



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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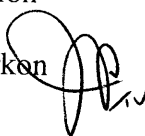
MEMORANDUM


**AGENDA ITEM**


For Meeting of: 10-28-04


**SUBMITTED LATE**


**TO:** The Commission

**THROUGH:** James A. Pehrkon   
Staff Director

**FROM:** Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Associate General Counsel

Brad C. Deutsch   
Assistant General Counsel

Ron B. Katwan   
Attorney

**SUBJECT:** Final Rules on Coordinated and Independent Expenditures by Party Committees (11 CFR 109.35)

On June 30, 2004, the Commission published a Notice of Proposed Rulemaking ("NPRM"), entitled "Coordinated and Independent Expenditures by Party Committees. See 69 Fed. Register 39,373 (June 30, 2004). The NPRM proposed certain changes needed to conform the Commission's regulations in 11 CFR Part 109 to the Supreme Court's invalidation of BCRA Section 213 (2 U.S.C. 441a(d)(4)) in McConnell v. FEC, 540 U.S. 93, 199-205 (2003). After reviewing the comments and considering the issues presented in the NPRM, the Office of the General Counsel has prepared the attached Final Rules and Explanation and Justification for Commission consideration. The draft Final Rules are identical to the rules proposed in the NPRM.

**Recommendation:**

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

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 102, 106, and 109**

3 **[Notice 2004 - >]**

4 **Coordinated and Independent Expenditures by Party Committees**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Final Rules.


7 **SUMMARY:** The Federal Election Commission is removing its rules restricting the  
8 ability of political party committees to make both independent  
9 expenditures and coordinated party expenditures with respect to the  
10 same candidate's general election campaign for Federal office. The  
11 Commission is also repealing its rules prohibiting political party  
12 committees that make coordinated party expenditures with respect to  
13 a candidate from transferring funds to, or assigning authority to make  
14 coordinated party expenditures to, or receiving a transfer of funds  
15 from, a political party committee that has made or intends to make an  
16 independent expenditure with respect to that candidate. These rules  
17 were originally promulgated to implement section 213 of the  
18 Bipartisan Campaign Reform Act of 2002. However, in McConnell  
19 v. FEC, the U.S. Supreme Court held that section 213 is  
20 unconstitutional. Therefore, the Commission is now removing the  
21 rules implementing section 213. Further information is provided in  
22 the supplementary information that follows.  
23

1 **EFFECTIVE**  
2 **DATE:** [Insert date thirty days after date of publication in the FEDERAL  
3 REGISTER]  
4

5 **FOR FURTHER**  
6 **INFORMATION**  
7 **CONTACT:** Mr. Brad C. Deutsch, Assistant General Counsel, or Mr. Ron B.  
8 Katwan, Attorney, 999 E Street N.W., Washington, D.C. 20463,  
9 (202) 694-1650 or (800) 424-9530.

10 **SUPPLEMENTARY**  
11 **INFORMATION:**

12 The Notice of Proposed Rulemaking (“NPRM”), on which these final rules are  
13 based, was published in the Federal Register on June 30, 2004. 69 Fed. Register 39,373  
14 (June 30, 2004). The comment period closed on July 30, 2004. The Commission received  
15 three written comments on the proposed rules. These Final Rules are identical to the rules  
16 proposed in the NPRM.

17 Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional  
18 Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to  
19 the Speaker of the House of Representatives and the President of the Senate, and publish  
20 them in the Federal Register at least 30 calendar days before they take effect. The final  
21 rules that follow were transmitted to Congress on , 2004.

22  
23 **Explanation and Justification**

24 To conform its regulations to the Supreme Court’s invalidation of section 213 of the  
25 Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-155 (Mar. 27, 2002)) (“BCRA”) in  
26 McConnell v. FEC, 540 U.S. 93, 199-205 (2003), the Commission is removing its

1 regulations at 11 CFR 109.35 and deleting any cross-references to that section in other  
2 regulations.

3 I. 11 CFR 102.6—Transfer of funds; collecting agents.

4 The Commission is revising section 102.6 by deleting the cross-reference to section  
5 109.35, which is being removed.

6 II. 11 CFR 106.8—Allocation of expenses for political party committee phone banks  
7 that refer to clearly identified Federal candidate.

8 The Commission is revising section 106.8 by deleting the cross-reference to section  
9 109.35, which is being removed.

10 III. 11 CFR 109.30—How are political party committees treated for purposes of  
11 coordinated and independent expenditures?

12 The Commission is revising section 109.30 by deleting the cross-references to  
13 section 109.35, which is being removed.

14 IV. 11 CFR 109.33—May a political party committee assign its coordinated party  
15 expenditure authority to another political party committee?

