons in a Congressional district or State. The NPRM invited comments on what
11 additional information, website features, or search options should be made available. Finally, the
12 NPRM stated that the final rule would list the types of information that the FCC determines it
13 will provide on its website.

14 The Media Bureau of the Federal Communications Commission provided comments on
15 these issues, as did ten other commenters. The FCC acknowledges that BCRA requires it to
16 create, maintain and make available to the public on its website a database of information
17 necessary to determine if a communication can be received by 50,000 or more persons in any
18 Congressional district or State. The FCC emphasized that "this undertaking could be
19 extraordinarily complex and will require the expenditure of substantial resources in terms of
20 time, money, and personnel." The FCC cautioned that, at a minimum, this database will involve
21 the integration of information regarding the population and the geography of Congressional
22 districts and State boundaries, and that it could also require the FCC to examine "more detailed

1 information relating to the specific programming services transmitted or carried by each
2 broadcast station, cable system, and satellite system in the country.”

3 The FCC also stated that the “creation and maintenance of a database that complies
4 with . . . BCRA will be, no matter what the details, a large and difficult undertaking.” The FCC
5 provided numerical data that underscore the magnitude of its task, noting that, as of June 30,
6 2002, there are 8450 FM radio stations, 4811 AM radio stations, and 1712 full-power analog
7 television stations operating in the United States, and that as of August 27, 2002, there are 516
8 digital television stations, 10,500 cable systems, and several satellite providers. Because of the
9 nature of this task, the FCC asked this Commission to craft rules that will simplify the task to the
10 extent possible. The FCC sought flexibility and discretion to implement the database based upon
11 its expertise and available data, so that it will be able to provide the public with the information
12 as quickly and accurately as possible.

13 One commenter argued that the proposal in the NPRM regarding what information should
14 be available on the FCC website was not sufficient. This commenter suggested that the
15 Commission ~~should~~ also require the FCC “to compile and maintain a database, available on the
16 World Wide Web, of certain information that has to be collected anyway under Section 504 of
17 the BCRA.” Section 504 of BCRA, amends the Communications Act of 1934 to require
18 broadcast licensees to maintain certain records regarding requests to purchase broadcast time for
19 the purpose of communicating a message of a political nature. See 47 U.S.C. 315(e).

20 Eight commenters either stated specifically that they supported the database concept as
21 described in the NPRM, or by their comments, appeared to support it. One commenter urged the
22 Commission to defer to the FCC’s determination of the specifics of how the database should
23 operate.

1 In order to provide the FCC with the most flexibility possible, the Commission has
2 decided not to include in the final rule any additional requirements as to the types of information
3 to be made available on the FCC's website. Instead, the interim final rule lists only what is
4 required by BCRA: the FCC's website will provide information that will permit those who wish
5 to make communications to determine easily whether the radio or television stations, cable
6 systems, or satellite systems through which they wish to publicly distribute their communications
7 will reach 50,000 or more persons in a particular State or Congressional district, and, therefore,
8 whether they are required to file statements of electioneering communications with the Federal
9 Election Commission. Due to the stated challenge the FCC is facing in creating this website
10 database, and because section 504 of BCRA includes information unrelated to electioneering
11 communications, the Commission does not believe it is appropriate to require the FCC to include
12 such information in its database.

13 The Commission also received comments on the statement in the proposed rule at section
14 100.29(b)(5) that reliance on the FCC information will be a complete defense to a charge that a
15 communication was capable of being received by 50,000 or more persons, and that as a result,
16 the communication met the definition of an "electioneering communication." All of the
17 commenters who addressed this topic agreed that reliance on the information provided on the
18 FCC website should be sufficient, and many of them believed it should be a complete defense to
19 any liability arising under BCRA. One commenter argued that the Commission should permit
20 challenges to the information provided on the FCC website. Another commenter argued that, if
21 the database cannot state whether a communication transmitted over a particular outlet reaches
22 50,000 or more persons, then it should be presumed to not reach 50,000 or more persons.
23 Another commenter argued that the Commission should announce that it will not entertain

1 complaints of violations until the technological issues are resolved and the targeting information
2 is available as proposed.