16 The Commission is revising section 109.33 by deleting the cross-reference to  
17 section 109.35, which is being removed.

18 V. 11 CFR 109.35—What are the restrictions on a political party committee making  
19 both independent expenditures and coordinated party expenditures in connection with the  
20 general election of a candidate?

21 Under the Federal Election Campaign Act of 1971 (the “Act”), as amended, 2  
22 U.S.C. 431 et seq., a national committee, State committee, or a subordinate committee of a  
23 State committee of a political party may make expenditures in coordination with a Federal

1 candidate for that candidate’s general election campaign<sup>1</sup> up to prescribed limits without  
2 these expenditures counting against the party committee’s contribution limits. 2 U.S.C.  
3 441a(d)(1)-(3); 11 CFR 109.32. While the Act limits coordinated expenditures, the  
4 Supreme Court has determined that political party committees may make unlimited  
5 “independent expenditures,”<sup>2</sup> which are not coordinated with a candidate or a candidate’s  
6 authorized committees or agents. See Colorado Republican Federal Campaign Committee  
7 v. FEC, 518 U.S. 604 (1996) (“Colorado I”).<sup>3</sup>  
8 BCRA section 213 amended 2 U.S.C. 441a(d), by prohibiting political party  
9 committees, under certain conditions, from making both coordinated party expenditures and  
10 independent expenditures with respect to the same candidate, and from making transfers  
11 and assignments to other political party committees. 2 U.S.C. 441a(d)(4).

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<sup>1</sup> See 2 U.S.C. 441a(a)(7)(B)(i)-(ii) for a definition of coordinated party expenditures. See also 11 CFR 109.20(b).

<sup>2</sup> “Independent expenditure” is defined in 2 U.S.C. 431(17). See also 11 CFR 100.16.

<sup>3</sup> The holding of Colorado I is limited to independent expenditures in connection with Congressional campaigns. The opinion in Colorado I did not address the issue of whether regulation of independent expenditures is constitutionally permissible in connection with Presidential campaigns. (“Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of presidential campaigns.”) 518 U.S. at 612. Thus, the opinion in Colorado I did not reach the issue of whether former 11 CFR 110.7(a)(5) which prohibited independent expenditures by the national committee of a political party in connection with a Presidential campaign was constitutional. Subsequently, however, BCRA effectively repealed section 110.7(a)(5) and the Commission replaced the section with 11 CFR 109.36, which prohibits a national committee of a political party from making independent expenditures in connection with a presidential campaign only in certain circumstances in which the national committee of a political party serves as the principal campaign committee or authorized committee of its Presidential candidate. See Coordinated and Independent Expenditures; Final Rules, 68 Fed. Register 421, 447-48 (January 3, 2003).

1 In 2002, the Commission promulgated rules at 11 CFR 109.35 to implement BCRA  
2 section 213. Coordinated and Independent Expenditures, Final Rules, 68 Fed. Register 421,  
3 422 (January 3, 2003).

4 Subsequently, in McConnell v. FEC, the Supreme Court found BCRA section 213  
5 unconstitutional. The Court held that by requiring political parties to choose between  
6 coordinated and independent expenditures during the post-nomination, pre-election period,  
7 BCRA section 213 placed an unconstitutional burden on the parties' right to make  
8 unlimited independent expenditures. 540 U.S. at 199-205. Accordingly, the NPRM  
9 proposed removing the regulations at 11 CFR 109.35, which implemented BCRA section  
10 213.

11 The Commission received three comments on this rulemaking. The Internal  
12 Revenue Service submitted a comment informing the Commission that it had no comments.  
13 A second comment, while urging the Commission to remove the regulations implementing  
14 BCRA section 213 on the grounds that it was unconstitutional, primarily addressed issues  
15 beyond the scope of this rulemaking. A third brief comment concerned issues also not  
16 within the scope of this rulemaking. The Commission received no comments opposing the  
17 removal of its regulations at 11 CFR 109.35 as proposed in the NPRM. Accordingly, the  
18 Commission is removing and reserving section 109.35 because the statutory foundation for  
19 this section, 2 U.S.C. 441a(d)(4), has been invalidated by the Supreme Court in McConnell  
20 v. FEC.

21 VI. 11 CFR 109.36—Are there circumstances under which a political party committee  
22 is prohibited from making independent expenditures?

1           The Commission is revising section 109.36 by deleting the word “additional” in the  
2 heading of section 109.36, because, as a result of the removal of section 109.35, the  
3 circumstances described in section 109.36 are the only circumstances under which a  
4 political party committee is prohibited from making independent expenditures.