3 Under the interim final rules at 11 CFR 100.29(b)(6)(i), if the FCC database indicates that
4 a communication cannot be received by more than 50,000 persons in a particular Congressional
5 district or State, then such information shall be a complete defense against any charge that such
6 communication constitutes an electioneering communication with respect to that particular
7 district or State, as long as such information is posted on the FCC's website on or before the date
8 the communication is publicly distributed.

9 The proposed rule in the NPRM would have stated that a defense involving the
10 information on the FCC website would be available if the person making the communication
11 relied on the information prior to the public distribution of the communication. The interim final
12 rule removes the reliance requirement. The information on the FCC website is intended to state
13 objective facts regarding the reach of broadcast systems and networks, and cable and satellite
14 systems. These facts are true regardless of whether the person making the communication knew
15 of them or intended to make an electioneering communication.

16 However, the Commission is concerned that if the FCC database may not be able to does
17 not provide information for every possible system or network, or may not be operational in time
18 for any special elections in 2003 when such information might be necessary, indicating whether a
19 communication can be received by 50,000 or more persons. In those situations,
20 paragraphs (b)(6)(ii)(A) through (C) set out three ways a person can establish a defense to a
21 charge that a communication reached 50,000 or more persons in a particular district or State.

22 The first method is if the person reasonably relied on written documentation obtained
23 from the entity publicly distributing the communication, stating that the communication cannot

1 be received by 50,000 or more persons in the specified Congressional district (for U.S. House of
2 Representatives candidates) or State (for U.S. Senate candidates or presidential primary
3 candidates).

4 The second method is if the communication is not publicly distributed on a broadcast
5 station, radio station or cable system located, in whole or in part, in any Metropolitan Area (MA).
6 For many years, the Commission has used the Office of Management and Budget's (OMB)
7 definition of MA in other portions of the Commission's regulations governing national
8 convention host committee financing. See 11 CFR 9008.52(c)(2) ("For purposes of this section,
9 any business (including any branch of a national or regional chain, a franchise, or a licensed
10 dealer) or labor organization or other organization with offices or facilities located within the
11 Metropolitan Area (MA) of the convention city shall be considered local.") See also Explanation
12 and Justification, 59 Federal Register 33610 (June 29, 1994). Because MAs contain at least
13 50,000 inhabitants under OMB's definition, a communication aired or transmitted by an entity
14 outside of any such areas in the specified district or State will not be presumed to reach 50,000
15 persons.

16 The third method is if the person making the communication reasonably believes that the
17 communication cannot be received by 50,000 or more persons in the relevant Congressional
18 district or State. Such belief must be reasonably based on information in possession of the maker
19 of the communication prior to or at the time the communication is made. For example, if a
20 person engaged a media buyer to secure broadcast time, and that media buyer reasonably
21 informed that person that the communication would not reach 50,000 persons in the relevant
22 Congressional district or State, then that would result in a reasonable belief as to the reach of the
23 communication. ~~then it will be presumed that such communication can be received by more than~~

1 50,000 persons, unless the person making the communication obtains written documentation
2 from the broadcast station or network, cable system, or satellite system, stating that such
3 communication cannot be received by 50,000 or more persons in the Congressional district or
4 State.

5 ——— The proposed rule in the NPRM stated that a defense involving the information on the
6 FCC website would be available if the person making the communication relied on the
7 information prior to the public distribution of the communication. The interim final rule removes
8 the reliance requirement. The information on the FCC website is intended to state objective facts
9 regarding the reach of broadcast systems and networks, and cable and satellite systems. These
10 facts are true regardless of whether the person making the communication knew of them or
11 intended to make an electioneering communication.

12 ——— Under the rule, if, for whatever reason, the FCC database does not state whether a
13 particular communication will reach 50,000 or more persons in a relevant Congressional district
14 or State, a person who desires to communicate via a particular station or network may rely on
15 written documentation from the broadcast station or network, cable system or satellite system,
16 that states the communication will not be available to 50,000 or more individuals in the relevant
17 Congressional district or State.

18 The Commission encourages, but does not require, persons who believe their
19 communications will reach fewer than 50,000 persons in a particular Congressional district or
20 State, to confirm this before the communication is transmitted by checking the information on
21 the FCC website, or if the website does not so indicate, obtaining a written statement from the
22 broadcast station or network, cable system, or satellite system, or otherwise determining that the
23 communication will not be aired on any broadcast station, radio station, or cable system in any

1 MA in the specified district or State. Otherwise, violations of the restrictions on funding sources,
2 and of the 24-hour disclosure requirement, might occur. See 11 CFR 114.2(b)(2)(iii),
3 114.14(a)(1), 114.14(b)(1) and (2), and 104.171(b). To assure persons that the information on
4 the FCC website is reliable, the Commission encourages the FCC to establish a date by which all
5 information on the website will be considered correct and unchangeable for a coming election
6 cycle, and to post that date on its website.

7

8 11 CFR 100.29(b)(7) – Determining Whether a Communication Can Be Received by
9 50,000 or More Persons

10 In the NPRM, the Commission also sought comments on how the term “persons” should
11 be interpreted for purposes of determining the required potential audience for electioneering
12 communications. See 2 U.S.C. 434(f)(3)(C). The term “person” is defined in 2 U.S.C. 431(11)
13 and in current Commission regulations at 11 CFR 100.10 to mean an individual, partnership,
14 association, corporation, labor organization and any other organization or group of persons. The
15 NPRM suggested that persons other than individuals should be excluded because partnerships
16 and other legal entities are, by definition, not part of the “relevant electorate.” Therefore,
17 limiting “persons” to individuals or natural persons was proposed.

18 All nine commenters who addressed this issue favored construing “persons” to mean
19 natural persons or individuals. Several commenters thought the term should be further limited to
20 include only persons who are, as described by the commenters, either voting-age citizens,
21 registered voters, eligible voters, or those entitled to vote.

22 In reviewing what this provision is intended to accomplish, the Commission has
23 determined that attempting to define “person” by itself is not the best approach. Rather, the

1 Commission has determined that the more appropriate course is to define the term “can be
2 received by 50,000 or more persons,” because this phrase is a more accurate reflection of the
3 concept Congress sought to address in BCRA. This approach enables the Commission, with the
4 assistance of the FCC, to employ varying factors to determine whether a communication has the
5 necessary audience for it to be considered an electioneering communication. Due to the nature of
6 the technologies involved, precision is not always feasible in measuring how many persons in a
7 particular Congressional district or State can receive a television or radio communication. Nor is
8 it required by BCRA, which only employs a more or less than 50,000 persons standard.

9 In adopting this approach, the Commission is, in effect, assessing the number of
10 individuals without attempting to determine how many of them may be registered voters or
11 eligible voters. The Commission is concerned that to attempt to further define the universe of
12 individuals is not required by BCRA and could seriously and unnecessarily complicate the effort
13 to provide information in a timely manner.

14 The Commission has identified several methodologies that are included in the interim
15 final rules in 11 CFR 100.29(b)(7)(i)(A) through (H) to determine whether a communication
16 meets BCRA’s audience standard in a particular Congressional district or State. While ~~they~~these
17 methodologies cannot achieve complete precision, the Commission believes ~~they methodologies~~
18 ~~described below~~ could aid in reliably and objectively determining whether a communication can
19 be received by 50,000 or more persons in a Congressional district or State, as required by BCRA.

20 The Commission has ascertained that there are a number of different situations that will
21 involve various calculations and configurations to make this determination. Some
22 communications are broadcast by television stations, radio stations, or networks. These
23 broadcast signals may also be redistributed by cable or satellite systems. Other communications

1 appear on a single cable system, which may involve more than one cable franchise. Still other
2 communications appear on cable networks (CNN, FOX News, USA, for example) that are
3 publicly distributed via cable and satellite. Because Congressional districts are the most
4 problematic, the discussion of the methodologies herein will address them specifically. Points
5 made in this discussion can be extrapolated to apply statewide for Senate and presidential
6 primary elections.

7 For over-the-air television broadcasters, broadcast contours appear to be the best way to
8 gauge viewership. Thus, if a Congressional district lies entirely within a Grade B broadcast
9 contour, the potential viewership of that station would be the population of that district.

10 A broadcast contour is the geographic line within which the broadcast signal is at a
11 particular strength. For example, the line demarcating the Grade B contour represents the area
12 where fifty percent of the population can receive the signal, and fifty percent cannot. The
13 Commission understands that the FCC is capable of comparing the geographic sweep of
14 broadcast contours, and state boundaries and Congressional districts. Contours are a
15 construction, not a geographic certainty; use of contours will both under- and over-count an
16 audience. Nevertheless, based on the technology, contours are the most reliable, readily available
17 measure of audiences that "can receive" a broadcast signal and, according to the FCC, are
18 regularly relied upon in that agency and in the telecommunications industry.

19 Using population figures is consistent with the Commission's previously stated proposal,
20 and was supported by a number of commenters, who agreed that "persons" should mean natural
21 persons. Subscribers of cable or satellite television within the broadcast contour are not counted
22 in the interim final rules at 11 CFR 100.29(b)(7)(i)(E), as that would result in the
23 double-counting of certain persons. If a communication is simultaneously broadcast on a

1 network, where multiple stations broadcasting the same material each reach a portion of the
2 Congressional district, the populations within those portions must be combined to determine
3 whether a communication reaches 50,000 or more persons. This method is found in the interim
4 final rules at 11 CFR 100.29(b)(7)(i)(F)(1).

5 For a broadcast station with Grade B broadcast contours that do not cover an entire
6 Congressional district, one way to determine the relevant viewership is to first ascertain the
7 population within that portion of the district within the broadcast contour. With respect to the
8 remaining portion of the district, a calculation must be made of the viewership of cable and
9 satellite television that retransmit the broadcast station, and that result is added to the first
10 number to determine whether the 50,000-person threshold is met. This method is found in the
11 interim final rules at 11 CFR 100.29(b)(7)(i)(F)(2).

12 When determining viewership of a cable system or satellite system, the number of
13 subscribers to each system provides a baseline. However, it is unlikely that the number of
14 subscribers exactly equals viewership - inevitably, in many households where one person is the
15 subscriber, there will be several people who are viewers. Accordingly, the interim rules in
16 11 CFR 100.29(b)(7)(ii) use a multiplier to account for this fact. One multiplier that could be
17 used is the current average U.S. household size, which at present is 2.62 persons. See Jason
18 Fields and Lynne M. Casper, *America's Families and Living Arrangements: March 2000*,
19 Current Population Reports, P20-537, U.S. Census Bureau, Washington, D.C., 2001. All cable
20 and satellite systems carrying the broadcast channel and operating within the district or State
21 must be considered.

22 Thus, in the hypothetical described above, if the Congressional district is served by a
23 cable system, and it is determined that 10,000 of the cable system's subscribers reside outside of

1 the broadcast contour but within the Congressional district, then 26,200 (2.62 x 10,000) persons
2 are added to the population within the contour to determine if the communication can be received
3 by 50,000 or more persons.

4 With respect to communications publicly distributed solely on cable or satellite systems,
5 the same sort of calculations described above must be made under the interim final rules at 11
6 CFR 100.29(b)(7)(i)(G) and (H). With respect to cable television networks, the Commission
7 notes that not all cable systems carry all cable networks. Nevertheless, for the sake of simplicity,
8 the interim final rules assume that every cable and satellite system carries every cable network,
9 and calculations are based on this assumption. This creates a rebuttable presumption as to the
10 reach of a particular cable network, which may be overcome by demonstrating that the cable
11 system in question did not carry that network at the time a communication was transmitted. This
12 rebuttable presumption is set forth in the interim final rules at 11 CFR 100.29(b)(7)(iii).

13 With respect to communications publicly distributed via AM or FM radio stations, each
14 of these media have their own terminology for the reach of over-the-air signals, which are
15 reflected in the interim final rules at 11 CFR 100.29(b)(7)(i)(A) through (D). The analysis
16 involved with these communications is similar to that for over-the-air only television broadcast
17 stations. Information regarding the term used for FM stations, "primary service contour," can be
18 found on the FCC's website at: <http://www.fcc.gov/mb/audio/fmclasses.html>. With respect to
19 AM stations, the FCC's rules at 47 CFR part 73 describe the various classes of radio stations and
20 the types of service areas (primary and/or secondary) that are applicable to them. The
21 Commission's rules at 11 CFR 100.29(b)(7)(i)(C) and (D) use the phrase "outward service area"
22 to address the fact that some stations may have a reach further than a primary service area.

1 Several commenters addressed whether the regulations should require aggregation of
2 recipients of the same communication from multiple outlets and, if so, whether the regulations
3 should aggregate substantially similar communications for this purpose. Theoretically, one
4 communication could be publicly distributed via several small outlets, each of which reaches
5 fewer than 50,000 persons in the relevant area, but in the aggregate reach 50,000 or more persons
6 in the relevant area. The commenters agreed that the size of radio and television audiences might
7 eliminate this concern as a practical matter. The commenters generally favored a potential
8 audience measure that considers the viewers or listeners of each station separately and does not
9 aggregate those figures, except in one instance. For example, the commenters argued that if the
10 identical television advertisement is separately broadcast on three broadcast stations, each of
11 which reaches slightly fewer than 50,000 distinct individuals in the relevant area, no
12 electioneering communication should result. (This example assumes the broadcast stations are
13 not also distributed on a cable or satellite system serving the relevant area.)

14 Similarly, some of the commenters argued that if a cable system has 45,000 viewers in
15 the relevant area and if it distributes an ad on several of the channels under its control—a news
16 channel, a sports channel, and a lifestyle channel, for example—no electioneering
17 communication could result as none of these distributions would be available to 50,000 or more
18 persons in the relevant area. The only instance in which audience aggregation was supported by
19 the commenters was if a television communication is simultaneously distributed by a network
20 programming provider on multiple broadcast stations, then the combined potential audiences of
21 all the broadcast stations along with any individuals who can receive the stations on a cable or
22 satellite system should be analyzed to determine if 50,000 or more individuals in the relevant
23 area can receive the communication. If so, then an electioneering communication would result,

1 assuming the timing and content requirements are also met. The interim final rules take this
2 approach.

3 These interim final rules represent an initial effort by the Commission to provide clear
4 guidance to the Federal Communications Commission and to those who would make
5 electioneering communications, as to how to determine whether a communication can be
6 received by 50,000 or more persons. The Commission seeks comments on whether this approach
7 is appropriate. Additionally, the Commission seeks comments on whether it should defer to the
8 Federal Communications Communication to determine whether a communication can be
9 received by 50,000 or more persons within a Congressional district or State. The Commission
10 also seeks comments on whether the various formulae it has adopted for making these
11 calculations are reasonable. The Commission is especially interested inis comments addressing
12 any alternative means of accomplishing the same task.

13

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

15 The Commission certifies that these interim final rules do not have a significant
16 economic impact on a substantial number of small entities. The basis of this certification is that
17 these rules do not require any small entity to take any action or incur any cost.

18

19 **List of Subjects**

20 11 CFR Part 100

21 Elections.

22

1 For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the Code of
2 Federal Regulations is amended as follows:

3 **PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)**

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

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

6 2. Paragraph (b) of section 100.29 is revised by adding paragraphs (b)(6) and (b)(7) to read
7 as follows:

8 **§ 100.29 Electioneering communication (2 U.S.C. 437(f)).**

9 * * * * *

10 (b) * * *

11 (6) (i) Information on the number of persons in a Congressional district or State
12 that can receive a communication publicly distributed by a television
13 station, radio station, a cable television system, or satellite system, ~~is shall~~
14 be available on the Federal Communications Commission's website,
15 www.fcc.gov. A link to that site is available on the Federal Election
16 Commission's website, www.fec.gov. If the Federal Communications
17 Commission's website ~~of the FCC~~ indicates that a communication cannot
18 be received by more than 50,000 persons in the Congressional district or
19 State, then such information shall be a complete defense against any
20 charge that such communication constitutes an electioneering
21 communication, so long as such information is posted on the Federal
22 Communications Commission's website on or before the date the
23 communication is publicly distributed.

1 (ii) If the Federal Communications Commission's website does not indicate
2 whether a communication can be received by 50,000 or more persons in
3 the specified Congressional district or State, it shall be a complete defense
4 against any charge that a communication reached 50,000 or more persons
5 when the maker of a communication:

6
7 (A) Reasonably relies on written documentation obtained from the
8 broadcast station, radio station, cable system, or satellite system
9 that states that the communication cannot be received by 50,000 or
10 more persons in the specified Congressional district (for U.S.
11 House of Representatives candidates) or State (for U.S. Senate
12 candidates or presidential primary candidates);

13
14 (B) Does not publicly distribute the communication on a broadcast
15 station, radio station, or cable system, located in any Metropolitan
16 Area in the specified Congressional district (for U.S. House of
17 Representatives candidates) or State (for U.S. Senate candidates or
18 presidential primary candidates); or

19
20 (C) Reasonably believes that the communication cannot be received by
21 50,000 or more persons in the specified Congressional district (for
22 U.S. House of Representatives candidates) or State (for U.S.
23 Senate candidates or presidential primary candidates).
24

1 ~~However, if the FCC database does not provide information, on or before the date of the~~
2 ~~communication, indicating whether a communication can be received by~~
3 ~~50,000 or more persons, then it will be presumed that such communication~~
4 ~~can be received by more than 50,000 persons, unless the person making~~
5 ~~the communication obtains written documentation from the broadcast~~
6 ~~station or network, cable system, or satellite system, stating that such~~
7 ~~communication cannot be received by 50,000 or more persons in the~~
8 ~~Congressional district or State.~~

9 (7) (i) Can be received by 50,000 or more persons means -

10 (A) In the case of a communication transmitted by an FM radio
11 broadcast station or network, where the Congressional district or
12 State lies entirely within the station's or network's protected or
13 primary service contour, that the population of the Congressional
14 district or State is 50,000 or more; or

15 (B) In the case of a communication transmitted by an FM radio
16 broadcast station or network, where a portion of the Congressional
17 district or State lies outside of the protected or primary service
18 contour, that the population of the part of the Congressional district
19 or State lying within the station's or network's protected or
20 primary service contour is 50,000 or more; or

21 (C) In the case of a communication transmitted by an AM radio
22 broadcast station or network, where the Congressional district or
23 State lies entirely within the station's or network's most outward

1 service area, that the population of the Congressional district or
2 State is 50,000 or more; or

3 (D) In the case of a communication transmitted by an AM radio
4 broadcast station or network, where a portion of the Congressional
5 district or State lies outside of the station's or network's most
6 outward service area, that the population of the part of the
7 Congressional district or State lying within the station's or
8 network's most outward service area is 50,000 or more; or

9 (E) In the case of a communication appearing on a television broadcast
10 station or network, where the Congressional district or State lies
11 entirely within the station's or network's Grade B broadcast
12 contour, that the population of the Congressional district or State is
13 50,000 or more; or

14 (F) In the case of a communication appearing on a television broadcast
15 station or network, where a portion of the Congressional district or
16 State lies outside of the Grade B broadcast contour -

17 (1) That the population of the part of the Congressional district
18 or State lying within the station's or network's Grade B
19 broadcast contour is 50,000 or more; or

20 (2) That the population of the part of the Congressional district
21 or State lying within the station's or network's broadcast
22 contour, when combined with the viewership of that
23 television station or network by cable and satellite

1 subscribers within the Congressional district or State lying
2 outside the broadcast contour, is 50,000 or more; or

3 (G) In the case of a communication appearing exclusively on a cable or
4 satellite television system, but not on a broadcast station or
5 network, that the viewership of the cable system or satellite system
6 lying within a Congressional district or State is 50,000 or more; or

7 (H) In the case of a communication appearing on a cable television
8 network, that the total cable and satellite viewership within a
9 Congressional district or State is 50,000 or more.

10 (ii) Cable or satellite television viewership is determined by multiplying the
11 number of subscribers within a Congressional district or State, or a part
12 thereof, as appropriate, by the current national average household size, as
13 determined by the Bureau of the Census.

14 (iii) A determination that a communication can be received by 50,000 or more
15 persons based on the application of the formula at paragraph (b)(7)(i)(G)
16 or (H) of this section shall create a rebuttable presumption that may be
17 overcome by demonstrating that -

18 (A) One or more cable or satellite systems did not carry the network on
19 which the communication was publicly distributed at the time the
20 communication was publicly distributed; and

21 (B) Applying the formula to the remaining cable and satellite systems
22 results in a determination that the cable network or systems upon
23

1 which the communication was publicly distributed could not be
2 received by 50,000 persons or more.

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David M. Mason
Chairman
Federal Election Commission

11 DATED: _____
12 BILLING CODE: 6715-01-P