5  
6       **Certification of No Effect Pursuant to 5 U.S.C. § 605(b)**

7       **[Regulatory Flexibility Act]**

8  
9           The attached rules will not have a significant economic impact on a substantial  
10 number of small entities. The basis of this certification is that the national, State, and local  
11 party committees of the two major political parties are not small entities under 5 U.S.C. 601  
12 because they are not small businesses, small organizations, or small governmental  
13 jurisdictions.

14           To the extent that political party committees may fall within the definition of "small  
15 entities," their number is not substantial. In addition, the rules do not add but remove  
16 restrictions applicable to political party committees.

17  
18       **List of Subjects**

19       11 CFR Part 102

20           Political committees and parties, reporting and recordkeeping requirements.

21       11 CFR Part 106

22           Political candidates, campaign funds, political committees and parties.

23       11 CFR Part 109

1 Coordinated expenditures, independent expenditures, political committees and  
2 parties.  
3



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

4 **PART 102 – REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY**  
5 **POLITICAL COMMITTEES (2 U.S.C. 433)**

6 1. The authority citation for Part 102 continues to read as follows:

7 **Authority:** 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

8 2. Section 102.6 is amended by revising paragraph (a)(1)(ii) to read as follows:

9 **§ 102.6 Transfers of funds; collecting agents.**

10 (a) \* \* \*

11 (1) \* \* \*

12 (ii) Subject to the restrictions set forth at 11 CFR ~~109.35(e)~~, 300.10(a),  
13 300.31 and 300.34(a) and (b), transfers of funds may be made  
14 without limit on amount between or among a national party  
15 committee, a State party committee and/or any subordinate party  
16 committee whether or not they are political committees under 11  
17 CFR 100.5 and whether or not such committees are affiliated.

18 \* \* \* \* \*

19

20 **PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

21 3. The authority citation for Part 106 continues to read as follows:

22 **Authority:** 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

23 4. Section 106.8 is amended by revising paragraph (b)(2)(ii) to read as follows:

1 § 106.8 Allocation of expenses for political party committee phone banks that refer to  
2 a clearly identified Federal candidate.

3 \* \* \* \* \*

4 (b) \* \* \*

5 (2) \* \* \*

6 (ii) A coordinated expenditure or an independent expenditure, subject to  
7 the limitations, restrictions, and requirements of 11 CFR 109.10,  
8 109.32, and 109.33 ~~and 109.35~~; or

9 \* \* \* \* \*

10

11 **PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C.**  
12 **431(17), 441a(a) and (d), AND PUB. L. 107-155 SEC. 214(c))**

13 5. The authority citation for Part 109 continues to read as follows:

14 **Authority:** 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L.  
15 107-155, 116 Stat. 81.

16 6. Section 109.30 is amended by revising the section to read as follows:

17 **§ 109.30 How are political party committees treated for purposes of coordinated and**  
18 **independent expenditures?**

19  
20 Political party committees may make independent expenditures subject to the  
21 provisions in this subpart. See 11 CFR ~~109.35 and 109.36~~. Political party committees may  
22 also make coordinated party expenditures in connection with the general election campaign  
23 of a candidate, subject to the limits and other provisions in this subpart. See 11 CFR 109.32  
24 through 11 CFR ~~109.34~~109.35.

1 7. Section 109.33 is amended by revising paragraph (a) to read as follows:

2 **§ 109.33 May a political party committee assign its coordinated party expenditure**  
3 **authority to another political party committee?**  
4

5 (a) Assignment. ~~Except as provided in 11 CFR 109.35(e),~~ ¶ The national committee of a  
6 political party and a State committee of a political party, including any subordinate  
7 committee of a State committee, may assign its authority to make coordinated party  
8 expenditures authorized by 11 CFR 109.32 to another political party committee. Such an  
9 assignment must be made in writing, must state the amount of the authority assigned, and  
10 must be received by the assignee committee before any coordinated party expenditure is  
11 made pursuant to the assignment.

12 \* \* \* \* \*

13 8. Section 109.35 is removed and reserved.

14 ~~§ 109.35 What are the restrictions on a political party committee making both~~  
15 ~~independent expenditures and coordinated party expenditures in connection with the~~  
16 ~~general election of a candidate?~~

17 (a) ~~Applicability.~~ For the purposes of this section, all political committees established  
18 and maintained by a national political party (including all congressional campaign  
19 committees) and all political committees established and maintained by a State political  
20 party (including any subordinate committee of a State committee) shall be considered to be  
21 a single political committee.

22 (b) ~~Restrictions on certain coordinated and independent expenditures.~~ On or after the  
23 date on which a political party nominates a candidate for election to Federal office, no  
24 committee of the political party may make:

