

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christopher Shays and Martin Meehan,

Plaintiffs,

v.

United States Federal Election Commission,

Defendant.

Civil Action No. 02-CV-1984
(Judge Kollar-Kotelly)

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

Roger M. Witten (Bar No. 163261)
David A. O'Neil (*pro hac vice*)
WILMER CUTLER PICKERING LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800

Randolph D. Moss (Bar No. 417749)
Stacy E. Beck (Bar No. 480540)
WILMER CUTLER PICKERING LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Donald J. Simon (Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Charles G. Curtis, Jr. (*pro hac vice*)
Michelle M. Umberger (Bar No. 480620)
Michael M. Markman
Sarah E. Reindl
HELLER EHRMAN WHITE & McAULIFFE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
(608) 663-7460

Brent N. Rushforth (Bar No. 331074)
Carl S. Nadler (Bar No. 395279)
Martina M. Stewart
HELLER EHRMAN WHITE & McAULIFFE LLP
1666 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 912-2000

Fred Wertheimer (Bar No. 154211)
Alexandra Edsall (Bar No. 453518)
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, D.C. 20006
(202) 429-2008

*Attorneys for Plaintiffs Christopher Shays
and Martin Meehan*

Table of Contents

Table of Authorities	iii
Table of Abbreviations	xiii
Introduction and Summary of the Argument	1
Standards of Review	4
Argument	7
I. The Challenged Coordination Regulations Violate FECA, BCRA, And The APA	7
A. The Commission’s “Content Standards” Are Unlawful and Invite Gross Abuse and Circumvention	9
B. The Commission Acted Unlawfully In <i>Per Se</i> Excluding the Internet From the Rules on Coordinated Communications	20
II. The Challenged Soft-Money Regulations Violate BCRA Title I And Undermine The Soft-Money Ban.....	29
A. The FEC Definitions of “Solicit” and “Direct” Violate Congressional Intent and Invite Gross Abuse and Circumvention.....	30
B. The FEC’s Narrowed Definition of “Agent” Violates Congressional Intent and Invites Gross Abuse and Circumvention	41
C. The FEC Regulation Governing State Party Fundraisers Violates Congressional Intent and Invites Gross Abuse and Circumvention	48
D. The “Grandfather” Provision in the FEC Regulation Defining an Affiliated Entity of a National Party Violates Congressional Intent and Invites Gross Abuse and Circumvention	53
E. The Commission’s Regulations on “Federal Election Activity” Violate Congressional Intent and Invite Massive Circumvention of BCRA’s Soft-Money Restrictions on State, District, and Local Party Committees.....	58
F. The Remaining Challenged Soft-Money Regulations Violate BCRA and Invite Further Abuse and Circumvention.....	70
III. The Commission’s Regulations On “Electioneering Communications” Violate BCRA Title II-A And The APA	72

A.	The Commission’s Regulations Improperly Exempt All Broadcast Ads Sponsored By Any Section 501(c)(3) Corporation	73
B.	The Commission’s Regulations Improperly Exclude All Unpaid Broadcast Communications From the Definition of “Electioneering Communications”	81
IV.	Plaintiffs Have Standing, And Their Facial Challenges To The Commission’s Final Regulations Are Ripe For Immediate Resolution.....	84
	Conclusion	89
	Appendix A — Selected Regulations	follows 90
	Appendix B — Selected Statutory Provisions	follows Appendix A

Table of Authorities

Cases:

<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	87
<i>AFL-CIO v. FEC</i> , 333 F.3d 168 (D.C. Cir. 2003)	4
<i>Akins v. FEC</i> , 101 F.3d 731 (D.C. Cir. 1996) (en banc), vacated on other grounds, 524 U.S. 11 (1998).....	6
<i>Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.</i> , 456 U.S. 556 (1982).....	<i>passim</i>
<i>AOTOP, LLC v. NLRB</i> , 331 F.3d 100 (D.C. Cir. 2003)	46
<i>Ariz. Pub. Serv. Co. v. EPA</i> , 211 F.3d 1280 (D.C. Cir. 2000)	70
<i>AT&T Corp. v. Iowa Utils. Bd.</i> , 525 U.S. 366 (1999)	88
<i>AT&T Corp. v. FCC</i> , 349 F.3d 692 (D.C. Cir. 2003)	89
<i>Becker v. FEC</i> , 230 F.3d 381 (1st Cir. 2000), cert. denied sub nom. <i>Nader v. FEC</i> , 532 U.S. 1007 (2001)	85
<i>Buchanan v. FEC</i> , 112 F. Supp. 2d 58 (D.D.C. 2000)	85
* <i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	<i>passim</i>
<i>Bush-Quayle ’92 Primary Comm., Inc. v. FEC</i> , 104 F.3d 448 (D.C. Cir. 1997).....	7
<i>Carey Canada, Inc. v. Columbia Cas. Co.</i> , 940 F.2d 1548 (D.C. Cir. 1991).....	55
<i>Chamber of Commerce v. FEC</i> , 69 F.3d 600 (D.C. Cir. 1995)	7, 87, 89
* <i>Chevron U.S.A. Inc. v. Natural Res. Def. Council</i> , 467 U.S. 837 (1984).....	<i>passim</i>
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	22
<i>Cisneros v. Alpine Ridge Group</i> , 508 U.S. 10 (1993).....	49
<i>Cnty. for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989).....	44
<i>Cobell v. Norton</i> , 240 F.3d 1081 (D.C. Cir. 2001)	90
<i>Commodity Futures Trading Comm’n v. Schor</i> , 478 U.S. 833 (1986).....	17
* <i>Common Cause v. FEC</i> , 692 F. Supp. 1391 (D.D.C. 1987).....	4, 32, 71

<i>Common Cause v. FEC</i> , 692 F. Supp. 1397 (D.D.C. 1988)	90
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001).....	34-35
<i>Engine Mfrs. Ass'n v. EPA</i> , 88 F.3d 1075 (D.C. Cir. 1996).....	5
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 505 U.S. 469 (1992)	32
<i>*FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	<i>passim</i>
<i>FDIC v. Phila. Gear Corp.</i> , 476 U.S. 426 (1986).....	17
<i>FEA v. Algonquin SNG, Inc.</i> , 426 U.S. 548 (1976)	15
<i>*FEC v. Christian Coalition</i> , 52 F. Supp. 2d 45 (D.D.C. 1999)	7-8, 18
<i>*FEC v. Colo. Republican Fed. Campaign Comm.</i> , 533 U.S. 431 (2001)	7-8, 43
<i>*FEC v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981).....	4-6
<i>Fox Television Stations, Inc. v. FCC</i> , 280 F.3d 1027 (D.C. Cir. 2002)	87
<i>Good Samaritan Hosp. v. Shalala</i> , 508 U.S. 402 (1993).....	6
<i>Halverson v. Slater</i> , 129 F.3d 180 (D.C. Cir. 1997).....	5, 14, 60
<i>Harris v. FAA</i> , 353 F.3d 1006 (D.C. Cir. 2004)	87
<i>Harrison v. PPG Indus., Inc.</i> , 446 U.S. 578 (1980).....	23
<i>Indep. Ins. Agents of Am., Inc. v. Hawke</i> , 211 F.3d 638 (D.C. Cir. 2000).....	5, 14
<i>Inner City Broad. Corp. v. Sanders</i> , 733 F.2d 154 (D.C. Cir. 1984).....	61
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	4, 6
<i>Jund v. Town of Hempstead</i> , 941 F.2d 1271 (2d Cir. 1991).....	45, 47
<i>Karl Rove & Co. v. Thornburgh</i> , 824 F. Supp. 662 (W.D. Tex. 1993)	45
<i>La. Energy & Power Auth. v. FERC</i> , 141 F.3d 364 (D.C. Cir. 1998)	88-89
<i>Lamie v. U.S. Trustee</i> , 124 S. Ct. 1023 (2004)	32
<i>Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit</i> , 507 U.S. 163 (1993).....	14
<i>Lopez v. United States</i> , 201 F.3d 478 (D.C. Cir. 2000)	46
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	17

<i>Makins v. District of Columbia</i> , 277 F.3d 544 (D.C. Cir. 2002)	46
<i>Marshall v. Meadows</i> , 921 F. Supp. 1490 (E.D. Va. 1996), <i>appeal dismissed</i> , 105 F.3d 904 (4th Cir. 1997)	85
* <i>McConnell v. FEC</i> , 124 S. Ct. 619 (2003).....	<i>passim</i>
* <i>McConnell v. FEC</i> , 251 F. Supp. 2d 176 (D.D.C. 2003).....	<i>passim</i>
* <i>MCI Telecomms. Corp. v. AT&T</i> , 512 U.S. 218 (1994)	4-5
<i>Media Access Project v. FCC</i> , 883 F.2d 1063 (D.C. Cir. 1989)	88
<i>Meek v. Metro. Dade County</i> , 985 F.2d 1471 (11 th Cir. 1993)	85
<i>Morales v. Trans World Airlines</i> , 504 U.S. 374 (1992).....	33
* <i>Motor Vehicles Mfg. Ass'n v. State Farm Mut. Auto. Ins.</i> , 463 U.S. 29 (1983)	7, 20
<i>N. Haven Bd. of Educ. v. Bell</i> , 456 U.S. 509 (1982).....	15, 17, 26
<i>Nat'l Automatic Laundry & Cleaning Council v. Shultz</i> , 443 F.2d 689 (D.C. Cir. 1971)	26
<i>Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.</i> , 522 U.S. 479 (1998)	87
<i>Natural Res. Def. Council, Inc. v. Browner</i> , 57 F.3d 1122 (D.C. Cir. 1995)	4, 70
<i>Natural Res. Def. Council, Inc. v. Train</i> , 510 F.2d 692 (D.C. Cir. 1975)	90
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974)	17
<i>Ohio Ass'n of Cmty. Action Agencies v. FERC</i> , 654 F.2d 811 (D.C. Cir. 1981).....	23
<i>Ohio Forestry Ass'n v. Sierra Club</i> , 523 U.S. 726 (1998).....	88
* <i>Orloski v. FEC</i> , 795 F.2d 156 (D.C. Cir. 1986).....	<i>passim</i>
<i>Overnite Transp. Co. v. NLRB</i> , 140 F.3d 259 (D.C. Cir. 1998)	43
<i>Pub. Citizen v. Burke</i> , 843 F.2d 1473 (D.C. Cir. 1988).....	6
<i>Pub. Citizen v. Dep't of Justice</i> , 491 U.S. 440 (1989).....	5
<i>Republican Nat'l Comm. v. FEC</i> , 76 F.3d 400 (D.C. Cir. 1996).....	6
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1990).....	7
<i>Smiley v. Citibank (S.D.), N.A.</i> , 517 U.S. 735 (1996).....	6

<i>Sprint Corp. v. FCC</i> , 331 F.3d 952 (D.C. Cir. 2003)	88
<i>Toyota Motor Mfg., Ky., Inc. v. Williams</i> , 534 U.S. 184 (2002).....	25, 36, 44
<i>TRW, Inc. v. Andrews</i> , 534 U.S. 19 (2001).....	34-35
<i>United States v. Espy</i> , 145 F.3d 1369 (D.C. Cir. 1998).....	23
<i>United States v. Sun-Diamond Growers of Cal.</i> , 138 F.3d 961 (D.C. Cir. 1998).....	45
<i>United States Air Tour Ass’n v. FAA</i> , 298 F.3d 997 (D.C. Cir. 2002)	87
<i>Univ. of Great Falls v. NLRB</i> , 278 F.3d 1335 (D.C. Cir. 2002).....	6, 39
<i>Vote Choice, Inc. v. DiStefano</i> , 4 F.3d 26 (1 st Cir. 1993)	85
* <i>Whitman v. Am. Trucking Ass’ns</i> , 531 U.S. 457 (2001)	5, 87
<i>Wis. Dep’t of Revenue v. William Wrigley, Jr., Co.</i> , 505 U.S. 214 (1992).....	32-33

Statutes, Legislation and Legislative History:

2 U.S.C. § 431(8).....	29, 63
2 U.S.C. § 431(9).....	13, 29, 73
2 U.S.C. § 431(17)(B).....	42
2 U.S.C. § 431(20)(A).....	<i>passim</i>
2 U.S.C. § 431(20)(B).....	60
2 U.S.C. § 431(21).....	64
2 U.S.C. § 431(22).....	9, 21, 64
2 U.S.C. § 434(f).....	<i>passim</i>
2 U.S.C. § 438(e)	88
2 U.S.C. § 441a(a).....	13, 42, 54
2 U.S.C. § 441b(b).....	36, 62
2 U.S.C. § 441b(c)	73
2 U.S.C. § 441d(a)	22
2 U.S.C. § 441i(a)-(f).....	<i>passim</i>

5 U.S.C. § 706(2).....	3, 90
5 U.S.C. §§ 801 <i>et seq.</i>	3
5 U.S.C. § 7323(a)(2).....	53
26 U.S.C. 501(c)(3).....	<i>passim</i>
*Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81	<i>passim</i>
117 Cong. Rec. 43,379 (1970)	62-63
145 Cong. Rec. H8255 (daily ed. Sept. 14, 1999)	25
145 Cong. Rec. S12834-35 (daily ed. Oct. 19, 1999)	25
145 Cong. Rec. S12676 (daily ed. Oct. 15, 1999)	25
147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001)	72
147 Cong. Rec. S2696 (daily ed. Mar. 22, 2001)	29, 37
148 Cong. Rec. H409-11 (daily ed. Feb. 13, 2002)	75, 77-78
148 Cong. Rec. S2138-45 (daily ed. Mar. 20, 2002)	<i>passim</i>
148 Cong. Rec. S2340 (daily ed. Mar. 22, 2002)	26
Test. of Commissioner David M. Mason before the Committee on Rules, United States Senate (May 3, 2000)	29

Regulations and Agency Materials:

5 C.F.R. § 734.208.....	53
11 C.F.R. § 100.5(g)	54
11 C.F.R. § 100.14.....	72
11 C.F.R. § 100.14(a) (2001).....	72
11 C.F.R. § 100.23(c)(2)(iii) (2001).....	8
11 C.F.R. § 100.23(e)(1) (2001).....	24
11 C.F.R. § 100.24(a).....	<i>passim</i>
11 C.F.R. § 100.25	59, 64

11 C.F.R. § 100.26.....	9, 20-21
11 C.F.R. § 100.29.....	<i>passim</i>
11 C.F.R. § 100.133.....	61
11 C.F.R. § 106.5(a)(2)(iv).....	61
11 C.F.R. § 109.1(b)(5) (2001).....	44
11 C.F.R. § 109.3.....	9, 42
11 C.F.R. § 109.21(c)(1)-(4).....	10
11 C.F.R. § 110.11(a).....	22
11 C.F.R. § 114.4(c), (d).....	62
11 C.F.R. § 300.2(b).....	42
11 C.F.R. § 300.2(c).....	<i>passim</i>
11 C.F.R. § 300.2(m), (n).....	31, 34
11 C.F.R. § 300.30(c)(3).....	71
11 C.F.R. § 300.32(c)(4).....	71
11 C.F.R. § 300.33(c)(2).....	60, 68
11 C.F.R. § 300.64.....	48-49
64 Fed. Reg. 60,360 (Nov. 5, 1999).....	27
65 Fed. Reg. 76,138 (Dec. 6, 2000).....	18, 20, 24
66 Fed. Reg. 50,358 (Oct. 3, 2001).....	27
67 Fed. Reg. 35,654 (May 20, 2002).....	31, 51, 70
67 Fed. Reg. 49,064 (July 29, 2002).....	<i>passim</i>
67 Fed. Reg. 50,582 (Aug. 5, 2002).....	61
67 Fed. Reg. 65,190 (Oct. 23, 2002).....	<i>passim</i>
67 Fed. Reg. 69,928 (Nov. 19, 2002).....	31, 40
67 Fed. Reg. 76,962 (Dec. 13, 2002).....	22

68 Fed. Reg. 421 (Jan. 3, 2003).....	<i>passim</i>
FEC Advisory Opinion 1979-13.....	36
FEC Advisory Opinion 1979-66.....	36
FEC Advisory Opinion 1980-64.....	61
FEC Advisory Opinion 1980-65.....	36
FEC Advisory Opinion 1982-65.....	36
FEC Advisory Opinion 1983-12.....	16
FEC Advisory Opinion 1983-38.....	36
FEC Advisory Opinion 1984-13.....	16
FEC Advisory Opinion 1984-55.....	36
FEC Advisory Opinion 1986-26.....	16
FEC Advisory Opinion 1986-37.....	16
FEC Advisory Opinion 1988-2.....	36
FEC Advisory Opinion 1988-22.....	16
FEC Advisory Opinion 1988-27.....	16
FEC Advisory Opinion 1989-32.....	16
FEC Advisory Opinion 1990-5.....	16
FEC Advisory Opinion 1991-3.....	36
FEC Advisory Opinion 1992-6.....	16
FEC Advisory Opinion 1992-37.....	16
FEC Advisory Opinion 1994-15.....	16
FEC Advisory Opinion 1995-9.....	24
FEC Advisory Opinion 1995-33.....	24
FEC Advisory Opinion 1995-35.....	24
FEC Advisory Opinion 1996-2.....	24

FEC Advisory Opinion 1996-11	16
FEC Advisory Opinion 1996-16	24
FEC Advisory Opinion 1996-48	82
FEC Advisory Opinion 1997-16	24
FEC Advisory Opinion 1998-22	24
FEC Advisory Opinion 1999-6	36
FEC Advisory Opinion 1999-7	24
FEC Advisory Opinion 1999-9	24
FEC Advisory Opinion 1999-17	24
FEC Advisory Opinion 1999-24	24
FEC Advisory Opinion 1999-25	24
FEC Advisory Opinion 2000-7	36
FEC Advisory Opinion 2000-16	24
FEC Advisory Opinion 2003-25A	12
FEC Advisory Opinion 2003-34	82
FEC Gen. Counsel’s Rep., MUR 3585 (Nov. 10, 1994)	44
FEC Gen. Counsel’s Rep., MUR 4291 (June 9, 2000)	12
FEC First Gen. Counsel’s Rep., MUR 5338 (Mar. 27, 2003)	55
FEC Campaign Guide for Corporations and Labor Organizations (2001)	36
IRS Rev. Rul. 2004-6, <i>published in</i> Int. Rev. Bulletin 2004-4 (Jan. 26, 2004)	79

Secondary Sources:

Kate Ackley, <i>Interest Groups Vow: We’ll Still Be Heard</i> , Legal Times, Dec. 15, 2003	27
3 Am. Jur. 2d Agency (2003)	42

Michael Barone & Richard E. Cohen, <i>The Almanac of American Politics—2004</i> (National Journal Group) (2003)	11
Black’s Law Dictionary (7th ed. 1999)	32-34
Damon Chappie, <i>New IRS Guidance May Open Loophole</i> , Roll Call, Jan. 26, 2004	79
Chris Cillizza, <i>GOP Group Joins Soft Money Fray</i> , Roll Call, Nov. 24, 2003	56
E-Voter Institute, <i>E-Voter 2002 Study Reveals Internet Use in Senate Races</i> (Nov. 13, 2002)	27
Dana Milbank, <i>Curtain Goes Up on Glass-House Attack</i> , Washington Post, Feb. 15, 2004	28
Dick Morris, <i>Behind the Oval Office: Winning the Presidency in the Nineties</i> (Random House 1997)	12
National Journal Group Inc., <i>Group Says Abraham’s Pushing Out Jobs</i> (Mar. 23, 2000)	78
The Oxford English Dictionary (2d ed. 1989)	32-33
The Pew Research Center For The People & The Press, <i>Perceptions of Partisan Bias Seen As Growing — Especially by Democrats — Cable and Internet Loom Large In Fragmented Political News Universe</i> , The Pew Research Center News Release, Jan. 11, 2003	27
Random House Dictionary of the English Language (2d ed. 1987)	32-33
Restatement (Second) of Agency (1958)	44-45
Restatement (Third) of Agency (Tentative Draft Nov. 2, 2001)	43
Alexis Rice, <i>Campaigns Online: The Profound Impact of the Internet, Blogs, and E- Technologies in Presidential Political Campaigning</i> (Jan. 2004)	27
Jonathan Roos, <i>Internet top tool for candidates</i> (Nov. 17, 2003)	27
Jim Rutenberg, <i>In Politics, the Web Is a Parallel World With Its Own Rules</i> (Feb. 22, 2004)	28
*2A Norman J. Singer, <i>Statutes and Statutory Construction</i> (6th ed. 2000 rev.)	<i>passim</i>
Cliff Sloan, <i>Political Ads + Internet = A Good Fit</i> (Jan. 2, 2004)	27

Bob Tedeschi, <i>E-Commerce Report: Your Web surfing is being interrupted to bring you a paid video commercial. Advertisers think you will stick around</i> , New York Times, Jan. 19, 2004.....	28
Scott E. Thomas, <i>The 'soft money' and 'issue ad' mess: How we got here; how Congress responded, and what the FEC is doing</i> , Campaigns & Elections Law Compliance Seminar, Washington, D.C., 2003	11, 16
Scott E. Thomas & Jeffrey H. Bowman, <i>Coordinated Expenditure Limits: Can They Be Saved?</i> , 49 Cath. U. L. Rev. 133 (1999)	16, 18
Webster's Third New International Dictionary (2002)	32-33
Ian Zack, <i>Congress' Gift to the Internet</i> (Feb. 26, 2002)	27

Table of Abbreviations

The following abbreviations are used in this memorandum:

- Use of the Internet for Campaign Activity; Notice of Inquiry, 64 Fed. Reg. 60,360 (Nov. 5, 1999), *abbreviated as* 64 Fed. Reg. at _____.
- General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures; Final Rule, 65 Fed. Reg. 76,138 (Dec. 6, 2000) (codified at 11 C.F.R. pts. 100, 109 and 110), *abbreviated as* 65 Fed. Reg. at _____.
- The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations; Proposed Rules, 66 Fed. Reg. 50,358 (Oct. 3, 2001), *abbreviated as* 66 Fed. Reg. at _____.
- Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Proposed Rules, 67 Fed. Reg. 35,654 (May 20, 2002), *abbreviated as* 67 Fed. Reg. at _____.
- Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49,064 (July 29, 2002) (codified at 11 C.F.R. pts. 100, *et al.*), *abbreviated as* 67 Fed. Reg. at _____.
- Reorganization of Regulations on "Contribution" and "Expenditure"; Final Rules, 67 Fed. Reg. 50,582 (Aug. 5, 2002) (codified at 11 C.F.R. pt. 100), *abbreviated as* 67 Fed. Reg. at _____.
- FCC Database on Electioneering Communications; Final Rules, 67 Fed. Reg. 65,190 (Oct. 23, 2002) (codified at 11 C.F.R. pts. 100 and 114), *abbreviated as* 67 Fed. Reg. at _____.
- Contribution Limitations and Prohibitions; Final Rule, 67 Fed. Reg. 69,928 (Nov. 19, 2002) (codified at 11 C.F.R. pts. 102 and 110), *abbreviated as* 67 Fed. Reg. at _____.
- Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76,962 (Dec. 13, 2002) (codified at 41 C.F.R. pts. 100, 101, *et al.*), *abbreviated as* 67 Fed. Reg. at _____.
- Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 421 (Jan. 3, 2003) (codified at 11 C.F.R. pts. 100, *et al.*), *abbreviated as* 68 Fed. Reg. at _____.
- Plaintiffs' Exhibit, *abbreviated as* PX__.

Introduction and Summary of the Argument

This action under the Administrative Procedure Act challenges regulations promulgated by the Federal Election Commission to implement the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.¹ The Supreme Court and this Court have found that prior FEC regulations “subverted,” “eroded,” and “circumvent[ed]” the Federal Election Campaign Act; left the Nation’s campaign finance system in “utter disarray,” “an elaborate fiction,” and “so riddled with loopholes as to be rendered ineffective”; and thereby helped trigger a crisis in public confidence that ultimately required the intervention of Congress, the President, and the federal judiciary.² Regrettably, the challenged provisions of the Commission’s new regulations threaten to repeat history. Among other flaws:

- In response to a Congressional command for broader regulations on coordinated communications, the Commission has adopted “content standards” that, for the first

¹ Specifically, this action challenges portions of the Commission’s final Title I regulations governing soft money published at 67 Fed. Reg. 49,064 (PX 1); portions of the Commission’s final Title II-A regulations governing electioneering communications published at 67 Fed. Reg. 65,190 (PX 2); and portions of the Commission’s final Title II-B regulations governing expenditures for coordinated communications published at 68 Fed. Reg. 421 (PX 3). The specific challenged regulations are reprinted in Appendix A to this memorandum; pertinent statutory provisions are reprinted in Appendix B. *See also* First Am. Compl. ¶¶ 19-100 (Dkt. No. 7).

² *McConnell v. FEC*, 124 S. Ct. 619, 660 & n.44 (2003) (BCRA § 323(a) “simply effects a return to the scheme that was approved in *Buckley* and that was subverted by the creation of the FEC’s allocation regime. ... [T]he FEC regulations permitted more than Congress, in enacting FECA, had ever intended.”); *id.* at 650 (“The solicitation, transfer, and use of soft money [authorized by the FEC’s rules and advisory opinions] thus enabled parties and candidates to circumvent FECA’s limitations on the source and amount of contributions in connection with federal elections.”); *id.* at 661 (“[T]he FEC’s allocation regime has invited widespread circumvention of FECA’s limits on contributions to parties for the purpose of influencing federal elections.”); *id.* at 674 (BCRA seeks “to restore the efficacy of FECA’s long-time statutory restriction — approved by the Court and eroded by the FEC’s allocation regime — on contributions to state and local party committees for the purpose of influencing federal elections”); *McConnell v. FEC*, 251 F. Supp. 2d 176, 651 (D.D.C. 2003) (Kollar-Kotelly, J.) (“The vast record in this case demonstrates that this system — a cobbled-together aggregation of FEC regulations and advisory opinions — is in utter disarray[.]”); *id.* at 652 (Title I seeks to “restructur[e] the failed allocation regime that has produced a campaign finance system so riddled with loopholes as to be rendered ineffective”); *id.* at 653 (FECA’s contribution restrictions were “eroded as a result of a series of FEC rulemaking and advisory opinions”); *id.* at 655 (FECA’s contribution regime “had become nothing more than an elaborate fiction”); *see also McConnell*, 124 S. Ct. at 648 (FEC allocation regulations were contrary to “a literal reading of FECA’s definition of ‘contribution’”); *McConnell*, 251 F. Supp. 2d at 195-201 (*per curiam*).

time ever under FECA, exempt fully coordinated political communications from regulation during much of the election cycle so long as those communications avoid express advocacy or the dissemination of a candidate's own campaign materials. In addition, although the old coordination rules included Internet communications, the new rules create a *per se* exemption for coordinated political communications over the Internet. *See* Part I *infra*.

- In response to a Congressional command to get national parties, federal officeholders, and candidates for federal office out of the soft-money business, the Commission has adopted definitions of key terms — including “solicit,” “direct,” and “agent” — that sharply diverge from dictionaries, the common law, common sense, and the Commission's own long-standing interpretations. Under the Commission's new definitions, “solicit” means only to “ask” explicitly, “direct” is subsumed within “solicit” (thus rendering it superfluous), and “agent” is narrowed to a rigid formalism not followed under any other major federal statute. *See* Part II *infra*.
- In response to BCRA's regulation of “Federal election activity” by state, district, and local party committees, the Commission adopted definitions of key terms — including “get-out-the-vote,” “voter identification,” and “voter registration” activity — that are much more restrictive than the commonly understood meanings of those terms. The Commission has thereby purported to narrow the meaning of “Federal election activity” to include only a fraction of those state party activities that Congress determined both affect Federal elections and pose the greatest risk of corruption. *See* Part II-E *infra*.

- In response to BCRA’s regulation of “electioneering communications,” the Commission carved out a *per se* exemption for *any* ad aired by a Section 501(c)(3) corporation, notwithstanding clear statutory language and legislative history to the contrary. The Commission also added an exemption for any ad not “aired for a fee,” notwithstanding the Commission’s own recognition that such ads can readily have the effect of promoting or opposing federal candidates. *See* Part III *infra*.

Because of these and the many other flaws spelled out in this memorandum, this Court should “hold unlawful and set aside” the challenged regulations as “arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law”; “in excess of [the Commission’s] statutory jurisdiction, authority, or limitations”; and as having been promulgated “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (C)-(D).

This Court needs no background about what is at stake.³ Thus, after a brief summary of the *Chevron* and APA standards of review, this memorandum turns to a detailed demonstration of how the challenged regulations violate FECA, BCRA, and the APA. The last part of this memorandum addresses the Commission’s standing and ripeness defenses.⁴

³ For additional background, *see* Plaintiffs’ Statement of Material Facts As To Which Plaintiffs Contend There Is No Genuine Dispute; Plaintiffs’ First Am. Compl. ¶¶ 1-24, 72-75, and 85-90 (Dkt. No. 7). It is undisputed that the challenged regulations constitute “final agency action” within the meaning of § 10(a) of the APA, 5 U.S.C. § 704, and that the Commission complied with the Congressional Review of Agency Rulemaking Act, 5 U.S.C. §§ 801 *et seq.*, in promulgating the challenged regulations. Pursuant to 5 U.S.C. § 801(g), “no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to” the challenged regulations.

⁴ The parties dispute the proper scope of the record, but this dispute is not central to the disposition of this case given that all of the rulemaking challenges may be resolved at *Chevron* step one. Plaintiffs also believe that judicial notice should be taken of various materials. These matters are addressed in the accompanying Plaintiffs’ Motion Regarding Consideration of Exhibits [“Plaintiffs’ Mot. *Re* Exhibits”].

Standards of Review

None of the challenged regulations survives scrutiny under *Chevron* step one because they all are clearly at odds with the language, structure, legislative history, and underlying purposes of FECA and BCRA. “[T]he courts are the final authorities on issues of statutory construction,” and “must reject administrative constructions ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.” *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) [“DSCC”].⁵ Before giving any deference to the Commission’s views, “the court must first exhaust the ‘traditional tools of statutory construction’ to determine whether Congress has spoken to the precise question at issue. ... If the court can determine congressional intent, ‘then that interpretation must be given effect.’” *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (internal citations and quotation marks omitted). The “traditional tools” include the statutory language, context, dictionary definitions, canons of construction, legislative history, and the Congressional purposes and objectives “as expressed either explicitly or implicitly in the Act.” *Orloski v. FEC*, 795 F.2d 156, 162 (D.C. Cir. 1986).⁶

The Commission’s challenged regulations fail *Chevron* step one whether they violate express statutory language or principles that are implicit in the statutory scheme. If the “traditional tools” indicate that a statute “clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is ‘silent’ in the *Chevron*

⁵ See also *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987) (Flannery, J.).

⁶ See also *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225-29 (1994); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Chevron*, 467 U.S. at 843 n.9; *AFL-CIO v. FEC*, 333 F.3d 168, 172-73 (D.C. Cir. 2003).

sense.”⁷ Moreover, “a reviewing court should not confine itself to examining a particular statutory provision in isolation,” but must consider the language in “context” and “interpret the statute ‘as a symmetrical and coherent regulatory scheme.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citations omitted). Because the Commission’s readings of BCRA “make[] no sense” and are “implausible” when analyzed in context using the “traditional tools,” they fail at *Chevron* step one.⁸

Nor do the challenged rules survive scrutiny at *Chevron* step two, should the Court reach that stage in the analysis. Although the Commission’s resolution of statutory ambiguities is “presumptively” entitled to deference in ordinary circumstances, there are weighty reasons in this “extraordinary” case for giving scant deference to the Commission’s views:⁹

- One of the conclusions animating both BCRA and *McConnell* is that the FEC persistently erred in executing Congress’s will regarding the very topics that are the subjects of the challenged regulations. *See* p. 1 & n.2 *supra*.
- The Commission adopted new definitions of many key terms that sharply and without explanation depart from long-standing Commission definitions of those same terms.

No deference is warranted in these circumstances.¹⁰

⁷ *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996); *see also Halverson v. Slater*, 129 F.3d 180, 186-87 (D.C. Cir. 1997) (citing numerous authorities).

⁸ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 466-68 (2001); *see also MCI*, 512 U.S. at 225-34; *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644-45 (D.C. Cir. 2000); *Halverson*, 129 F.3d at 183-89. *See generally Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 455 (1989) (“[S]tatutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”) (quoting Learned Hand).

⁹ *Compare DSCC*, 454 U.S. at 37 (FEC “presumptively” should receive deference) *with Brown & Williamson*, 529 U.S. at 159 (“[i]n extraordinary cases, ... there may be reason to hesitate before concluding that Congress” intended to leave the issue to agency discretion).

¹⁰ *See, e.g., MCI*, 512 U.S. at 231-32 (“What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme
(Footnote continued)

- The control group of Commissioners that adopted the challenged regulations took an exceedingly narrow and unfriendly view of Congress’s authority under the First Amendment. The Commission’s views on constitutional law are entitled to no deference, and the District Court and Supreme Court opinions in *McConnell* reject and override those views in numerous respects.¹¹

Even if the Court affords the challenged rules deference at *Chevron* step two, they must still be rejected. They do not survive a close examination of “the ‘thoroughness, validity and consistency of ... [the] agency’s reasoning.’” *Orlowski*, 795 F.2d at 164 (quoting *DSCC*, 454 U.S. at 37). They repeatedly “go[] beyond the limits of what is ambiguous and contradict[] what ... is quite clear.” *Whitman*, 531 U.S. at 481. And they repeatedly ignore the D.C. Circuit’s admonition that the Commission may not use “objective, bright-line test[s]” if such tests “*unduly compromise the Act’s purposes*” or “*create the potential for gross abuse.*” *Orloski*, 795 F.2d at 164-165 (emphasis added).¹²

For many of these same reasons, the challenged regulations also violate the standards of “reasoned analysis” required under the APA. The Commission repeatedly failed to consider all

of rate regulation only where effective competition does not exist.”); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (although “the mere fact that an agency interpretation contradicts a prior agency position is not fatal,” “[s]udden and unexplained change” may violate the APA); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (although agency is not “estopped” from changing its position, “the consistency of an agency’s position is a factor in assessing the weight that position is due”); *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”) (citation omitted).

¹¹ See, e.g., *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (no deference to agency analysis of “constitutional concerns, an area of presumed judicial, rather than administrative, competence”); *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 524 U.S. 11 (1998); *Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988) (no deference to “gloss” that agency puts on regulations so as to avoid constitutional problems).

¹² See also *Republican Nat’l Comm. v. FEC*, 76 F.3d 400, 406-07 (D.C. Cir. 1996) (concluding that one portion of challenged rule failed under *Chevron* step two as “unreasonable and contrary to the statute,” because “we doubt that Congress authorized the Commission to accomplish” its asserted purpose through the chosen means).

of the relevant factors; failed to articulate its rationale or to justify its premises on key points; failed to respond to objections and concerns raised by the FEC Office of General Counsel and outside commenters; and failed to acknowledge or explain striking departures from its own precedents.¹³

Argument

I. The Challenged Coordination Regulations Violate FECA, BCRA, And The APA.

Congress and the courts have long recognized that, to be effective, any restrictions on contributions to a candidate or political party must also govern expenditures by outside spenders made in coordination with the candidate or party. For a generation, courts have reiterated the importance of “prevent[ing] attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions.” *Buckley v. Valeo*, 424 U.S. 1, 47 (1976); *see also McConnell*, 251 F. Supp. 2d at 255-57 (*per curiam*) (reviewing judicial decisions on coordination). As the Supreme Court observed in *McConnell*, “expenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash.’” 124 S. Ct. at 705 (*quoting FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 (2001) [*“Colorado IP”*]). Indeed, coordinated expenditures for expressive communications frequently are much *more* valuable than cash.¹⁴ As *McConnell* underscores, “‘expressive coordinated expenditures present real

¹³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (emphasis in original); *see also id.* at 46-57; *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1990); *Republican Nat’l Comm.*, 76 F.3d at 407-08; *Chamber of Commerce v. FEC*, 69 F.3d 600, 606 (D.C. Cir. 1995) (rule was arbitrary and capricious where the Explanation and Justification “provides no explanation” for “differential treatment”); *Bush-Quayle ‘92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 453-54 (D.C. Cir. 1997) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”) (citation omitted) (rejecting Commission discussion that “‘glosses over’ precedent and is essentially a bare assertion that the two cases are different”).

¹⁴ *See Christian Coalition*, 52 F. Supp. 2d at 88 (coordinated attack ads “come with an ‘anonymity premium’ of great value to a candidate running a positive campaign,” because they allow her to “spread a negative message about her opponent, at corporate or union expense, without being held accountable for negative

(Footnote continued)

dangers to the integrity of the electoral process.” 251 F. Supp. 2d at 256 (*per curiam*) (*quoting FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999)).

Because of the importance of combating these dangers and the difficulties of policing “winks or nods,” Congress and the courts also have consistently emphasized the need to draw “functional” rather than “formal” lines in regulating coordinated activities. *Colorado II*, 533 U.S. at 438, 446-47; *see also McConnell*, 124 S. Ct. at 705 (analysis has “nothing” to do with formal tests and “everything to do with the functional consequences of different types of expenditures”). This emphasis on function over form led Congress to enact Section 214 of BCRA, which repealed an errant FEC rule narrowing the scope of “coordinated communications” subject to regulation and instructed the Commission to promulgate new rules.¹⁵ As the sponsors emphasized, “Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill.”¹⁶ This Court and the Supreme Court both upheld Section 214 in opinions emphasizing the need for a realistic, functional approach in regulating coordinated communications. *See* 251 F. Supp. 2d at 252-57 (*per curiam*); 124 S. Ct. at 704-06.

campaigning,” and thus are “substantially more valuable than dollar-equivalent contributions”); *see also McConnell*, 251 F. Supp. 2d at 553-54 (Findings ¶ 2.6.8), 614-15 (Kollar-Kotelly, J.).

¹⁵ Specifically, whereas the Commission in December 2000 had adopted narrowing regulations that placed significant weight on whether a communication had resulted from “substantial discussion or negotiation ... the result of which is collaboration or agreement” between the candidate and outside spender, Section 214 called for new rules that “shall not require agreement or formal collaboration to establish coordination.” *Compare* 11 C.F.R. § 100.23(c)(2)(iii) (2001) *with* BCRA § 214(c).

¹⁶ 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (PX 102); *see also id.* (statement of Sen. Feingold) (“These rules need to make more sense in light of real life campaign practices than do the current regulations.”).

The Commission's new regulations move in exactly the *opposite* direction than Congress intended and open up glaring new loopholes. The two most damaging loopholes are (1) new "content standards" that completely exempt a variety of coordinated political communications from regulation during much of the election cycle, and (2) a *per se* exemption for coordinated political communications that are transmitted over the Internet.¹⁷

A. The Commission's "Content Standards" Are Unlawful and Invite Gross Abuse and Circumvention.

The Commission's new rules provide that an expressive communication is subject to scrutiny under the coordination provisions *only* if one or more of the following "content standards" is met:

(1) The communication qualifies as an "electioneering communication" under new 11 C.F.R. § 100.29 and, thus, is a broadcast, cable, or satellite communication made within 30 days of a primary or 60 days of a general election.

(2) The communication is a "public communication" as defined elsewhere by BCRA and its implementing rules, and disseminates "campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing," with certain exceptions not material here, at any time during the election cycle.¹⁸

¹⁷ The Commission's new coordination regulations violate BCRA in an additional respect: All of the so-called "conduct standards" rely on an unreasonably narrow definition of "agent," so that an outside spender and candidate or party coordinating their efforts through an intermediary are subject to the rules only if the intermediary has "actual authority, either express or implied, to engage in" the specific coordinated activities in issue. 11 C.F.R. § 109.3. The Commission used the same narrow approach with respect to agency in this context as it adopted with respect to the soft-money rules. For all of the reasons set forth in Part II-B of this memorandum dealing with the soft-money rules, the Commission's narrow approach with respect to agency is equally objectionable with respect to the coordination rules. *See also* Oct. 11, 2002 Comments of the Center for Responsive Politics, at 1-2 (PX 4), Common Cause and Democracy 21, at 9-11 (PX 5), and Sen. McCain *et al.*, at 3 (PX 6); Oct. 24, 2002 Public Hrg. Tr. at 72-76, 88-93 (test. of Messrs. Simon, Shor and Noble) (PX 7).

¹⁸ "Public communication" is defined as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 2 U.S.C. § 431(22); *see also* 11 C.F.R. § 100.26; Part I-B *infra*.

(3) The communication is a “public communication” that “expressly advocates the election or defeat of a clearly identified candidate for Federal office,” at any time during the election cycle.

(4) The communication is (a) a “public communication”; that (b) “refers to a political party or to a clearly identified candidate for Federal office”; (c) “is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate”; and (d) “is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.”

11 C.F.R. § 109.21(c)(1)-(4); *see also* 68 Fed. Reg. at 427-31, 453-54.

According to the Commission, the purpose of these “content standards” is to create a “safe harbor” for coordinated communications that fall beyond their terms and to “screen[] out[]” those communications from any regulation.¹⁹ The breadth of coordinated political communications sheltered by this “safe harbor” is striking. To begin, outside political advertisements that are run more than 120 days before a general election, primary, or convention may now be closely coordinated with — *indeed, fully controlled by* — a candidate or political party so long as the advertisements do not republish the candidate’s own campaign materials or engage in “express advocacy” — a test the Supreme Court has concluded is “functionally meaningless.” *McConnell*, 124 S. Ct. at 689; *see n. 32 infra*. Thus, under the plain language of the new rules, a candidate will now be able to help create an advertisement touting his virtues or attacking his opponent’s, and then persuade a corporation or union to sponsor it using treasury

¹⁹ 68 Fed. Reg. at 426, 430 & n.2 (“[T]he inclusion of . . . the content standard[] could function efficiently as an initial threshold for the coordination analysis. . . . [T]he content standard may be viewed as a ‘filter’ or a ‘threshold’ that screens out[sic] certain communications from even being subjected to analysis under the conduct standards. . . . In effect, the content standard of paragraph (c)(4)(ii) operates as a ‘safe harbor’ in that communications that are publicly disseminated or distributed more than 120 days before the primary or general election will not be deemed to be ‘coordinated’ under this particular content standard under any circumstances.”).

funds, so long as the advertisement is run more than 120 days before any primary, convention, or general election and avoids any “express advocacy” or republication of campaign materials.²⁰

The effects of this new “safe harbor” will vary depending upon each State’s Congressional primary date. For example, in States that hold March primaries for nominations to federal office, federal candidates will be able to engage in unregulated and unrestricted coordination up until November of the year before the primary (*i.e.*, 120 days before the primary), and again between the March primary and the following July (*i.e.*, 120 days before the November general election).²¹ States holding late primaries will face not two distinct loophole periods, but rather one period extending well into the election year itself. For example, in the States that hold their Congressional primaries in mid-September, candidates and outside spenders may engage in no-holds-barred coordination (so long as they avoid express advocacy or republication of campaign materials) up until mid-May of the election year.²²

The results are indefensible. Candidates frequently seek to communicate with the electorate outside the 120-day windows before the primary or general elections; these can be crucial make-or-break periods.²³ The Commission’s “timeframe” loopholes permit candidates to

²⁰ As FEC Commissioner Scott E. Thomas cogently observed, so long as they are run more than 120 days before the primary or general election, “there will be no need for even pretense regarding independence when undertaking ‘issue ads’ that bash the record of named candidates Even though coordinated to the hilt, [such ads] will escape treatment as a contribution or party coordinated expenditure.” Scott E. Thomas, *The ‘soft money’ and ‘issue ad’ mess: How we got here, how Congress responded, and what the FEC is doing*, Campaigns & Elections Law Compliance Seminar, Washington, D.C., 2003, at 18 (PX 115).

²¹ This will be the pattern in the many States that hold their primaries and conventions prior to early July of the election year. See Michael Barone & Richard E. Cohen, *The Almanac of American Politics—2004* at 1782 (National Journal Group) (2003) (Congressional primary dates) (PX 179).

²² Numerous States hold their primaries and conventions in the second half of the election year, thus allowing a significant “safe harbor” under the new rules for unregulated coordination during the entire off-year and a substantial portion of the election year itself. See *id.*

²³ Consider, for example, Dick Morris’s account of how the Clinton campaign used so-called issue ads beginning in the summer of 1995 to secure reelection: “Week after week, month after month, from early July 1995
(Footnote continued)

engage in unregulated and unrestricted coordination with corporations, unions, wealthy individuals, and interest groups during broad periods — free from any contribution limitations, source restrictions, or even reporting requirements. In doing so, as Commissioners Thomas and McDonald recently pointed out, the Commission “ignores the important lessons of *Buckley*.” FEC Advisory Op. 2003-25A (concurring opinion) (PX 117) (under § 109.21, “even ads that promote, support, attack or oppose a candidate can be created and fully controlled by a candidate and yet be paid for without limit by a party committee, corporation, union, or even a foreign government”).

Under the new rules, moreover, a candidate or party will be able to engage in massive, unrestricted, and unregulated coordination with outside spenders at *any* time — even on the eve of an election — so long as the coordinated communications do not “refer[] to a political party or to a clearly identified candidate for Federal office.” By emphasizing issues and playing on themes of concern to a candidate, such communications may influence the outcome of an election even without mentioning a candidate or party by name. Under the new rules, even if

more or less continually until election day in '96, sixteen months later, we bombarded the public with ads. The advertising was concentrated in the key swing states This unprecedented campaign was the key to success. . . . As election day approached, the free media began to cover the Clinton- and Dole-campaign ads with greater intensity. But by then, the early advertising had so locked the campaign into its basic pattern that the advertising — and the reports on it — had little impact. A given ad would produce a blip up or a blip down in the polls, but none realigned what had been set in place by our earlier ads.” Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties* 139-40 (Random House 1997) (PX 178). Likewise, the AFL-CIO issue advocacy campaign discussed by this Court in *McConnell* included flights of ads run in December 1995 in 17 districts, most of which did not hold primaries until May 1996 or later. *See* 251 F. Supp. 2d at 541-42 (Kollar-Kotelly, J.); *see also* June 9, 2000 FEC Gen. Counsel’s Rep., MUR 4291, at 31-32 & n.14 (PX 155). 1996 primary dates are available at <http://www.fec.gov/pubrec/fe1996/hr.htm>. The AFL-CIO’s campaign also included ads run in late June in districts that had held May primaries, and that thus would have been exempt from regulation altogether under the new rules. *See* June 9, 2000 FEC Gen. Counsel’s Rep., MUR 4291, at 14. As this Court also discussed in *McConnell*, the RNC engaged in massive issue advocacy between March 18, 1996 and the Republican National Convention in August, “designed to boost Senator Dole’s image at a time when he had virtually run out of federal matching primary funds.” 251 F. Supp. 2d at 451 (Findings ¶ 1.20) (Kollar-Kotelly, J.); *see also id.* at 451-53, 687. Although these particular ads would not have fallen into a gap period because they were run within 120 days of the nominating convention, they illustrate the importance of political advertising during the spring and early summer months of an election year. Note: The non-record items cited in this footnote are discussed in Plaintiffs’ Mot. *Re* Exhibits at 3-5.

there were evidence that the candidate was helping to prepare such “issue ads” containing themes and points of special concern to him, scheduling their air times to complement his own advertising schedule and themes, and soliciting corporations, unions, wealthy individuals, or interest groups to run the ads, such activities will now entirely escape regulation.

Statutory Language and Structure. Congress has long defined an “expenditure” subject to FECA as “*any* purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office” (subject to numerous exemptions). 2 U.S.C. § 431(9)(A)(i) (emphasis added). Since 1976, Congress also has provided that *any* such “expenditure” that is “made by any person in cooperation, consultation, or concert with, or at the request or suggestion of,” a candidate or party “shall” be subject to FECA’s contribution limits, source prohibitions, and disclosure requirements. *Id.* § 441a(a)(7)(B)(i)-(ii). There is no hint of an exemption for coordinated expenditures made during certain parts of an election cycle. To the contrary, both the plain language and structure of FECA regulate expenditures and contributions *throughout* an election cycle, without any restriction to express advocacy or the republication of candidate materials during certain periods.

The Commission argues that its new “time frame” test is “based on” BCRA § 101(b), FECA § 301(20)(A)(i), 2 U.S.C. § 431(20)(A)(i), which defines “Federal election activity” engaged in by state and local parties to include “voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election.” 68 Fed. Reg. at 430. The Commission’s Explanation and Justification [“E&J”] asserts that this constitutes a Congressional determination “deeming that period of time before an election to be *reasonably related to that election*,” as opposed to

communications that occur at more “distant” periods. *Id.* (emphasis added). This is a complete misapplication of the statute, and a *non sequitur*. New FECA § 323(b) and its implementing definitions regulate “Federal election activity” to “ensure[] that the state and local parties are no longer used as conduits for national party spending of nonfederal funds to aid federal election campaigns.” *McConnell*, 251 F. Supp. 2d at 700 (Kollar-Kotelly, J.); *see generally id.* at 699-703; *McConnell*, 124 S. Ct. at 670-76. Congress recognized that the regulation of voter registration activities could have a “dramatic” and “significant” effect on state elections, and therefore sought to “str[ike] a compromise” and to “accommodate” competing federal and state interests. 251 F. Supp. 2d at 699, 702-03 (Kollar-Kotelly, J.).

That Congress included a 120-day provision in one part of BCRA dealing with voter registration activities by state and local parties says nothing about Congressional intent with respect to the entirely different issue of communications coordinated among candidates, parties, and outside spenders where no comparable language was included in the statute. Under the canon of *expressio unius est exclusio alterius*, Congress’s use of “timeframe” limits with respect to some FECA provisions suggests that it intended for no temporal restrictions to apply to provisions it did not similarly limit.²⁴ For example, Congress defined “Federal election activity” applicable to state and local parties to include any “public communication” that meets certain criteria, without a 120-day or any other time limitation.²⁵ The Commission concedes in its E&J

²⁴ *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Indep. Ins. Agents of Am.*, 211 F.3d at 643-44 (applying *expressio unius* canon under *Chevron* step one to reject an agency’s construction of statute); *Halverson*, 129 F.3d at 185-86 (same); 2A Norman J. Singer, *Statutes and Statutory Construction* §§ 47:23 to 47:25 (6th ed. 2000 rev.) [“Statutes and Statutory Construction”].

²⁵ BCRA § 101(b), FECA § 301(20)(A)(iii), 2 U.S.C. § 431(20)(A)(iii), includes in the definition of “Federal election activity” “a public communication that refers to a clearly identified candidate for Federal office ... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)”

that BCRA “regulates public communications *without regard to timeframe.*” 68 Fed. Reg. at 430 (emphasis added). Congress’s open-ended regulation of “public communications” by state and local parties is far more analogous to the issue at hand — regulation of coordinated communications — than the “compromise” treatment of voter registration activities by state and local parties.²⁶

Legislative History. Section 214 constitutes an unmistakable Congressional determination that the old FEC coordination rules — which did not include *any* timeframe restrictions — were under-inclusive and needed to be strengthened. Although Congress left the particulars to the Commission, there was a clear intent for the new rules to reach *more* rather than *fewer* instances of coordination. The sponsors emphasized that the old rules “set[] too high a bar to the finding of ‘coordination’” and “miss many cases of coordination”; that the new rules “need to make more sense in light of real life campaign practices than do the current regulations”; and that “we expect the FEC to cover ‘coordination’ *whenever it occurs*” 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statements of Sens. Feingold and McCain) (emphasis added) (PX 102).²⁷ The FEC’s “content standards,” however, set an even *higher* bar to a finding of coordination, make even *less* sense in “real life,” and result in a dramatic *deregulation* of coordinated communications outside of the 120-day pre-election window. As

²⁶ The Commission also defends the reasonableness of its 120-day timeframe test by suggesting that it could have adopted the shorter 30-day/60-day timeframes that govern “electioneering communications.” 68 Fed. Reg. at 430. Those statutory provisions, however, deal with *independent* rather than *coordinated* expenditures, and there is nothing to suggest that Congress, in *expanding* the regulation of independent expenditures to include certain communications within 30 days of a primary or 60 days of a general election, thereby intended to *constrict* the traditional regulation of coordinated communications during any time period.

²⁷ The floor explanations by the sponsors on the eve of final passage are an “authoritative guide” entitled to “substantial weight.” *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (“Although the statements of one legislator made during debate may not be controlling, ... [the remarks] of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.”); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements should “be accorded substantial weight”).

Commissioner Thomas has observed, “the congressional direction given to the Commission to toughen its coordination regulations was lost in the shuffle. Indeed, what was regulated before outside the 120-day timeframe is no longer regulated, except for ‘express advocacy.’”²⁸

Congress enacted Section 214 with the understanding that a finding of coordination does not turn on an express advocacy test, yet the Commission has now adopted essentially that same test to govern during all but 240 days (or fewer) of each election cycle — less than a third of the two-year House election cycle.²⁹ This is a sharp departure from the Commission’s consistent approach over the past generation. In its Advisory Opinions and enforcement proceedings, the Commission repeatedly has held that an outside group’s “statements, comments or references” concerning a candidate may, if “made with the cooperation, consultation or prior consent of, or at the request or suggestion of,” the candidate or his agents, be deemed coordinated communications “*regardless of whether such references contain ‘express advocacy’ or solicitations for contributions,*” and therefore be treated as expenditures by the outside group and in-kind contributions to the candidate. FEC Advisory Op. 1990-5 (emphasis added) (PX 139); *see also* FEC Advisory Ops. 1988-22 (PX 142) and 1983-12 (PX 149).³⁰ Congress crafted

²⁸ Thomas, *supra* note 20, at 18.

²⁹ In the States that hold mid-September primaries, the express advocacy test will govern all but about 170 days of each cycle — less than a quarter of the House election cycle.

³⁰ The Commission traditionally has employed a rebuttable “presumption that the financing of a communication to the general public, not within the ‘press exception,’ that discusses or mentions a candidate in an election-related context and is undertaken in coordination with the candidate or his campaign is ‘for the purpose of influencing a federal election.’ ... Such a communication made in coordination with a candidate presumptively confers ‘something of value’ received by the candidate so as to constitute an attributable ‘contribution,’ even though the value of the benefit so conferred may be relatively minor.” FEC Advisory Op. 1990-5. For other examples of the Commission rejecting an “express advocacy” test in defining what constitutes an “in-kind contribution,” *see, e.g.*, FEC Advisory Ops. 1996-11 (PX 130), 1994-15 (PX 135), 1992-37 (PX 136), 1992-6 (PX 137), 1989-32 (PX 140), 1988-27 (PX 141), 1986-37 (PX 144), 1986-26 (PX 145), and 1984-13 (PX 147); *see generally* Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 *Cath. U. L. Rev.* 133, 152-60 (1999) (PX 114).

BCRA against this backdrop, and with this understanding in mind. As Senator Feingold explained on the eve of the Senate’s final passage, “[e]xisting law provides that a campaign-related communication that is coordinated with a candidate or party is a contribution to the candidate or party, *regardless of whether the communication contains ‘express advocacy.’*” 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (emphasis added) (PX 102). The Commission was not at liberty to depart from a long-standing construction relied upon by Congress as it fine-tuned the campaign finance laws.³¹

Congressional Purposes and Objectives. As this Court and the Supreme Court have concluded, the express advocacy test is “functionally meaningless” in the context of regulating supposedly *independent* expenditures, and “*has not aided the legislative effort to combat real or apparent corruption ...*” *McConnell*, 124 S. Ct. at 689 (emphasis added).³² It defies belief to suppose that Congress for some reason might have intended to authorize the extension of this discredited standard to the regulation of *coordinated* as well as *independent* communications. *See pp. 4-6 supra*. Indeed, Judge Green in *Christian Coalition* rejected arguments that sought to engraft an express advocacy standard onto the regulation of coordinated communications, concluding that those arguments were “untenable,” “fanciful,” “unpersuasive,” “pernicious,” and threatened to “frustrate both the anti-corruption and disclosure goals of the Act.”³³ These

³¹ *See Brown & Williamson*, 529 U.S. at 143-44; *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986); *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986); *N. Haven Bd. of Educ.*, 456 U.S. at 535 (1982); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Orloski*, 795 F.2d at 166; 2B Statutes and Statutory Construction §§ 49:09 to 49:10.

³² *See also* 124 S. Ct. 650-52, 688-89; 251 F. Supp. 2d at 529-60 (Findings ¶¶ 2.3-2.7), 591-92, 605-16 (Kollar-Kotelly, J.); *id.* at 874-90 (Findings ¶¶ 272-308) (Leon, J.).

³³ 52 F. Supp. 2d at 87-88 & n.50. As Judge Green concluded, “importing the ‘express advocacy’ standard into § 441b’s contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government’s compelling interest in preventing real and perceived corruption that can flow from large campaign contributions. Were this standard adopted, it would

(Footnote continued)

observations apply with equal force to the Commission's new "safe harbor." *Christian Coalition* was widely criticized for not going far *enough* in the regulation of coordinated communications.³⁴ It is ironic that the new rules flout the teachings of the one part of *Christian Coalition* that was widely embraced and left undisturbed by Congress.

Just three years ago, in promulgating the 2000 coordination rules that were repealed by BCRA § 214(b) for being too under-inclusive, the Commission itself cautioned that the adoption of "content standards" (including express advocacy) in regulating coordinated communications could eviscerate several of FECA's core purposes:

There is a substantial argument that any of the content standards suggested could be under-inclusive in the context of coordination. Some advertising by campaigns, for instance, does not include express advocacy and does not refer specifically to candidates as candidates or state that they are running for election. Allowing candidates, campaigns and political parties to ask corporations, labor unions or other persons to sponsor that kind of advertising without limit or disclosure could 'give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions.'

65 Fed. Reg. at 76,141 (quoting *Christian Coalition*, 52 F. Supp. 2d at 88) (PX 160). It is no defense that the Commission's new rule undermines FECA and BCRA merely for part of each election cycle. It obviously takes no great imagination to envision the blatant coordination that will take place as a result of the new loophole the Commission has now created out of whole cloth.

Additional Flaws. The new coordination rule does not survive *Chevron* step one. But even if *arguendo* one could imagine some ambiguity about Congressional intent, the

open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat." *Id.* at 88.

³⁴ See, e.g., 148 Cong. Rec. S2144-45 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (PX 102); see also Thomas & Bowman, *supra* note 30, at 164 n.153.

Commission’s rule would still fall under *Chevron* step two and the APA. For all of the reasons already set forth, the Commission’s timeframe test is not a reasonable reading in light of the language, structure, legislative history, and policies of FECA and BCRA. Nor has the Commission engaged in the “reasoned analysis” required under the APA, particularly given its significant decision to deregulate a variety of coordinated communications that previously had been subject to the rules. For example, although the Commission “recognize[d]” in its E&J that its content standards “may” shield “some” coordinated communications made for the purpose of influencing Federal elections, “thereby potentially narrowing the reach” of FECA’s coordination provisions, it made *no* effort to examine either the potential scope of this under-inclusiveness or the extent to which circumvention might result. 68 Fed. Reg. at 426. Some of the Commission’s central assumptions in the E&J are entirely unsupported and unfounded, such as its key premise that coordinated public communications occurring more than 120 days before an election are unlikely to be “reasonably related” to the election *unless* they contain express advocacy or republish the campaign’s own materials. *Id.* at 430. Nor did the Commission explain why any of the other proposed standards offered during the rulemaking would be inadequate to protect communications “that are not made for the purpose of influencing a federal election,” *id.* at 427-28, while at the same time avoiding the significant under-inclusiveness of the new “timeframe” approach.³⁵ Perhaps most striking of all, the Commission did not even *acknowledge* that its adoption of what amounts to an express advocacy test for most of the election cycle marks a sharp departure from its precedents over the past generation, let alone offer the “reasoned

³⁵ See, e.g., Oct. 11, 2002 Comments of The Campaign and Media Legal Center, at 3-6 (PX 8), Center for Responsive Politics, at 5-7 (PX 4), and Common Cause and Democracy 21, at 12-14 (PX 5); Oct. 24, 2002 Public Hrg. Tr. at 16-22, 42-52 (test. of Messrs. Shor, Simon, and Noble) (PX 7).

analysis” and “justification for rescinding” its earlier approach. *State Farm*, 463 U.S. at 42, 52; *see also* pp. 6-7 & n.13 *supra*.

B. The Commission Acted Unlawfully In *Per Se* Excluding the Internet From the Rules on Coordinated Communications.

The old coordination regulations that BCRA § 214(b) repealed were targeted to “general public political communications,” expressly defined in the regulations to include communications made through “any electronic medium, including the Internet or on a web site.”³⁶ This was consistent with Commission precedent dating back to the dawn of the Internet era, and was intended to “reflect[] the expanding role of that medium in federal campaigns.” 65 Fed. Reg. at 76,144. When Congress repealed “[t]he regulations on coordinated communications” that included communications over the Internet and other media and directed the Commission to promulgate “new regulations on coordinated communications,” BCRA § 214(b)-(c), the only fair reading is that Congress intended for the FEC to *continue* to regulate political communications over the Internet, not to *deregulate* them. Here again, however, the Commission moved in exactly the opposite direction than Congress intended, completely exempting communications “using the Internet and electronic mail” from regulation under the new rules. 68 Fed. Reg. at 430; *see also* 11 C.F.R. § 100.26. If allowed to stand, this loophole will enable candidates, parties, and outside spenders to engage in unregulated and unrestricted coordination via the Internet. This completely contradicts the “functional” approach followed by Congress and the courts; ignores political and technological realities that are obvious to any

³⁶ 11 C.F.R. § 100.23(e)(1) (2001) defined “general public political communications” to “include those made through a broadcasting station (including a cable television operator), newspaper, magazine, outdoor advertising facility, mailing or any electronic medium, including the Internet or on a web site, with an intended audience of over one hundred people.”

current user of the Internet; and will open new and powerful avenues for circumventing the governing contribution limitations, source restrictions, and reporting requirements.

Statutory Language and Structure. The Commission’s E&J asserts that, to “provide[] consistency within the regulations” and “avoid an arbitrary distinction,” the reach of “coordinated communications” covered by the BCRA Section 214 rules should not exceed the scope of “public communications,” a phrase that applies to “Federal election activity” by state and local parties and that BCRA defines to embrace “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising.*” BCRA § 101(b); FECA § 301(22); 2 U.S.C. § 431(22) (emphasis added). The Commission previously had concluded in its BCRA soft-money rulemaking that “public communications” should not be read to cover communications “transmitted using the Internet and electronic mail” because (1) “BCRA does not reference the ‘Internet’ or ‘electronic mail’” in the definition of “public communications”; and (2) under the canon *ejusdem generis*, the catch-all phrase “any other form of general public political advertising” cannot be construed to include the Internet and e-mail because they are “separate and distinct” forms of media from all the others. 67 Fed. Reg. at 49,072; *see* 11 C.F.R. § 100.26.³⁷

Even accepting the Commission’s leap of logic that “coordinated communications” should be construed in the same manner as “public communications,” and even if the Commission had been consistent in applying its *ejusdem generis* construction to the Internet and

³⁷ Plaintiffs have also challenged the *per se* exclusion of Internet communications from regulation under the “Federal election activity” rules. *See* First Am. Compl. ¶¶ 65-66. All of the arguments in this section apply as well to that part of plaintiffs’ challenge. *See* Part II-E *infra*.

e-mail,³⁸ the Commission’s reading does not make it past *Chevron* step one. On its face, the phrase “*any other form of general public political advertising*” plainly includes at least certain communications over the Internet. There can be no question that “political advertising” takes place on the Internet (in exponentially increasing amounts), and that there are various mechanisms by which such advertising over the Internet is targeted at the “general public.”

The Commission misapplies *ejusdem generis*, “the statutory canon that ‘[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (citation omitted). The Commission nowhere explains how the Internet and e-mail are functionally different from the broad class of communications technologies that precedes the general catch-all phrase. To be sure, the Internet is newer than the other technologies, but including new developments is one purpose of including a catch-all phrase. The Commission’s E&J quotes one commenter who suggested that, unlike the specific enumerated technologies, the Internet is a “form[] of two-way dialogue.” 67 Fed. Reg. at 49,071-72. This is a false distinction because the statutory list includes the telephone, the classic instrumentality for “two-way dialogue,” and mass mailings,

³⁸ In a separate BCRA rulemaking involving disclaimer requirements, the Commission construed a virtually identical statutory phrase — “any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising” — to *include* certain types of e-mail and Internet websites. See 67 Fed. Reg. at 76,962-64 (PX 9); 11 C.F.R. § 110.11(a) (defining “public communications” for purposes of the disclaimer requirements to include “unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public”); see also BCRA § 311; FECA § 318(a); 2 U.S.C. § 441d(a) (disclaimer provisions). The Commission acknowledged that it had previously excluded the Internet under the “*ejusdem generis*” canon of construction, but explained: “[T]he Commission has decided that certain Internet-based communications also should be covered. The Commission has for years interpreted the statute to require disclaimers on electronic mail and Internet website communications. ... In view of the widespread use of this technology in modern campaigning, and the relatively non-intrusive nature of disclaimer requirements, the Commission has concluded that the interests served by prompt public disclosure warrant application of the disclaimer provisions” to the Internet. 67 Fed. Reg. at 76,964. The Commission made no effort to reconcile its conflicting constructions of the same statutory phrases, or to explain why it was following some of its precedents with respect to the Internet but not others.

which typically invite “two-way” interaction in the form of response cards and checks. The E&J also emphasizes the “inexpensive,” “cheap,” and “widely available” nature of the Internet, *id.*, but that view is both over- and underinclusive. First, the same could be said of mail and the telephone. Second, not all communications efforts over the Internet are “inexpensive” and “cheap.” Just as the Commission recognizes a distinction between a lone letter writer or telephone caller and professional mass mailings and telephone banks, so too must lines be drawn between individual e-mails and professional advertising efforts using the Internet. Such efforts may involve mass e-mails, banner and pop-up ads, webcasts, transmission of high-quality voice, graphics, or video advertisements, and other sophisticated (and expensive) political advertising efforts.³⁹

The Supreme Court has cautioned that *ejusdem generis* should not be applied where the list of specific terms does not imply a limited class and where Congress used “expansive language” in the general clause that does not readily admit of a limiting construction. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980) (phrase “any other final action” should be applied according to its plain meaning). That is precisely the case here. To exclude Internet advertising ignores the statute’s plain language, which embraces “*any other form of general public political advertising*” (emphasis added).⁴⁰

³⁹ See the sources cited in n.50 *infra*. Another suggested distinction reasons that an Internet user makes a choice to visit a particular website, whereas television, radio, billboards, telephone calls, mail, and the like all involve a captive audience that has not chosen to be exposed to the particular message in question. May 29, 2002 Comments of Mindshare Internet Campaigns LLC, at 3-4 (PX 10). This does not account for incoming e-mail, which is no different in nature or function from letters in the mailbox or a ringing telephone. Nor does this supposed distinction account for spam, pop-ups, and other forms of Internet advertising, which differ neither in nature nor function from ads interrupting television or radio programs.

⁴⁰ See also *United States v. Espy*, 145 F.3d 1369, 1370-72 (D.C. Cir. 1998); *Ohio Ass’n of Cmty. Action Agencies v. FERC*, 654 F.2d 811, 819-20 (D.C. Cir. 1981); see generally 2A Statutes and Statutory Construction §§ 47:17 to 47:22.

Prior Agency Construction and Legislative History. Any remaining doubts on this score are dispelled by an analysis of the FEC’s prior construction of the phrase “general public political advertising” and by BCRA’s legislative history. As early as the spring of 1995, the Commission held that the use of the Internet to distribute political communications or to solicit contributions constituted “general public political advertising” as that phrase was used in FECA and the Commission’s implementing regulations. FEC Advisory Op. 1995-9 (*re* use of Internet by the “Newtwatch” PAC) (PX 134). Thereafter, the Commission repeatedly held that, although the Internet presents a number of special issues requiring careful case-by-case consideration, and although its special characteristics will frequently justify a much lighter regulatory touch than do other forms of communications, this new technology must remain subject to the basic architecture of the federal campaign finance laws, including when used for coordinated communications. *See especially* FEC Advisory Op. 1998-22 (costs of web site operated “in cooperation, consultation or concert with” a candidate’s campaign would be an in-kind contribution) (PX 126); FEC Advisory Op. 1999-17 (concluding that answers to various Internet-related FECA questions turned in part on whether the Internet activities were coordinated with a candidate) (PX 122); 11 C.F.R. § 100.23(e)(1) (2001) (coordination rules fully apply to communications made through “the Internet or on a web site”); 65 Fed. Reg. at 76,144.⁴¹

Thus, when Congress instructed the Commission to promulgate new coordination rules, it did so against the backdrop of a long-standing construction that recognized the Internet and e-mail as forms of “general public political advertising.” Under settled canons of construction,

⁴¹ For other examples of the Commission’s careful case-by-case approach recognizing the applicability of FECA’s major provisions to the Internet, *see, e.g.*, FEC Advisory Ops. 1995-33 (PX 133), 1995-35 (PX 132), 1996-2 (PX 131), 1996-16 (PX 129), 1997-16 (PX 127), 1998-22 (PX 126), 1999-7 (PX 124), 1999-9 (PX 123), 1999-17 (PX 122), 1999-24 (PX 121), 1999-25 (PX 120), and 2000-16 (PX 118).

Congress's repetition of this phrase without revision in BCRA is strong evidence that Congress intended for that construction to control. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193-94 (2002) ("Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); *see also* cases cited on p. 17 & n.31 *supra*.

Moreover, Congress repeatedly rejected attempts to exclude activities over the Internet from regulation. In the Senate, Senator Bennett's "Internet Freedom Protection Act," a bill that would have exempted many individual Internet political activities while continuing to regulate paid advertising, solicitation, and corporate and union activities over the new medium, died in committee.⁴² In the House, Representative DeLay's proposed amendment to the Shays-Meehan legislation, which would have exempted all Internet activities from regulation except with respect to "the solicitation or receipt of contributions,"⁴³ was decisively rejected 160-268 after a debate in which the proposal was condemned as a "poison pill," an Internet "loophole," "a step backwards," and an "anti-reform" that would make the Internet "the favored conduit for special interests to fund soft money and stealth issue ads into federal campaigns."⁴⁴

⁴² *See* 145 Cong. Rec. S12834-35 (daily ed. Oct. 19, 1999) (PX 106); *see also* 145 Cong. Rec. S12676 (daily ed. Oct. 15, 1999) (statement of Sen. Burns) (PX 105); Test. of Commissioner David M. Mason before the Committee on Rules, United States Senate, at 5 (May 3, 2000) (describing S. 1747 as "helpful" but urging Congress "to consider even broader exemptions" for the Internet) ["Mason Testimony"] (PX 109).

⁴³ The DeLay amendment would have provided that "none of the limitations, prohibitions, or reporting requirements of this Act shall apply to any activity carried out through the use of the Internet or to any information disseminated through the Internet," except with respect to "the solicitation or receipt of contributions." 145 Cong. Rec. H8255 (daily ed. Sept. 14, 1999) (statement of Rep. DeLay) (PX 107).

⁴⁴ *Id.* at H8256 (statement of Rep. Allen) (explaining that DeLay proposal would "create[] a potentially huge loophole through which big donors, corporations, and unions could pour unlimited funds into Internet ad campaigns to directly promote the election or defeat of a candidate. This would spread the disease of sham issue ads from the TV to the Internet."). *See also id.* (statement of Rep. Campbell) ("[I]t is apparent to me that the gentleman [Rep. DeLay] would not do anything to disclose the Red Chinese Communists funding a huge campaign for a candidate for office in the United States, provided they use the Internet loophole which his amendment creates, and that is exactly the reason why we have disclosure *If the means of dissemination are to be controlled, the* (Footnote continued)

Shortly before final enactment of BCRA, then-FEC Chairman Mason and then-Commissioner Bradley A. Smith wrote to Congress identifying eleven “problematic” features of the proposed legislation, and “urge[d] Congress to consider ways to address these issues[.]”⁴⁵

Number one on their target list was the regulation of the Internet and e-mail:

The Commission has treated Internet web pages available to the public and widely-distributed e-mail as forms of “general public political communication.” Thus, the [use of that term in the new legislation] combined with the Commission’s established interpretation of the FECA could command regulation of Internet and e-mail communications.⁴⁶

Consistent with the rejection of the Bennett and DeLay proposals, Congress ignored this final effort to exempt the Internet from FECA and BCRA, adopting the language as it stood.

The Commission has now impermissibly adopted an interpretation of the law that Congress squarely and repeatedly rejected. “Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment.” 2A Statutes and Statutory Construction § 48:18, at 482-83 (collecting numerous authorities). “[P]ositive action by Congress rejecting the limiting amendments” provides evidence of a “clear purpose” that the statute reach more broadly than the suggested limitation. *Nat’l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971) (Leventhal, J.).⁴⁷ Indeed, the Commission’s regulation undermines BCRA’s aims even *more*

Internet should be covered no more and no less.” (emphasis added). For the House vote rejecting the DeLay amendment, see *id.* at H8260-61.

⁴⁵ Feb. 25, 2002 Letter from Chairman David M. Mason and Commissioner Bradley A. Smith to Hon. Mitch McConnell, reprinted in 148 Cong. Rec. S2340 (daily ed. Mar. 22, 2002) (PX 101).

⁴⁶ *Id.*

⁴⁷ See also *Brown & Williamson*, 529 U.S. at 144 (rejecting agency construction where “Congress considered and rejected bills” that would have achieved the same result); *N. Haven Bd. of Educ.*, 456 U.S. at 534-35 (construction of statute must take account that Congress “refused to pass bills that would have amended [the statute] to limit its coverage” in the manner now advocated).

than the proposals Congress rejected. The new rule exempts *all* Internet and e-mail activities, whereas the rejected proposals would have allowed for a modicum of regulation in this area.⁴⁸

Congressional Purposes and Objectives. The Commission's *per se* exemption of all Internet activities opens a major new loophole in FECA and BCRA, and is utterly inconsistent with the "functional" and realistic course long followed by Congress and the courts in regulating coordinated expenditures. *See pp. 7-8 supra.* The Commission acknowledged in 1999 that the Internet had emerged as "a powerful campaign tool with the potential to significantly influence the outcome of federal elections."⁴⁹ The Internet has only grown in importance since then.⁵⁰

⁴⁸ During the soft-money rulemaking, one commenter took a press interview with Representative Shays completely out of context in arguing that Congress intended to exclude the Internet from "public communications." *See* May 29, 2002 Comments of Mindshare Internet Campaigns LLC, at 2 (quoting Representative Shays as telling Forbes.com that "[t]he Internet is not really the problem right now. There is a general feeling that, if in doubt, stay away from putting on any restrictions.") (PX 10). When Representative Shays's remarks are examined in context, it is clear that he was explaining why the new provisions regarding "electioneering communications" in Title II-A extended only to "ads on broadcast, cable and satellite outlets, but not the Internet." Ian Zack, *Congress' Gift to the Internet*, (Feb. 26, 2002), available at <http://www.forbes.com/2002/02/26/campaignfinance.html> (PX 164). Congress's decision to limit its new provisions regarding *independent* expenditures to certain "broadcast, cable, or satellite communication[s]," BCRA § 201(a), FECA § 304(f)(3)(A), 2 U.S.C. § 434(f)(3)(A), says nothing about the entirely separate provision targeted to "*any* ... form of general public political advertising" (emphasis added).

⁴⁹ 64 Fed. Reg. 60,360 (PX 161). This notice prompted more than 1,300 comments, and eventually led to the issuance of an NPRM on "The Internet and Federal Elections." 66 Fed. Reg. 50,358 (PX 159). The proposed rules, which were never finalized, would have exempted certain aspects of Internet usage from FECA's coverage while leaving intact the Commission's overall regulatory framework with respect to the Internet (including the rules on coordination).

⁵⁰ Solely as a matter of background and to illustrate the significance of this issue, the Court may take judicial notice of pertinent articles and reports describing the continued growth in the political use of the Internet. *See* Plaintiffs' Mot. *Re* Exhibits at 4-5. *See, e.g.,* E-Voter Institute, *E-Voter 2002 Study Reveals Internet Use in Senate Races*, (Nov. 13, 2002), available at <http://www.e-voterinstitute.com/public/rel-search.php?action=list> (analysis of 2002 state and local races "that used Internet advertising and email blasts to get attendance at rallies, solicit last minute contributions, and get out the vote") (PX 165); The Pew Research Center For The People & The Press, *Perceptions of Partisan Bias Seen As Growing — Especially by Democrats — Cable and Internet Loom Large In Fragmented Political News Universe*, The Pew Research Center News Release, Jan. 11, 2003 (PX 166); Jonathan Roos, *Internet top tool for candidates*, (Nov. 17, 2003), available at <http://www.dmregister.com/news/stories/c4789004/22779230.html> (PX 167); Kate Ackley, *Interest Groups Vow: We'll Still Be Heard*, *Legal Times*, Dec. 15, 2003, at 12 (PX 168); Cliff Sloan, *Political Ads + Internet = A Good Fit*, (Jan. 2, 2004), available at <http://www.newsday.com/news/opinion/ny-vpslo023608369jan02,0,5803906.story?coll=ny-viewpoints-headlines> ("All indications are that as the 2004 presidential race gets under way in earnest we will see an explosion of paid political advertising online.") (PX 169); Alexis Rice, *Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning*, (Jan. 2004), available at <http://www.campaignsonline.org/reports/online.pdf> (PX 170); Dana

(Footnote continued)

The Commission's *per se* exemption renders even paid advertisements and highly targeted Internet spam completely unregulated. It opens an avenue for rampant circumvention of all of FECA's and BCRA's central provisions.

Additional Flaws. The Commission's *per se* exclusion of Internet communications from its new coordination regulations fails *Chevron* step one. But even if there were a plausible argument that Congress had left this choice entirely up to the Commission, the new rules fail *Chevron* step two and the APA. For all of the reasons already set forth, outright exclusion of the Internet from the coordinated communication rules is an unreasonable construction in light of the language, structure, legislative history, and policies of FECA and BCRA. Nor has the Commission engaged in the "reasoned analysis" required under the APA. None of its E&Js even *acknowledges* the Commission's departure from its precedents, let alone offers a reasonable justification for this change in course. *See* pp. 6-7 & n.13 *supra*. Nor does the Commission anywhere explain why the Internet is *not* a form of "general public political advertising" for purposes of the coordination and soft-money rules, but remains so for purposes of the BCRA disclaimer provisions. *See* n.38 *supra*. Such inconsistency is the height of arbitrary and capricious action. The Commission's cryptic defense of its *per se* exclusion relies on the "cheap," "inexpensive," and "widely available" nature of the Internet, without accounting for situations in which political advertising over the Internet is *not* "cheap" and "inexpensive," *i.e.*,

Milbank, *Curtain Goes Up on Glass-House Attack*, Washington Post, Feb. 15, 2004, at A-4 (Bush-Cheney reelection campaign sent an e-mail to 6 million people with an Internet advertisement attacking Sen. John F. Kerry) (PX 171); Jim Rutenberg, *In Politics, the Web Is a Parallel World With Its Own Rules*, (Feb. 22, 2004), available at <http://www.nytimes.com/2004/02/22/weekinreview/22rute.html> ("[P]art of the Web's appeal has been its unbridled nature, and it is showing that it can act as a back alley—where punches can be thrown and things can be said that might be deemed out of place, even if just at a particular moment, in the full light of the mainstream media.") (PX 172); *see also* Bob Tedeschi, *E-Commerce Report: Your Web surfing is being interrupted to bring you a paid video commercial. Advertisers think you will stick around*, New York Times, Jan. 19, 2004, at C-7 (new ad technology and high-speed connections now allow TV ads to be run on Web pages, evading pop-up blockers) (PX 173).

where it is inescapably bought and paid for, and is thus a “[]thing of value” under the statutory definitions of “expenditure” and “contribution.” *See* 2 U.S.C. § 431(8)-(9). The Commission did not even pretend to consider other approaches that might give broad, unregulated latitude to individual use of the Internet while continuing to regulate paid advertising and mass distribution efforts over the Internet, such as the proposals embodied in S. 1747 or the distinction drawn by Commissioner Mason between “posting information on the Internet” versus paid efforts at Internet advertising and mass distribution.⁵¹ Thus, even if Congress had left the Commission free to promulgate a *per se* exclusion of all Internet communications, the agency has utterly failed to justify that choice on this record. *See pp. 6-7 supra*.

II. The Challenged Soft-Money Regulations Violate BCRA Title I And Undermine The Soft-Money Ban.

The “centerpiece” of BCRA is the soft-money ban in Title I, and the “cornerstone of Title I is new FECA § 323(a)[(1)], which prohibits national party committees ... from soliciting, receiving, directing, or spending any soft money.”⁵² The remainder of new FECA § 323 regulates in specified circumstances the soft-money fundraising and spending activities of state, district, and local committees, federal officeholders, and candidates for federal office. The Supreme Court sustained these provisions in reliance “not only on the fact that they regulate contributions used to fund activities influencing federal elections, but also that they regulate

⁵¹ In his testimony regarding S. 1747, Commissioner Mason had urged Congress to consider a distinction between “Internet publication” and “Internet distribution,” so that “all persons and organizations would be free to publish as they choose for those Internet users who seek information, but would be regulated to the extent that they advertised or affirmatively circulated political material. ... While Internet publication may deserve specific protection, it is difficult to justify treating \$25,000 in Internet advertising differently than \$25,000 in radio advertising or direct mail.” Mason Testimony, *supra* note 42, at 6. The Commission’s E&J makes no effort to assess this distinction.

⁵² 147 Cong. Rec. S2696 (daily ed. Mar. 22, 2001) (statement of Sen. Feingold) (PX 104); *McConnell*, 124 S. Ct. at 654 (citing 2 U.S.C. § 441i(a)).

contributions to or at the behest of entities uniquely positioned to serve as conduits for corruption.” 124 S. Ct. at 668 n.51. The Court emphasized that “Congress enacted § 323 as an integrated whole to vindicate the Government’s important interest in preventing corruption and the appearance of corruption.” *Id.* at 659.⁵³

The challenged regulations undermine Title I’s soft-money ban in many ways. As set forth below, they violate the language and structure of Title I, its clear legislative history, and its purposes and objectives. They repeatedly narrow the definitions of key statutory terms in violation of long-standing Commission interpretations, Congressional intent, and common sense. They open up new avenues for circumvention and gross abuse. They are not the product of reasoned analysis, but of raw edict.

A. The FEC Definitions of “Solicit” and “Direct” Violate Congressional Intent and Invite Gross Abuse and Circumvention.

Central to Congress’s goal of removing parties, candidates, and officeholders from soft-money fundraising is BCRA’s direction that such entities may not “solicit” or “direct” funds outside of the Act’s requirements. Those terms control the three core soft-money prohibitions in the Act. First, national parties “may not solicit ... or direct” soft money. BCRA § 101(a); FECA § 323(a)(1); 2 U.S.C. § 441i(a)(1). Second, national, state, district, or local party committees “shall not solicit any funds, ... or direct any donations to” certain § 501(c) and § 527 organizations. BCRA § 101(a); FECA § 323(d); 2 U.S.C. § 441i(d). And third, federal officeholders and candidates “shall not ... solicit” or “direct” funds in connection with any election unless the funds do not exceed FECA’s hard money contribution limit and do not come from prohibited sources. BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441i(e)(1). Because

⁵³ See generally 124 S. Ct. at 654-86; 251 F. Supp. 2d at 439-525 (Title I findings), 651-716 (Kollar-Kotelly, J.).

these three provisions form the linchpin of the soft-money ban, the definitions of “solicit” and “direct” are vital to the campaign finance reforms Congress has prescribed.

Contrary to Congress’s goals, however, and in direct conflict with BCRA’s text, structure, and legislative history, the FEC has defined the terms “solicit” and “direct” in a manner that invites “gross abuse” and circumvention of the Act. *Orloski*, 795 F.2d at 165. In its final soft-money regulations, the Commission defined both “solicit” and “direct” to encompass only to “ask.” 11 C.F.R. § 300.2(m), (n). The FEC rejected a rule proposed by the Office of General Counsel that would have included within the definition of “solicit” a “suggestion[] or recommendation” to make a contribution, 67 Fed. Reg. at 35,660 (PX 11), and has similarly made clear that the definition of “solicit” does not include “a series of conversations which, when taken together, constitute a request for a contribution or donation,” 67 Fed. Reg. at 49,086-87 (PX 1). In addition, the regulations state categorically that “merely providing information or guidance as to the requirement of a particular law” constitutes neither “solicitation” nor “direction.” 11 C.F.R. § 300.2(m), (n). Under the FEC definitions, therefore, the terms “direct” and “solicit” encompass only an outright, express request that is contained in a single communication. *See* 67 Fed. Reg. at 69,942 (“By using the term ‘ask,’ the Commission defined ‘solicit’ to require some affirmative verbalization or writing ... ‘intended to, and reasonably understood to, convey a request for some action.’”) (PX 12).

These definitions are in direct and irreconcilable conflict with Congress’s clearly expressed intent in the statutory provisions they are intended to implement. They also represent plainly unreasonable interpretations of BCRA’s provisions and an arbitrary and capricious exercise of the FEC’s rulemaking authority.

Statutory Language and Structure. This conflict is particularly apparent from an analysis of BCRA’s text, “[t]he starting point in discerning congressional intent.” *Lamie v. U.S. Trustee*, 124 S. Ct. 1023, 1030 (2004). In a number of respects, the FEC’s definitions “flatly contradict[] Congress’s express purpose.” *Common Cause*, 692 F. Supp. at 1396. First, the plain meaning of both “solicit” and “direct” is far broader than the cramped definitions the FEC accorded those terms. The common understanding of “solicit” is not only to “ask,” but also more generally “to seek eagerly or actively,” “to seek to affect,” “to make petition to,” and to “strongly urge.”⁵⁴ “Ask,” by contrast, is commonly understood to be more limited, encompassing only those communications in which the speaker “call[s] upon for an answer” or “put[s] a question about.”⁵⁵ In using the term “solicit” rather than “ask,” Congress expressed its intent to capture within BCRA’s scope not only those communications that involve an express request, but also those commonly understood and recognizable solicitation locutions that, consistent with the plain meaning of “solicit,” suggest, encourage, recommend, or urge a particular result.⁵⁶

Particularly instructive on this point is the Supreme Court’s decision in *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992). In that case, the Court considered the ordinary meaning of “solicitation” in the context of 15 U.S.C. § 381, which prohibits a state from taxing any business that limits its activity within that state to “solicitation

⁵⁴ Webster’s Third New International Dictionary 2169 (2002) (PX 110); *see also* 15 Oxford English Dictionary 966 (2d ed. 1989) (“to try to find, obtain, or acquire”; “to entreat or petition”; “to urge”; “to induce or persuade”) (PX 111); Black’s Law Dictionary 1398 (7th ed. 1999) (defining “solicitation” as, *inter alia*, “seeking to obtain something”) (PX 112); *see, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (relying on dictionary definition to discern “natural reading” of statute and “normal meaning” of operative term).

⁵⁵ Webster’s Third New International Dictionary 128 (2002); *see also* 1 Oxford English Dictionary 687 (2d ed. 1989) (“[t]o call for an answer”; “to put a question to”; “to question”); Random House Dictionary of the English Language 123 (2d ed. 1987) (“to put a question to; to inquire of”) (PX 113).

⁵⁶ Webster’s Third New International Dictionary 128 (2002) (noting that “solicit, in modern use” and in contrast to “ask,” “commonly means no more than calling attention to one’s wants or desires”).

of orders.” Writing for the Court, Justice Scalia first noted that “[s]olicitation,’ commonly understood, means ‘[a]sking’ for, or ‘enticing’ to, something.” 505 U.S. at 223 (citing Black’s Law Dictionary 1393 (6th ed. 1990); Webster’s Third New International Dictionary 2169 (1981) (“solicit” means “to approach with a request or plea (as in selling or begging)”). The Court then deemed it “evident” that the term “solicitation” of orders

includes, *not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites* an order. Thus, for example, a salesman who extols the virtues of his company’s product to the retailer of a competitive brand is engaged in “solicitation” *even if he does not come right out and ask* the retailer to buy some.

Id. (emphasis added). The Supreme Court has thus squarely rejected the FEC’s view that the term “solicit” is limited to “explicit verbal requests,” holding instead that the ordinary meaning of that term includes “any speech or conduct that implicitly invites” the desired result. *Id.* On the usual “assumption that the ordinary meaning of [statutory] language accurately expresses the legislative purpose,” *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (internal quotation marks and citations omitted), the FEC definition of “solicit” is plainly invalid. Nothing in the statutory language suggests a meaning of the word narrower than its ordinary usage, and the purpose of BCRA as expressed in its structure and legislative history — to close loopholes — compels the diametrically opposite conclusion.

Similarly, contrary to the FEC definition, the common understanding of the term “direct” bears little relationship to that of “ask.” To “direct” means to “show or point out the way for,” “to assist by giving advice, instruction, or supervision,” or “to point out, prescribe, or determine a course or procedure.”⁵⁷ One thus “directs” a particular result by telling another to do an act or

⁵⁷ Webster’s Third New International Dictionary 640 (2002); *see also* 4 Oxford English Dictionary 701 (2d ed. 1989) (“[t]o inform, instruct, or guide (a person), as to the way; to show (any one) the way”; “to ordain, order, or appoint (a person) to do a thing”); Random House Dictionary of the English Language 558 (2d ed. 1987) (“to
(Footnote continued)

by showing him or her how to do so. Under the FEC’s definition of “direct,” however, such a communication would not constitute “direction” because it would not “call for an answer” or “put a question about” the contemplated act. Indeed, under the FEC’s definition of “direct,” a speaker could literally state, “I direct you to make a contribution” without being deemed to have “direct[ed]” a contribution within the meaning of BCRA. Plainly this was not Congress’s intent, nor was it Congress’s intent to exempt more likely statements such as “X is a fine organization; you should consider giving it \$10,000.”

In addition, the Commission’s definitions of “solicit” and “direct” violate the “‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Despite the FEC’s purported decision to treat “solicit” and “direct” as separate terms with independent meaning, *see* 67 Fed. Reg. at 49,087, the final regulations define both terms according to the operative act of “ask[ing].” *See* 11 C.F.R. § 300.2(m), (n). And although the definition of “direct” appears to apply in a discrete set of circumstances — where a speaker “asks” someone to make a contribution in which the contributor has previously expressed interest or intent, *see* 11 C.F.R. § 300.2(n) — any distinction based on this difference in wording is illusory. In fact, such a communication would also fall within the definition of “solicit,” regardless of any expression of prior interest or intent, because it involves an express request for a contribution. *See* 11 C.F.R. § 300.2(m) (“solicit means to ask that another person make a contribution”). In other words, the Commission’s definition of “direct” is subsumed entirely

manage or guide by advice, helpful information, instruction, etc.”; “to channel or focus toward a given result, object, or end”); Black’s Law Dictionary 471 (7th ed. 1999) (“To guide (something or someone)”).

within the definition of “solicit”; any communication deemed to be a “direction” would necessarily also be considered a “solicitation.” The result is that the word “direct” — one of the key terms, consistently used in the disjunctive, by which Congress carefully established the operative scope of BCRA — is rendered “wholly superfluous.” *Duncan*, 533 U.S. at 174; *see TRW*, 534 U.S. at 29 (rejecting as implausible an interpretation that would leave statutory component with “no work to do”).⁵⁸

The FEC’s definition of “solicit” also conflicts with statutory text because it departs from the Commission’s own longstanding and well established meaning of that term. As the FEC’s Assistant General Counsel emphasized in voicing concerns about the rule the Commission ultimately adopted,

[t]he concept of solicitation is not something that is new It is something that has been in the Federal Election Campaign Act for a very long time And [the FEC] ha[s] looked at [solicitation] very broadly in the past, in terms of encouraging support for, and providing information as to how to contribute, and publicizing the right to accept unsolicited contributions from any lawful contributor [I]t is an area of law that [is] pretty well settled.⁵⁹

⁵⁸ Similarly, the FEC’s definition of “solicit” renders entirely superfluous BCRA’s “state party fundraiser provision,” discussed in Part II-C *infra*. That provision states that although federal officeholders and candidates may not solicit or direct soft money, they “may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.” BCRA § 101(c); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3). As explained *infra*, Congress recognized that any form of participation in such an event might be deemed to amount to “solicitation” under BCRA, and therefore clarified through this provision that “attend[ing], speak[ing], or be[ing] a featured guest” at a state party fundraiser does not in itself constitute solicitation or direction. But if the term “solicit” includes only explicit verbal requests, as the FEC has concluded, *see id.*, then this provision serves no purpose: There would be no reason for Congress to clarify that attending, speaking at, or being the featured guest at a state-party fundraiser does not constitute solicitation, because none of those activities could conceivably be perceived as such.

⁵⁹ June 19, 2002 Open Meeting Tr. at 468-69 (PX 180); *see* Plaintiffs’ Mot. *Re* Exhibits at 6-8.

FECA has long prohibited corporations and unions from “soliciting” PAC contributions except from certain specified persons.⁶⁰ And the FEC has long construed those prohibitions in accord with the ordinary meaning of “solicit,” repeatedly concluding that a communication amounts to solicitation even if it falls short of a “straightforward request for contributions.” FEC, Campaign Guide for Corporations and Labor Organizations 24 (2001) [“Corporate and Labor Campaign Guide”] (PX 158). Thus, the FEC has consistently held that “solicitation” occurs when the corporation or union informs individuals from whom it may not solicit funds that the PAC may accept *unsolicited* contributions from them, encourages support for the PAC, facilitates contributions, or praises those who have contributed in a communication that is broadly distributed.⁶¹ “Congress’s repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.” *Toyota Motor*, 534 U.S. at 184, 193-94 (citations omitted); *see* p. 17 & n.31 and p. 25 *supra*. The Commission’s E&J offers no justification for failing to apply this canon of construction here.

Legislative History and Purpose. The Supreme Court recognized that BCRA was intended to “address Congress’ concerns about the increasing use of soft money” to “influence federal elections.” *McConnell*, 124 S. Ct. at 654. More specifically, as the Court explained,

⁶⁰ *See* FECA § 316(b)(4)(A)(i); 2 U.S.C. § 441b(b)(4)(A)(i) (corporations may “solicit” PAC funds only from stockholders, executive and administrative personnel, and their families); FECA § 316(b)(4)(A)(i); 2 U.S.C. § 441b(b)(4)(A)(ii) (unions may “solicit” funds only from members and members’ families).

⁶¹ *See, e.g.*, FEC Advisory Ops. 2000-7 (communication constitutes a solicitation if it would “either encourage readers to” contribute “or facilitate making contributions”) (PX 119); 1999-6 (communication held to be a solicitation because it “provides vital information on” how an employee may contribute and “includes several positive references to the convenience and advantages of” a new system for accepting contributions) (PX 125); 1991-3 (PX 138); 1988-2 (PX 143); 1984-55 (noting that “the Commission has ... held that where a separate segregated fund informs an individual whom it may not solicit that the individual has the right to make unsolicited contributions to the fund, the act of informing that individual that the fund may accept his contribution is itself a solicitation”) (PX 146); 1983-38 (PX 148); 1982-65 (PX 150); 1980-65 (PX 151); 1979-66 (PX 153); 1979-13 (PX 154); Corporate and Labor Campaign Guide, at 24.

Congress enacted Title I of BCRA in order to “plug the soft-money loophole” that had allowed parties and candidates to solicit non-federal funds for use in federal campaigns.⁶² Considered in light of this legislative history and manifest purpose, the definitions of “solicit” and “direct” adopted by the FEC “make[] no sense.” *Whitman*, 531 U.S. at 466; *see pp. 4-6 supra*. It is “implausible” to conclude that in enacting a provision intended to *expand* prohibitions against raising soft money for federal elections, and in choosing the word “solicit” to define the scope of those broadened prohibitions, Congress would have intended to *narrow* the definition of that term from both its ordinary meaning and its longstanding interpretation in other parts of FECA. *See Whitman*, 531 U.S. at 469. It is similarly implausible to conclude that Congress selected the term “direct” in order to further broaden existing prohibitions, but simultaneously intended to give that term no independent meaning or effect. Viewing these terms as important components of a “symmetrical and coherent regulatory scheme,” the FEC’s definitions cannot withstand scrutiny.⁶³

An examination of the practical, real-world effects of the Commission’s definitions reinforces these conclusions. The following exchange between the FEC’s General Counsel and then-Vice Chairman Sandstrom is particularly telling:

Mr. Norton: [I]t doesn’t seem to me to take a great deal of cleverness to make a solicitation that is clearly intended to encourage – to persuade a person to make a contribution, without coming out and asking. And I think this definition has the

⁶² 124 S. Ct. at 654; *see McConnell*, 251 F. Supp. 2d at 467–68, 693 (Kollar-Kotelly, J.); 147 Cong. Rec. S2696 (daily ed. Mar. 22, 2001) (statement of Sen. Feingold) (“The soft money ban is the centerpiece of this bill.”) (PX 104); 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (“It is a key purpose of the bill to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates.”) (PX 102).

⁶³ *Brown & Williamson*, 529 U.S. at 132-33 (internal quotation marks and citations omitted); *McConnell*, 251 F. Supp. 2d at 435 (Kollar-Kotelly, J.) (“[I]t must be remembered that the statutory provisions at issue were designed by Congress as a comprehensive approach to the abuses of FECA that legislators and candidates were acutely aware of in their capacity as political actors.”).

potential for great mischief. ... And I'm concerned that this language creates a definition so narrow that it would, frankly, be very easy to avoid.

Vice-chairman Sandstrom: It indeed runs that risk. It indeed, in return for not stifling conversations out there, without having those conversations subject to this Commission's review and complaint — because it's precisely the point the general counsel raises. *It allows a wink and a nod. But I think we're on dangerous ground when we start prosecuting winks and nods.*⁶⁴

Thus, contrary to Congress's goal of ending soft-money solicitations, for example, the FEC definitions do not appear to reach the following communications:

- "I am not permitted to ask for contributions, but unsolicited contributions can be accepted at the following address";
- "All contributions will help the party's election prospects immensely";
- "I suggest you give a million dollars to the state party";
- "I recommend that you call my friend Bob — he'll tell you what to do next";
- "I am particularly grateful to those of you who have contributed so generously to the party and other organizations that are working for our cause";
- "I will not forget those who contribute at this crucial stage";
- "Send all further contributions to the following address";
- "The resources we raise now will allow us to communicate our strategy through Labor Day";
- "Your immediate commitment to this project would mean a great deal to the entire [party] and to me personally";
- "[Y]ou are at the limit of what you can directly contribute to my campaign, but you can further help my campaign by assisting the [state party]."

These communications are not fanciful; the last three are drawn from actual solicitation letters cited by this Court and the Supreme Court as examples of the types of abuses BCRA was

⁶⁴ June 19, 2002 Open Meeting Tr. at 472-73 (PX 180). *Compare McConnell*, 124 S. Ct. at 705 (emphasizing importance of reaching prohibited activities undertaken "after a 'wink or nod'").

designed to eliminate.⁶⁵ Indeed, the possibilities for evasion of the FEC’s impermissibly narrow definition of “solicit” and “direct” are virtually endless. The FEC’s approach is reminiscent of the “magic words” charade that led to the massive “sham issue ad” loophole, which BCRA closed with clear judicial approval.⁶⁶ Here, if a fundraiser does not use magic words like “please give to,” then conduct that the solicitor, the solicitee, and everyone else recognizes as fundraising escapes regulation. Congress plainly did not go to such lengths in BCRA simply to close one loophole and open another.

Additional Flaws. The FEC purported to justify its cramped definitions of “solicit” and “direct” on the ground that a “precise definition in this context is necessary to avoid vague and overbroad application” and thus to steer clear of “constitutional concerns.” 67 Fed. Reg. at 49,087. “Constitutional concerns,” however, are “an area of presumed judicial, rather than administrative, competence,” *Univ. of Great Falls*, 278 F.3d at 1341, and the FEC is entitled to no deference on the “gloss” it puts on regulations to accommodate its views on constitutional law. *See* n.11 *supra*.

Beyond citing these “constitutional concerns,” the Commission made no effort to explain why it chose definitions so contrary to Congress’s expressed goals. The E&J for those definitions does not explain, for example, why the FEC departed from the longstanding and well-established meaning of “solicit” governing the FECA rules on corporate and union PACs. *See* pp. 35-36 *supra*. Nor does it offer any justification for defining “direct” in a manner inconsistent with the plain meaning of that term and the underlying purposes of BCRA. Thus, even if

⁶⁵ *See* *McConnell*, 251 F. Supp. 2d at 473 (Kollar-Kotelly, J.) (quoting a “solicitation letter from Senator McConnell to potential donor”); *id.* at 480 (quoting “a candidate’s solicitation letter”); *McConnell*, 124 S. Ct. at 672 n.60, 683 (quoting same letter).

⁶⁶ *See* 2 U.S.C. § 434(f)(3)(A)(i); *McConnell*, 124 S. Ct. at 688–689; *McConnell*, 251 F. Supp. 2d at 650 (Kollar-Kotelly, J.).

Congress's intent were not clearly expressed in the text, structure, history, and purposes of BCRA, the FEC's interpretations of "solicit" and "direct" would not be entitled to deference in a *Chevron* step-two analysis, would not be permissible and reasonable readings of those terms, and would violate the APA requirements for a "reasoned analysis." *See* pp. 6-7 and n.13 *supra*.

Indeed, far from *justifying* the FEC's definitions of "solicit" and "direct," the Commission's attempts to explain those definitions are perhaps the most damning evidence of their illegitimacy. As noted above, then-Commissioner Sandstrom, who introduced the amendment containing the definitions, responded to concerns voiced by the General Counsel that the definition of "solicit" risked massive circumvention by stating, "[i]t indeed runs that risk It allows a wink and a nod."⁶⁷ And in a particularly telling passage in its E&J, the FEC stated that its definition of "solicit" is intended to "craft clear and understandable definitions marking the boundary *between permissible and impermissible solicitations* by candidates, parties, or their agents in the realm of non-Federal funds." 67 Fed. Reg. at 69,942 (emphasis added). By its own admission, therefore, the FEC has defined "solicit" to capture only a *subset* (what it calls "*impermissible solicitations*") of the communications that properly fall within the meaning of that term. Congress, of course, drew no such distinction in BCRA, which prohibits *all* efforts by covered parties to "solicit" soft money.

The FEC may seek to characterize the Supreme Court's mention in *McConnell* of the definitions of "solicit" and "direct" as an approval of the current regulations. Any such argument would be incorrect. The Supreme Court referred to the FEC's definitions in the course of rejecting the plaintiffs' argument that BCRA's ban on soft-money solicitations impermissibly "outlaws *any* participation" by national parties in state-party activities, "including merely sitting

⁶⁷ June 19, 2002 Open Meeting Tr. at 473 (emphasis added).

down at a table and engaging in collective decisionmaking” about fundraising strategies. *McConnell*, 124 S. Ct. at 670. The Court countered that, even according to BCRA’s sponsors, the Act “permits a wide range of joint planning and electioneering activity” and then noted that “[t]he FEC’s current definitions of § 323(a)’s terms *are consistent with that view.*” *Id.* (emphasis added). But the Court nowhere suggested that those definitions reflect permissible interpretations of the Act. To the contrary, the Court’s treatment of “solicitation” elsewhere in the majority opinion contradicts the FEC’s definitions.⁶⁸ The Supreme Court’s broad understanding of “solicit” is also consistent with this Court’s view.⁶⁹

B. The FEC’s Narrowed Definition of “Agent” Violates Congressional Intent and Invites Gross Abuse and Circumvention.

As part of its “effort to plug the soft-money loophole,” *McConnell*, 124 S. Ct. at 654, Congress extended many of Title I’s key prohibitions to reach the “agents” of national, state, and local committees, federal candidates, federal officeholders, and state candidates. BCRA § 101(a); FECA § 323(a)-(b), (d)-(f); 2 U.S.C. § 441i(a)-(b), (d)-(f). The regulation of such “agents” is one of the steps “designed to ensure the integrity of Title I”; agents are among the actors Congress targeted because they are “uniquely positioned to serve as conduits for corruption.” *McConnell*, 251 F. Supp. 2d at 652 (Kollar-Kotelly, J.); 124 S. Ct. at 668 n.51. Other central provisions of FECA and BCRA also apply both to designated principals and to

⁶⁸ See, e.g., *id.* at 650 (“For example, a federal legislator running for reelection *solicited* soft money from a supporter by *advising* him that even though he had already ‘contributed the legal maximum’ to the campaign committee, he could still make an additional contribution to a joint program supporting federal, state, and local candidates of his party. Such *solicitations* were not uncommon.”) (emphasis added) (footnotes omitted); *id.* at 652 (describing as an example of solicitation instances in which candidates “sometimes *suggest[ed]* that corporations or individuals make donations to interest groups that run ‘issue ads’”) (emphasis added) (brackets in original) (internal quotation marks and citations omitted).

⁶⁹ See *McConnell*, 251 F. Supp. 2d at 473, 478 (Kollar-Kotelly, J.) (describing examples of solicitations in which speakers “encourage[d],” “suggest[ed],” “requested[ed],” and “recommend[ed]” soft-money contributions).

their “agents,” including provisions governing electioneering communications, independent expenditures, and coordinated communications.⁷⁰

Although Congress intended to take a broad, comprehensive approach in Title I, the new regulations dramatically *narrow* the Commission’s traditional definition of what constitutes an “agent.” They provide that “agent means any person who has *actual authority*, either express or implied, to engage in” certain activities on behalf of a principal subject to BCRA. 11 C.F.R. § 300.2(b) (emphasis added). Conversely, as the E&J emphasizes, this narrowed definition excludes “individuals who do not have any actual authority to act on [the principal’s] behalf, but only ‘*apparent authority*’ to do so.” 67 Fed. Reg. at 49,082 (emphasis added). This exemption of agents acting “only” with “apparent authority” is carried through to the new regulations on coordinated communications.⁷¹

The Commission’s exclusion of agents acting “only” with “apparent authority” from the scope of BCRA opens a gaping new loophole and sharply departs from general agency principles, governing case law, and the Commission’s own precedents. As the Supreme Court has emphasized, “under general rules of agency law, principals are liable when their agents act with apparent authority The apparent authority theory has long been the settled rule in the federal system.” *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565, 567 (1982) (*re* Sherman Act liability) [“*ASME*”]. An agent’s “actual” authority is determined by the instructions (express or implied) given directly from the principal to the agent. *See* Restatement (Second) of Agency § 7 (1958). “Apparent” authority, on the other hand, focuses on the

⁷⁰ *See, e.g.*, 2 U.S.C. §§ 431(17)(B) (independent expenditures), 441a(a)(7)(B)-(C) (coordinated expenditures, including with respect to electioneering communications).

⁷¹ *See* 11 C.F.R. § 109.3. Plaintiffs have challenged the narrowed definition in the new coordination rules, which fails for all of the reasons set forth in this subsection. *See* n.17 *supra*.

“manifestations” that the principal makes to third persons or the public at large about the agent’s authority. *Id.* § 8. As the D.C. Circuit has emphasized:

“Apparent authority” exists where the principal engages in conduct that “reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.” ... For there to be apparent authority, however, the third party must not only believe that the individual acts on behalf of the principal but, in addition, “either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.”⁷²

Although “[a]pparent authority often coincides with actual authority,” the former is much easier to establish because it is based on an objective, reasonable person standard and does not require a third party to prove what actually transpired between principal and agent.⁷³ In addition, basing liability on “apparent authority” places a “powerful incentive” on principals to ensure that their agents do not abuse the positions they hold, thereby maximizing compliance with the law. *ASME*, 456 U.S. at 572-73.

Congressional Intent. The Commission’s narrowed definition of “agent” does not survive *Chevron* step one. To begin, it is irrational to construe a statute designed to combat the *appearance* of corruption as leaving unregulated the acts of agents exercising *apparent* authority.⁷⁴ In addition, prior to BCRA, the Commission had consistently defined “agent” to

⁷² *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 266 (D.C. Cir. 1998) (quoting Restatement (Second) of Agency § 27 & cmt. a). *See also* 3 Am. Jur. 2d Agency § 75 (2003) (“Apparent authority, or ostensible authority, is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing.”).

⁷³ Restatement (Third) of Agency § 2.03, cmt. c (Tentative Draft Nov. 2, 2001) (“Apparent authority, when present, often has the effect of reinforcing the legal effect of actual authority when actual authority has been conferred by a principal but is not readily provable by a third party.”). *See also* May 8, 2002 Mem. from Commissioner Thomas to Commission, at 3 (“There are likely to be situations where we will not be able to prove actual authority because witnesses will not recall and documentary evidence is absent. Yet apparent authority might be shown.”) (PX 13).

⁷⁴ On the importance of combating the appearance of corruption, *see, e.g., McConnell*, 124 S. Ct. at 660-61, 664-65; 251 F. Supp. 2d at 663-64 (Kollar-Kotelly, J.); *see also Colorado II*, 533 U.S. at 440-41.

include those with apparent authority. A longstanding Commission rule governing expenditures defined “agent” as a person who either has “actual oral or written authority, either express or implied,” or “has been *placed in a position within the campaign organization where it would reasonably appear* that in the ordinary course of campaign-related activities he or she may authorize expenditures.” 11 C.F.R. § 109.1(b)(5) (2001) (emphasis added). The Commission used this same approach in defining an “agent” for purposes of regulating contributions, emphasizing that FECA reaches the actions of an agent who “*occupies a position that would lead a third party to believe that he is authorized to receive contributions.*”⁷⁵ This is, therefore, another area in which Congress crafted new statutory provisions using “a well-established term,” which strongly suggests its intent for “the term to be construed in accordance with pre-existing regulatory interpretations.” *Toyota Motor*, 534 U.S. at 193-94; *see* p. 17 & n. 31, pp. 25, 36 *supra*.

Moreover, it is “well established that ‘[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’” *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (defining “employee” in accord with “common-law agency doctrine”) (citation omitted). The Commission *admits* that “under the common law of agency, an ‘agent’s authority may be actual or apparent,” yet argues

⁷⁵ Nov. 10, 1994 FEC Gen. Counsel’s Rep., MUR 3585, at 35-36, 39-40 (emphasis added) (PX 156). The General Counsel explained further that, “[e]ven if an agent does not enjoy express or implied authority, ... a principal may be liable for the actions of his agent on the basis of apparent authority. ... *An agent is imbued with apparent authority where the principal has held the agent out as having such authority or has permitted the agent to represent that he has such authority, so that a reasonable person would believe the agent to have such authority.* ... Apparent authority commonly exists when a principal appoints an agent to a position with generally recognized duties or responsibilities. *See* Restatement (Second) of Agency § 27 at 104 (‘apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties’).” Nov. 10, 1994 FEC Gen. Counsel’s Rep., MUR 3585, at 37-38 (emphasis added).

that “full incorporation” of the common-law definition of “agency” “is not necessary to effect the statute’s underlying purposes.” 67 Fed. Reg. at 49,082. The Commission’s entire reasoning on this point in its E&J is as follows (*id.*):

[A]pparent authority is largely a concept created to protect innocent third parties who have suffered monetary damages as a result of reasonably relying on the representations of individuals who purported to have, but did not actually have, authority to act on behalf of principals. Unlike other legislative areas, such as consumer protection and anti-fraud legislation, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations. Rather, the Commission interprets Title I of BCRA to use agency concepts to prevent evasion or avoidance of certain prohibitions and restrictions by individuals who have actual authority and who do act on behalf of their principals. In this light, apparent authority concepts are not necessary to give effect to BCRA.

This illogic fails on many levels. The Commission’s emphasis on “detrimental reliance on unauthorized representations” appears to confuse apparent authority with the separate doctrine of estoppel.⁷⁶ Moreover, the doctrine of apparent authority is not limited to areas analogous to “consumer protection and anti-fraud legislation,” nor is it limited to the model in which a victim sues for having relied on the representations of the agent. Liability based on an agent’s apparent authority is recognized in antitrust, RICO, labor and employment law, securities, and many other areas involving many different models of liability — including cases dealing with campaign relationships and fundraising practices.⁷⁷ In addition, even if apparent

⁷⁶ See Restatement (Second) of Agency § 8B(1) (1958); *id.* § 8 cmt. d (comparing apparent authority with estoppel).

⁷⁷ On cases dealing with campaign practices, see *Jund v. Town of Hempstead*, 941 F.2d 1271, 1280 (2d Cir. 1991) (holding that town and county Republican Committees were liable under RICO and § 1983 for their agents’ participation in a coercive political contribution scheme because the agents “were working within the scope of their ‘general apparent authority’”); *Karl Rove & Co. v. Thornburgh*, 824 F. Supp. 662, 668-69, 671 (W.D. Tex. 1993) (predicating both jurisdiction and liability in part on apparent authority where candidate Thornburgh “knowingly allowed Dickman to perform acts which any reasonable vendor would interpret to mean Dickman was Thornburgh’s agent”), *aff’d*, 39 F.3d 1273, 1297-98 (5th Cir. 1994) (affirming with respect to actual authority; unnecessary to rely on apparent authority given the presence of actual authority); see also *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970 n.9 (D.C. Cir. 1998) (suggesting that “apparent authority” would be sufficient to ground FECA civil liability on an agent’s acts, whether or not the agent “acted to further the principal’s interests”). On

(Footnote continued)

authority were limited to areas analogous to “consumer protection,” BCRA *is* such a measure and *was* “created to protect innocent third parties.” The American people most certainly have suffered grievous harm (including economic loss) as a result of the soft-money system; those who miss the analogy to consumer protection miss the point of BCRA and the lessons of the findings in *McConnell*.

Promotion of Congressional Goals. The proper approach is marked out in *ASME*, applying the doctrine of apparent authority to the Sherman Act. The Supreme Court concluded that “[t]he apparent authority rule is also consistent with the congressional desire” of the antitrust laws, particularly because Congress intended for the Sherman Act to “sweep broadly.” 456 U.S. at 573 n.11. When a principal “cloaks its [agents] with the authority of its reputation,” this can lead to situations that are “rife with opportunities” for abuse. *Id.* at 570-71. If the principal is subject to liability for the actions of its agents in these circumstances, the principal will feel “pressure” to ensure that “systematic steps” are taken to comply with the law. *Id.* at 572-73.

That analysis applies with equal force here. Congress intended for Title I to sweep broadly in order to eliminate the pernicious soft-money system root and branch. As several commenters emphasized, the only way to achieve this goal is to make principals responsible for the fundraising actions of all agents whom they cloak with apparent authority.⁷⁸ Otherwise,

cases dealing with other areas of the law, *see ASME*, 456 U.S. at 568 (“In a wide variety of areas, the federal courts ... have imposed liability upon principals for the misdeeds of agents acting with apparent authority.”); *AOTOP, LLC v. NLRB*, 331 F.3d 100, 103-04 (D.C. Cir. 2003) (application of apparent authority to NLRA issues); *Makins v. District of Columbia*, 277 F.3d 544, 548 (D.C. Cir. 2002) (same with respect to Title VII issues); *Lopez v. United States*, 201 F.3d 478, 481 (D.C. Cir. 2000) (same with respect to forfeiture proceedings).

⁷⁸ As The Campaign and Media Legal Center argued, principles of apparent authority “are, perhaps, particularly relevant to the world of politics. In fundraising, some individuals are given titles by a party or campaign suggesting to the public that they have the power to act for the candidate or party. In these instances, we believe that the candidate or party should bear responsibility for the actions of those who are authorized to raise funds in their name. This will have the salutary effect not only of maintaining the broad prohibition of soft money; it will also protect these agents by forcing their candidates and parties to put them on proper notice of what is forbidden, in order to avoid exposing *themselves* to liability.” May 29, 2002 Comments, at 6 (PX 14). *See also* May 29, 2002 (Footnote continued)

principals could evade liability “by maintaining a studied ignorance of the activities undertaken by their subordinates.”⁷⁹ This would lead precisely to the danger identified in *ASME* — a principal “could avoid liability by ensuring that it remained ignorant of its agents’ conduct, and [federal law] would therefore encourage [the principal] to do as little as possible to oversee its agents.” 456 U.S. at 573. Meanwhile, so long as they kept their principals sufficiently ignorant of their particular practices — or at least communicated only through winks and nods — agents with apparent authority could exploit their positions to continue soliciting and directing soft money contributions, continue peddling access to their principals, and continue by virtue of their *apparent* authority to perpetuate the *appearance* if not the reality of corruption.

Additional Flaws. The Commission’s analysis therefore fails *Chevron* step one. But even if there were plausible arguments that Congress had left this issue entirely up to the Commission, the new regulation would fail *Chevron* step two and the APA’s requirements for a “reasoned analysis” of the rulemaking issues and evidence. For all of the reasons set forth above, excluding agents with apparent authority from the scope of BCRA is unreasonable in light of the language, history, purposes, and objectives of Title I. Moreover, the Commission in its E&J failed to follow the governing analysis set forth in cases like *ASME*; failed altogether to consider whether exempting agents with apparent authority might perpetuate the appearance of corruption that BCRA was designed to eliminate; failed to evaluate the potential dangers of

Comments of Common Cause and Democracy 21, at 16-17 (PX 15), Center for Responsive Politics, at 1 (PX 16), Sen. McCain *et al.*, at 14 (PX 17) (discussing importance of apparent authority doctrine in the context of “the political world”; “candidates and parties must take seriously their responsibility to make sure that their employees are familiar with and follow the new law”), DNC, DSCC, and DCCC, at 7-8 (PX 18), Michigan Democratic Party, at 7 (PX 19). *See also Jund*, 941 F.2d at 1280 (liability of political party committees for the unlawful solicitation activities of their agents based on an apparent authority “theory of liability will encourage unincorporated associations to police their agents and their actions”).

⁷⁹ May 29, 2002 Comments of The Campaign and Media Legal Center, at 7.

“gross abuse” and circumvention that would be opened by allowing agents with apparent authority to operate just beyond BCRA’s reach, *Orloski*, 795 F.2d at 165; failed to explain why it was necessary or appropriate to abandon the broad definition of “agent” that it had followed for the past generation; and failed to consider whether compliance with BCRA would be enhanced by placing the burden on principals to take reasonable steps to train and monitor *all* of their agents. *See pp. 6-7 & n.13 supra.*

C. The FEC Regulation Governing State Party Fundraisers Violates Congressional Intent and Invites Gross Abuse and Circumvention.

BCRA provides that, “notwithstanding” that a federal candidate or officeholder may not solicit, receive, direct, transfer, or spend soft money, he or she “may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.” BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3) [“state party fundraiser provision”]. Congress recognized that any form of participation in such an event could be deemed a “solicitation,” and therefore clarified through this provision that “attend[ing], speak[ing], or be[ing] a featured guest” at a state party fundraiser does not in itself constitute solicitation or direction.

The Commission seized on these provisions as permission for it to carve out a “total exemption” from the Act’s prohibition against solicitation or direction of soft money. 67 Fed. Reg. at 49,108. Under the Commission’s final regulation, a federal candidate or officeholder “may speak at [a fundraising event for a State, district, or local committee of a political party] *without restriction or regulation.*” 11 C.F.R. § 300.64(b) (emphasis added). Accordingly, in purportedly implementing a statute that bars solicitation by federal officeholders and candidates, the FEC has issued a rule permitting federal candidates and officeholders to engage in overt and blatant solicitation and direction of soft money in connection with federal elections so long as

they do so in the context of what is deemed “a fundraising event for a State, district, or local committee of a political party.” *Id.* § 300.64. The FEC’s “total exemption” — approvingly labeled by one Commissioner as a “total carve out”⁸⁰ — is contrary to Congress’s clearly expressed intent, represents an unreasonable interpretation of BCRA, and violates the APA in numerous other respects.

Statutory Language and Structure. The state party provision states: “Notwithstanding [the soft-money solicitation ban], a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.” BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3). It does not say that he or she may “solicit” — a word Congress knew how to use, as is evident elsewhere in BCRA. It states that a federal candidate or officeholder may “speak” at a state party fundraiser; it does not state such a person may “speak without restriction or regulation.” In addition, the “notwithstanding” clause “signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override *conflicting* provisions of any other section.” *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). As applied to BCRA, that rule of construction dictates that the state party fundraiser provision overrides the general anti-solicitation ban only to the extent there is a conflict between the two. Accordingly, as suggested by its natural and straightforward reading, the state party fundraiser provision indicates only that any of the listed activities — attending, speaking at, or being a featured guest at a designated event — will be permitted even if they would otherwise violate the ban on solicitations and directions. But with respect to any activity that goes *beyond* those specifically listed — including

⁸⁰ June 20, 2002 Open Meeting Tr. at 107 (statement of Commissioner Toner) (PX 181); *see* Plaintiffs’ Mot. *Re* Exhibits at 8-9.

and especially solicitation and direction of soft money — the general prohibition controls. Plainly, this limited clarification neither indicates that Congress intended a wholesale exemption from the general soft-money solicitation ban nor authorized the FEC to create one.⁸¹

BCRA’s structure reinforces this conclusion. The section immediately following the state party fundraiser provision *explicitly* sets forth circumstances in which soft-money solicitations are permitted. *Compare* new 2 U.S.C. § 441i(e)(3) (entitled “Fundraising Events”) *with* new 2 U.S.C. § 441i(e)(4) (entitled “Permitting Certain Solicitations”). The latter section allows solicitation by federal candidates and officeholders on behalf of nonprofit organizations pursuant to specified conditions and restrictions. The juxtaposition of these two provisions, and the difference in the way in which they are formulated, indicates that although Section 441i(e)(4) is an exception to the general soft-money solicitation ban, Section 441i(e)(3) — the state party fundraiser provision — is not.

Legislative History and Congressional Purpose. BCRA’s legislative history and Congress’s evident purpose similarly confirm that Congress neither intended nor authorized the FEC’s “total carve out.” *See* n.80 *supra*. As the sponsors repeatedly emphasized, BCRA was intended to eliminate the corruption and appearance of corruption resulting from federal officeholders and candidates raising money for themselves or organizations helpful to their election prospects.⁸² To this end, BCRA established a rule that is both clear and “simple:

⁸¹ *See also* 2A Statutes and Statutory Construction § 47:08, at 236 (“[W]here there is doubt concerning the extent of the application of the proviso on the scope of another provision’s operation, the proviso is strictly construed.”) (citations omitted); *id.* § 47:11, at 250-51 (“[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.”) (citations omitted).

⁸² *See McConnell*, 124 S. Ct. at 683 (“Large soft-money donations at a candidate’s or officeholder’s behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder.”); *McConnell*, 251 F. Supp. 2d at 708 (Kollar-Kotelly, J.) (“[BCRA] is targeted at reducing the corrosive influence of nonfederal funds on federal elections.”).

Federal candidates and officeholders cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee — national, state, or local.” 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (PX 102). The Commission’s initial proposed rule relied on this legislative history and purpose, and therefore cautioned that, “while [federal candidates or officeholders] may attend, speak, or be a featured guest at a State or local party fundraising event, they cannot solicit funds at any such event.” 67 Fed. Reg. at 35,672.

More generally, as both the three-judge District Court and the Supreme Court recognized and endorsed, BCRA was designed to “plug the soft-money loophole,” through which contributors were able to “bu[y] influence and access with Federal officeholders and candidates.”⁸³ It defies logic and “common sense” to conclude that in a law designed to close loopholes, Congress intended *sub silentio* to authorize the opening of another by allowing federal candidates and officeholders to solicit and direct soft money at any designated event. *Brown & Williamson*, 529 U.S. at 133. Had Congress intended that result, it surely would have said so expressly — as it very easily could have done by adding “solicit” and “direct” to the permitted activities listed in the state party fundraiser provision.⁸⁴

Additional Flaws. The FEC purported to justify its interpretation of the state party fundraiser provision on two grounds, neither of which supports the agency’s position. *First*, the Commission explained that its “total exemption” construction was “compelled by the plain

⁸³ *McConnell*, 124 S. Ct. at 654; 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (PX 102); *see also* 147 Cong. Rec. S2696 (daily ed. Mar. 22, 2001) (statement of Sen. Feingold) (PX 104).

⁸⁴ The opportunity for abuse of this loophole is exacerbated by the lack of any definition of what constitutes a “fundraising event for a State, district, or local committee of a political party.” BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3). Thus, nothing prevents a federal candidate or officeholder from calling together a group of wealthy donors, labeling the gathering a “fundraising event for a State, district, or local committee of a political party,” and conducting unrestricted solicitation of soft money at such an event.

language of the section and the structure of the section within BCRA ... because the statutory section is styled as such[;] [t]o conclude otherwise would require the Commission to read the restrictions itemized in the general prohibition into a statutory exemption that clearly and unambiguously excludes those restrictions by its own terms.” 67 Fed. Reg. at 49,108. As explained, this analysis is incorrect. The state party fundraiser provision is not “styled” as a “total exemption,” and it does not “clearly and unambiguously exclude th[e] restrictions” of the general solicitation ban. To the contrary, whereas the solicitation ban is phrased in terms of “solicit[ing]” and “direct[ing]” soft money contributions, the state party fundraising provision is phrased in terms of “speak[ing]” at designated events. *See* BCRA § 101(a); FECA §§ 323(e)(1), (3); 2 U.S.C. §§ 441i(e)(1), (3). There is no conflict between those prohibitions, much less a “clear and unambiguous” one.⁸⁵

Second, the FEC purported to justify its “total exemption” from the solicitation ban on the ground that any other construction would “raise serious constitutional concerns,” requiring “the Commission to regulate and potentially restrict what candidates and officeholders say at political events.” 67 Fed. Reg. at 49,108. The Commission’s constitutional views receive no deference, *see* p. 6 & n.11 *supra*, and in any event do not survive scrutiny. The Commission offered no explanation of why monitoring the speech of candidates and officeholders would be more difficult or intrusive at state party fundraising events than in other settings not controlled by the “total exemption.” Nor did the FEC even attempt to distinguish the burden of regulating communications under other federal laws that draw the line of acceptable political speech at

⁸⁵ Indeed, the FEC’s staff previously recognized as much, concluding in its draft final regulations that the position opposite from that ultimately adopted by the FEC — that federal candidates and officeholders may not solicit soft money at state party fundraisers — is “consistent with the statutory language.” Agenda Doc. No. 02-44, “Final Rule for Excessive and Prohibited Contributions: Non-Federal Funds or Soft Money,” June 17, 2002, at 184-85 (PX 20).

“solicitation.”⁸⁶ This Court and the Supreme Court in *McConnell* rejected the notion that there is any constitutional infirmity in restricting “what candidates and officeholders say” in connection with the solicitation and spending of money.⁸⁷ Thus, even if the Commission had Congressional authority to engage in this “total carve out,” its analysis is not entitled to deference and violates the standards of reasoned decisionmaking under the APA. *See pp. 6-7 & n.13 supra.*

D. The “Grandfather” Provision in the FEC Regulation Defining an Affiliated Entity of a National Party Violates Congressional Intent and Invites Gross Abuse and Circumvention.

To thwart easy circumvention, new FECA § 323(a)(2) extends the prohibitions on national party committees imposed by § 323(a)(1) to the national parties’ “agents” and to any entity “that is directly or indirectly established, financed, maintained, or controlled by” a national party. BCRA § 101(a); FECA § 323(a)(2); 2 U.S.C. § 441i(a)(2). The Commission’s new regulations implement § 323(a)(2) in a manner that directly contravenes BCRA’s text, structure, history, and purposes. The Commission defined the operative component of § 323(a)(2) — “directly or indirectly establish, finance, maintain, or control” — according to a set of factors that collectively determine whether the particular entity should be deemed to be affiliated with, and therefore bound by, the prohibitions imposed on sponsoring party committees. *See* 11 C.F.R. § 300.2(c). These factors are based on pre-BCRA “affiliation” concepts contained in 11 C.F.R. §

⁸⁶ *See, e.g.*, 5 U.S.C. § 7323(a)(2); 5 C.F.R. § 734.208, Example 2 (interpreting federal Hatch Act as providing that a federal employee “may give a speech or keynote address at a political fundraiser when he is not on duty, as long as the employee does not solicit political contributions”).

⁸⁷ *See McConnell*, 124 S. Ct. at 682-84 (upholding ban on candidate and officeholder solicitation in the context of federal and non-federal elections); *McConnell*, 251 F. Supp. 2d at 184 (per curiam) (same); *McConnell*, 251 F. Supp. 2d at 708 (Kollar-Kotelly, J.) (holding new FECA §323(e) constitutional because it “closely circumscribes” the activities of federal candidates and officeholders “to prevent the kinds of problems that developed with their solicitation of nonfederal funds”).

100.5(g),⁸⁸ and create a “totality of the circumstances” test in which each individual factor must be weighed and “examined in the context of the overall relationship” between the entity and the national party, 11 C.F.R. § 300.2(c)(2).⁸⁹

The Commission, however, has arbitrarily excluded potentially relevant information from its review by promulgating a “grandfather” provision that categorically excludes from consideration any activity or aspect of the party-entity relationship that occurred before November 6, 2002, BCRA’s effective date.⁹⁰ Accordingly, the FEC has decided to blind itself to obvious efforts by parties to establish, maintain, control, or fund “shadow” entities prior to the date that BCRA took effect. This conflicts with Congress’s clearly expressed intent, represents an unreasonable interpretation of the statutory language, and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Statutory Language and Structure. The text of § 323(a)(2) states that the soft-money prohibitions in § 323(a)(1) apply to any national party committee, the committee’s agents, and to “any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.” BCRA § 101(a); FECA § 323(a)(2); 2 U.S.C. § 441i(a)(2). The plain-English statutory reference to “any entity” forbids the FEC’s rule, which construes this provision

⁸⁸ Under FECA both before and after BCRA, two “affiliated” committees are subject to a common contribution limit. 2 U.S.C. § 441a(a)(5); 11 C.F.R. § 100.5(g).

⁸⁹ These factors also apply to the determination whether so-called “leadership PACs” established by federal candidates and officeholders are affiliated with their sponsors and therefore subject to the soft-money prohibitions in new FECA § 323(e)(1). Plaintiffs challenged those factors as applied to soft-money leadership PACs in their complaint, *see* First Am. Compl. ¶¶ 43–47, but have not briefed that challenge on the understanding that the Commission treats such organizations as affiliated under the factors set forth in 11 C.F.R. § 300.2(c). If the FEC fails to confirm this understanding to this Court, the plaintiffs will revive the issue.

⁹⁰ That provision states: “On or after November 6, 2002, an entity shall not be deemed to be directly or indirectly established, maintained, or controlled by another entity unless, based on the entities’ actions and activities *solely after* November 6, 2002, they satisfy the requirements of this section.” 11 C.F.R. § 300.2(c)(3) (emphasis added).

as applying only to *some* entities, *i.e.*, those where the indicia of affiliation appeared after November 6, 2002. Moreover, the language contains neither a temporal limitation nor any other indication that it is only to have prospective effect. To the extent any further analysis of the text is necessary or appropriate, Congress’s use of the word “established” — an inherently retrospective term that focuses on the formation of the entity — confirms that the affiliation inquiry was not intended to be artificially limited in the manner the FEC has prescribed. The FEC therefore lacked authority to create the “safe harbor” set forth in 11 C.F.R. § 300.2(c). Agencies, like courts, “may not create ambiguity where none exists.” *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1556 (D.C. Cir. 1991) (interpretation is invalid if it “rewrite[s] the policy or add[s] meaning to it that is not there”); *see also* pp. 4-5 *supra*.

Congressional Purposes and Objectives. The “grandfather” regulation openly flouts the basic purpose of BCRA as expressed through its structure and legislative history: to close loopholes that had allowed soft money to corrupt federal elections. An example of this rule’s practical effect illustrates how it undermines Congress’s unambiguously expressed intent.

In the first FEC enforcement proceeding under BCRA, the complaint alleged, *inter alia*, that a recently formed organization known as the “Leadership Forum” was in violation of new FECA § 323(a) because it was both soliciting soft money and had been “established, financed, maintained, or controlled” by the National Republican Congressional Committee (NRCC). *See* Mar. 27, 2003 FEC First Gen. Counsel’s Rep., MUR 5338, at 1-2 (PX 157). The FEC’s General Counsel found that the Leadership Forum had been incorporated on November 5, 2002, *one day before the § 300.2(c)(3) “grandfather” period expired*. The organization’s leadership included the former chief of staff to then-House Majority Whip Delay; a former chairman of the NRCC, who boasted on his law firm’s website that he “serves as an adviser to senior GOP congressional

leaders”; the former deputy counsel for the NRCC; and a lawyer who represents “the former and current Speaker of the United States House of Representatives, Newt Gingrich and Dennis Hastert, respectively.” *Id.* at 5-8. Attached to the complaint were a number of news articles, including one that quoted the chairman of the NRCC as saying, five days before the Leadership Forum first registered with the IRS, that “[w]e want to make sure there are adequate conduits for our supporters to get our message out,” that the entire House leadership was involved in the effort, and that “[w]e’re having stuff set up right now.” *Id.* at 8 (internal quotation marks and citations omitted). The same article described the individual who would soon become president of the Leadership Forum as “spearhead[ing] a unified effort to legally raise soft money to help Republican candidates.” *Id.*

Despite this overwhelming evidence that the Leadership Forum had been “established” by the NRCC, the FEC — relying on the “grandfather” clause it had created out of whole cloth — ruled that the Forum had not been established by the NRCC.⁹¹ Under the “grandfather” clause, the Commission was barred from applying the affiliation factors to any pre-November 6, 2002 conduct. Using this loophole, the national party committees were thus able to establish entities for the purpose of raising and spending soft money in connection with federal elections, entities that continue to function to this day.⁹²

⁹¹ The General Counsel explained that “[a] number of facts would ordinarily raise questions as to whether the NRCC played a substantial role in establishing the Forum However, every comment in the [news] article refers to alleged acts that took place, or were taking place, prior to November 6, 2002. More to the point, the comments refer at most to acts undertaken to establish the Forum prior to November 6, 2002. There are no similar facts or alleged comments on the record that occurred after November 6, 2002.” Mar. 27, 2003 FEC First Gen. Counsel’s Rep., MUR 5338, at 12.

⁹² The Leadership Forum is still operating and raising soft money. *See, e.g.*, Chris Cillizza, *GOP Group Joins Soft Money Fray*, Roll Call, Nov. 24, 2003 (PX 174).

Additional Flaws. The FEC purported to justify the “grandfather” regulation as necessary to protect organizations from being “penalize[d] for the way they ordered their affairs before the effective date of BCRA” and to “help ensure that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed.” 67 Fed. Reg. at 49,084. This justification does not satisfy the standard of reasoned deliberation necessary either to sustain agency action under the APA or entitle it to *Chevron* deference. *See pp. 6-7 supra.* And even if it did, it would not authorize the FEC to promulgate a rule that is contrary to the language and purpose of the statute.

The FEC’s concern that entities established or controlled by a national party prior to BCRA’s effective date will be “penalized” for their pre-BCRA conduct is inconsistent with the nature of the analysis that the Commission itself prescribed. Under the affiliation inquiry set forth in 11 C.F.R. § 300.2(c), no one factor or group of factors is dispositive in determining whether an entity is subject to the soft-money prohibitions of new FECA § 323(a)(1). Contrary to the FEC’s justification, there is thus no need for a categorical exclusion of pre-BCRA evidence of affiliation. Without such an exclusion, entities established or maintained by party committees before November 6, 2002 will not necessarily be deemed affiliated *because* of that pre-BCRA activity; nor, however, will they necessarily be deemed unaffiliated *despite* that activity. And where such an entity wishes to establish that its relationship with the party committee has ended, the FEC regulations afford a mechanism specifically for that purpose.⁹³

The irrationality of the FEC’s explanation is starkly illuminated by the case of the Leadership Forum, which was not a preexisting entity that haplessly found itself caught in a rule

⁹³ *See* 11 C.F.R. § 300.2(c)(4); 67 Fed. Reg. at 49,084 (“Paragraph (c)(4) ... provides a mechanism for a sponsor or an entity to request a determination by the Commission through the advisory opinion process that the sponsor is no longer deemed to finance, maintain, or control an entity, even if the sponsor established the entity.”).

change. To the contrary, it was clearly the product of a last-minute effort to create an entity that could brazenly slide through the loophole created by the Commission’s regulation. The Commission’s stated rationale plainly does not apply in such circumstances, and a rule that requires the FEC to blind itself to this reality is irrational and arbitrary.

E. The Commission’s Regulations on “Federal Election Activity” Violate Congressional Intent and Invite Massive Circumvention of BCRA’s Soft-Money Restrictions on State, District, and Local Party Committees.

“Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation,” *McConnell*, 124 S. Ct. at 673, Congress recognized that “BCRA’s restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations,” *id.* at 670-71. To avoid such “wholesale evasion” of the federal soft-money ban, *id.* at 671, and to plug the existing state-party soft-money loophole, *id.* at 675, Congress struck a carefully considered balance between “Federal election activity,” which is subject to BCRA, and purely state election activity, which is not.

Yet, contrary to this clear legislative language and purpose, the Commission has defined the operative terms of the state soft-money rules in a manner that not only permits, but openly invites, precisely the sort of evasion that Congress sought to preclude. Thus, where BCRA covers *all* “get-out-the-vote” [“GOTV”] activity “conducted in connection with an election in which a candidate for Federal office appears on the ballot,”⁹⁴ and *all* “voter registration activity” during the period that begins 120 days before a federal election,⁹⁵ the Commission arbitrarily limited these crucial statutory terms to those GOTV and voter registration efforts that involve

⁹⁴ BCRA § 101(b); FECA § 301(20)(A)(ii); 2 U.S.C. § 431(20)(A)(ii).

⁹⁵ BCRA § 101(b); FECA § 301(20)(A)(i); 2 U.S.C. § 431(20)(A)(i).

some type of affirmative assistance to the would-be voter, such as transportation to the polls or help in completing voter registration forms.⁹⁶ Similarly, where BCRA covers *all* “voter identification” activity conducted in connection with a federal election,⁹⁷ the Commission arbitrarily excluded the purchasing of voter lists⁹⁸ — even though the Commission’s General Counsel described list acquisition as a “key means of identifying voters.”⁹⁹ And, where BCRA’s state party rules apply to “generic campaign activity,”¹⁰⁰ the Commission simply rewrote the statute by replacing that term with the term “public communication”¹⁰¹ — despite the fact that Congress expressly defined “generic campaign activity” without reference to any such limitation and, indeed, in the very next paragraph of the Act separately defined “public communication.”

To make matters worse, the Commission went further in its narrowing of the law as enacted, opening further avenues for evasion of the state soft-money rules. The Commission, for example, manufactured an exception to the definitions of “voter identification” and GOTV activities where they are undertaken by associations of candidates for state or local office and refer only to state or local candidates.¹⁰² It manufactured further temporal limits on the state soft-money rules, above and beyond the temporal rules that Congress carefully considered and

⁹⁶ 11 C.F.R. § 100.24(a)(2), (3) (defining GOTV activity to mean “contacting registered voters by telephone, in person, or by other individualized means, *to assist* them in engaging in the act of voting,” and voter registration activity to mean “contacting individuals by telephone, in person, or by other individualized means *to assist* them in registering to vote”) (emphasis added).

⁹⁷ BCRA § 101(b); FECA § 301(20)(A)(ii); 2 U.S.C. § 431(20)(A)(ii).

⁹⁸ 11 C.F.R. § 100.24(a)(4) (defining voter identification to mean “*creating or enhancing* voter lists by verifying or adding information about the voters’ likelihood of voting in an upcoming election or their likelihood of voting for specific candidates”) (emphasis added).

⁹⁹ June 19, 2002 Open Meeting Tr. at 156 (PX 180).

¹⁰⁰ BCRA § 101(b); FECA § 301(20)(A)(ii); 2 U.S.C. § 431(20)(A)(ii).

¹⁰¹ 11 C.F.R. § 100.25.

enacted, by suggesting that certain GOTV activities would be regulated only during a 72-hour pre-election window, which apparently would leave state parties free to spend soft money on such activities at any other point during the election cycle.¹⁰³ And, it revised its long-standing allocation rules for state and local parties in a manner that served only to reopen precisely the type of loophole that Congress enacted BCRA to close.¹⁰⁴

Statutory Language and Structure. In crafting BCRA’s definition of “Federal election activity,” Congress took pains not to leave any “gap” for the Commission to fill. Not only is the statutory definition unusually precise,¹⁰⁵ but Congress went a step further and specified what activity was “excluded” from the definition.¹⁰⁶ In short, Congress did not leave the Commission any room to further narrow this important term, *see Halverson*, 129 F.3d at 185 (statute’s “mention of one thing implies the exclusion of another thing”) (internal quotation marks and citations omitted) — yet that is just what the Commission has done in a number of essential respects.

¹⁰² 11 C.F.R. §§ 100.24(a)(3), (4).

¹⁰³ 11 C.F.R. § 100.24(a)(3).

¹⁰⁴ 11 C.F.R. § 300.33(c)(2).

¹⁰⁵ Congress expressly defined what constitutes “Federal election activity”: (1) “voter registration activity” that occurs within 120 days of a regularly scheduled federal election; (2) “voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot”; (3) a “public communication” that “promotes or supports” a clearly identified candidate for federal office; and (4) “services provided” by a state or local party employee “who spends more than 25 percent of that individual’s compensated time during that month on activities in connection with a Federal election.” BCRA § 101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A).

¹⁰⁶ The activities Congress exempted from the definition of FEA include: (1) public communications that do not constitute voter registration, voter identification, GOTV, or generic campaign activity and refer solely to nonfederal candidates; (2) contributions to nonfederal candidates that are not earmarked for Federal election activity; (3) state and local political conventions; and (4) the cost of grassroots campaign materials, such as bumper stickers, that refer only to nonfederal candidates. BCRA § 101(b); FECA § 301(20)(B); 2 U.S.C. § 431(20)(B).

First, the Commission narrowed the scope of covered GOTV and voter registration activities to those that “assist” would-be voters. Thus, in the Commission’s view, calling potential voters and encouraging—or imploring—they to go to the polls or to register to vote is *not* covered unless some sort of “assistance” is provided—no matter how effective or common such activity is in influencing federal elections. This narrowing of key terms flies in the face of common usage, and thus the canons of construction. *See Inner City Broad. Corp. v. Sanders*, 733 F.2d 154, 158 (D.C. Cir. 1984) (“unless contrary indications are present, a court can assume that Congress intended the common usage of the term[s] to apply”). This Court, for example, has recognized that “voter registration” and “GOTV” involve “efforts to *encourage* a particular political party’s partisans to the polls.” *McConnell*, 251 F. Supp. 2d at 702 (Kollar-Kotelly, J.) (emphasis added). Indeed, the Commission itself has recognized that “registration” and “GOTV” “are terms of art used in campaign or election parlance ... [to] connote efforts to increase the number of person who register to vote and once registered, to maximize the number of eligible voters who go to the polls.” FEC Advisory Op. 1980-64 (PX 152). Likewise, one preexisting FEC regulation — part of the regulatory backdrop against which Congress enacted BCRA — describes “voter registration and get-out-the-vote activities” as actions “designed to *encourage* individuals to register to vote or to vote.” 11 C.F.R. § 100.133 (emphasis added). Another treats “[g]eneric voter drives, including voter identification, voter registration, and get-out-the-vote drives” as “activities that *urge* the general public to register, vote or support candidates.” 11 C.F.R. § 106.5(a)(2)(iv) (emphasis added). Not only are these regulations still in effect, but in August 2002, *after* the Commission had promulgated its final FEA regulations, the Commission reorganized certain existing regulations including 11 C.F.R. § 100.133.¹⁰⁷ In

¹⁰⁷ *See* 67 Fed. Reg. at 50,592 (PX 29).

doing so, the Commission made no effort to amend this provision to reflect the new, narrowed definition of GOTV and voter registration activities that governs in the FEA context. To the contrary, it promulgated a new title for Section 100.133: “Voter registration and get-out-the-vote activities.”¹⁰⁸ This title reflects the common-sense understanding that any “activity designed to encourage individuals to register to vote or to vote”¹⁰⁹ constitutes GOTV or voter registration activity.

The Commission’s inconsistent regulations lead to absurd results. Under the governing regulations, corporations and labor unions may finance certain GOTV and voter registration activities, which are broadly defined to encompass any activities at any time that encourage individuals to vote. *See* 11 C.F.R. §§ 100.133, 114.4(c) and (d). Meanwhile, the regulations narrowly define GOTV and voter registration activities conducted by state parties to encompass only activities that include some type of affirmative assistance and, in certain circumstances involving GOTV, take place within the 72 hours before an election. *See* 11 C.F.R. § 100.24(a)(3) and (4). Congress could not possibly have intended such a disparate result.

This conclusion is reinforced by the text and legislative history of the original FECA, in which Congress repeatedly used both phrases. FECA § 316(b)(2)(B), for example, permits corporations and unions to engage in limited, “nonpartisan registration and get-out-the-vote campaigns.” 2 U.S.C. § 441b(b)(2)(B). As the sponsor of this provision made clear, that phrase carries its common sense meaning — that is, “*any* communication ... which is designed to get out the vote, to get people to the polls to exercise their obligations as citizens.” 117 Cong. Rec.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

43,379, 43,388 (1970) (statement of Rep. Hansen) (emphasis added) (PX 108).¹¹⁰ In amending FECA in 2002, Congress again used the term “get-out-the-vote,” with no indication that the original understanding of that term had changed. In short, by requiring some act of affirmative assistance, the Commission has arbitrarily removed core voter registration and GOTV activities — such as phone calls and mass mailings urging potential voters to register to vote and to go to the polls — from BCRA’s reach. The Commission’s own General Counsel cautioned that this change would have a “significant impact in terms of what constitutes federal election activity.”¹¹¹

Second, the Commission promulgated a rule that defines voter identification to mean “*creating or enhancing* voter lists by verifying or adding information about the voters’ likelihood of voting in an upcoming election or their likelihood of voting for specific candidates.” 11 C.F.R. § 100.24(a)(4) (emphasis added). But, just as with its definitions of GOTV and voter registration, the Commission’s definition excludes a core voter identification activity — the purchase of voter lists. The Commission’s General Counsel described list acquisition as a “key means of identifying voters” and a “significant part of ... campaign spending.” June 19, 2002 Open Meeting Tr. at 156-57 (PX 180). The Commission has never previously excluded the purchasing of voter lists from “voter identification” and has offered, and can offer, no principled basis for doing so now. To the contrary, if “creating or enhancing voter lists” qualifies as “voter identification,” 11 C.F.R. § 100.24(a)(4), then, under any reasonable “functional” construction of the law, *McConnell*, 124 S. Ct. at 705, purchasing a list from someone else who has done so must qualify as well. Indeed, the sole rationale offered by the Commission for excluding

¹¹⁰ See also FECA § 301(8)(B)(xi); 2 U.S.C. § 431(8)(B)(xi) (defining “contribution” to exclude the costs of certain voter registration and GOTV activities conducted by state parties on behalf of their Presidential and Vice Presidential nominees); FECA § 301(8)(B)(ix); 2 U.S.C. § 431(8)(B)(ix) (defining “expenditure” to exclude same).

¹¹¹ June 19, 2002 Open Meeting Tr. at 87.

purchased lists — that “Committees have a number of reasons for acquiring voter lists, including fundraising and off-year party building activities,” 67 Fed. Reg. at 49,069 — applies with equal force to a party’s own efforts at “creating or enhancing voter lists.”

Third, the Commission set aside the statutory definition of “generic campaign activity” in favor of its own, far narrower definition of the phrase. Congress defined “generic campaign activity” to mean “a *campaign activity* that promotes a political party and does not promote a candidate or non-Federal candidate.”¹¹² In place of this statutory definition, the Commission defined the phrase to mean “a *public communication* that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or non-Federal candidate.” 11 C.F.R. § 100.25 (emphasis added). This dramatic narrowing of the definition is striking in a number of respects. A “public communication” is clearly only a subset of “campaign activity.” Of equal note, the Commission blithely equates “generic campaign activity” with “a public communication” without pausing over the fact that Congress, in the passage immediately following the statutory definition of “generic campaign activity,” treated the term “public communication” as an entirely distinct concept, which it separately defined.¹¹³ Plainly, had Congress intended to narrow the reach of “generic campaign activity” in the manner the Commission adopted, it could easily have done so — and would have done so.

The Commission’s definition of “generic campaign activity” so substantially departs from the plain text of BCRA that its own General Counsel was forced to admonish the Commission that the phrase is “specifically statutorily defined in BCRA ... that’s fairly clear on its face, ... [while the amended version constitutes] a somewhat narrower term than ‘campaign

¹¹² BCRA § 101(b); FECA § 301(21); 2 U.S.C. § 431(21) (emphasis added).

¹¹³ BCRA § 101(b); FECA § 301(22); 2 U.S.C. § 431(22). *See* Part I-B *supra*.

activity.” June 19, 2002 Open Meeting Tr. at 225-226. He further cautioned that Congress’s use of “public communication” in the same subsection showed that “Congress had already considered” using the term “public communication” in the definition of “generic campaign activity” and “perhaps had rejected [it].” *Id.* at 227.

In narrowing the definition of “generic campaign activity” in this manner, the Commission excluded a broad range of important campaign activity, including most Internet communications and mailing and phone banks directed to fewer than 500 people. It thus opened a substantial loophole never authorized by Congress.

Fourth, the Commission added a temporal component to BCRA that finds no basis in the text or purpose of the law.¹¹⁴ The Commission appeared to engraft in certain circumstances a 72-hour rule onto the definition of “GOTV,” presumptively limiting much of the reach of the GOTV provision to conduct occurring only within the *last three days* of the election.¹¹⁵ Although the final hours of an election are undoubtedly important, there is no reason that a state or local party might not spend massive sums mobilizing its voting base prior to these last 72 hours. Indeed, it is utterly implausible to suggest that state parties do not expend funds on GOTV mailings outside the 72-hour window or throughout the year on GOTV activity such as, for example, training their volunteers in the most effective techniques to get their supporters to

¹¹⁴ Plaintiffs have elected not to pursue their claim regarding the time restriction on Federal election activity imposed by 11 C.F.R. § 100.24(a)(1). *See* First Am. Compl. ¶¶ 63-64.

¹¹⁵ While two commissioners voted for Commissioner Sandstrom’s amendment based on the understanding “that it does not preclude activity conducted outside of the 72 hours from being found to be federal election activity,” June 19, 2002 Open Meeting Tr. at 117, neither the text of the regulation nor the Commissioners’ debate at the open meeting elucidate what, if any, activity conducted outside the 72-hour window *would* be considered GOTV activity. As Commissioner McDonald pointed out, “I like the idea of a time frame ... but here’s my problem with it. Here’s what we’re saying in terms of clarity. It’s 72 hours, but oh, let me tell you, it could be further back. ... So, I would just say to my colleagues that in terms of clarity, I’m not clear about the clarity. The clarity is, it’s 72 hours unless it’s something else. I don’t — for me, that just doesn’t register as clarity.” *Id.* at 119.

the polls. Moreover, the Commission made no effort to demonstrate that this was an appropriate line to draw. The Commission's own General Counsel observed that "proximity in time to the election is not necessarily dispositive with regard to whether an activity is a GOTV activity." Agenda Doc. No. 02-44, *supra* note 85, at 16. The imposition of this type of temporal restriction only provides an incentive for parties to frontload as much of their GOTV activity as possible, thereby further circumventing BCRA's soft-money restrictions.

Fifth, the Commission further narrowed the scope of both "GOTV" and "voter identification" by carving out activities consisting of "any communication by an association or similar group of candidates for State or local office or of individuals holding State or local office" when reference is made only to one or more State or local candidates. *See* 11 C.F.R. § 100.24(a)(3), (4). Yet, once again, Congress provided the Commission with no authority to adopt such an exemption — and the exemption is, in fact, in direct contravention of legislative intent. When Commissioner Sandstrom proposed amending the regulation to exempt this activity, the General Counsel cautioned the Commission that such an exemption "is not ... grounded in the language of the statute" and that it would "exclude from the definition of federal election activity an awful lot of activity, and substantially contracts the definition of federal election activity." June 19, 2002 Open Meeting Tr. at 114-15. Commissioner Thomas likewise explained that the proposal would "by its terms, narrow the definition of what is federal election activity ... every time we come up with a way to open up opportunities for more of the totally unrestricted money to be spent ... it presents all the problems that are at the heart of this legislation." *Id.* at 144-45. He also warned the Commission that the exemption would "set up a vehicle for evasion of the soft money restrictions." *Id.* at 146. Commissioner Sandstrom even acknowledged that it was a "knowing narrowing, on my part, of the potential sweep of this." *Id.*

at 132. Such a “knowing” alteration of the statute’s plain language without any authority from Congress is simply not permissible.

There can be no doubt that this rewriting of the statute will invite just the sort of circumvention that BCRA sought to prevent. “Money, like water, will always find an outlet.” *McConnell*, 124 S. Ct. at 706. Parties and candidates can easily conduct GOTV and voter identification activities through associations of state or local candidates (such as the Democratic or Republican Governors Association), avoid mention of federal candidates on the ballot, and mobilize voters to the polls. This is yet another example of the Commission creating, out of whole cloth, an exemption to the clear statutory language that has a high likelihood of subverting the core purpose of BCRA and opening a major loophole in federal campaign finance laws.

To the extent this narrowing provision was adopted to avoid a perceived constitutional flaw in the statute,¹¹⁶ moreover, the Commission’s views¹¹⁶ are entitled to no deference. *See* p. 6 & n.11 *supra*. This is particularly so in a case, such as this, where this Court and the Supreme Court have definitively resolved any question of the constitutionality of the statute at issue.

Finally, the Commission undercut yet another element of the definition of “Federal election activity” — although, in this case, did so more indirectly than in the others. Congress included in the definition of “Federal election activity” “services provided ... by an employee of a State, district, or local committee of a political party who spends more than 25 percent of [his or her] compensated time ... on activities in connection with a Federal election.”¹¹⁷ In doing so, Congress understood that, under longstanding Commission regulations, employees spending less

¹¹⁶ *See* June 19, 2002 Open Meeting Tr. at 54 (Comments of Commissioner Smith: “This amendment also protects [the] federalism of our system.”); *id.* at 129 (Comments of Commissioner Sandstrom: “So I’ve tried to narrow this ... in a way that still may not remove all constitutional issues ...”).

¹¹⁷ BCRA § 101(b); FECA § 301(20)(A)(iv); 2 U.S.C. § 431(20)(A)(iv).

than 25 percent of their time on Federal election activities would be subject to allocation rules. In an ironic turn, however, the Commission amended its allocation rules — ostensibly to implement this provision, but actually in derogation of BCRA’s purpose — to permit state and local parties to use exclusively soft money to pay the “[s]alaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity or activities in connection with a Federal election.” 11 C.F.R. § 300.33(c)(2).

There is, of course, no support in BCRA for this regulatory change. As Commission staff explained, “there is nothing in BCRA that expressly contemplates that the Commission would drop its long-standing practice of requiring the allocation between federal and nonfederal accounts.” June 19, 2002 Open Meeting Tr. at 351. Moreover, as rewritten, the regulation would invite circumvention of the state party soft money rules. Parties can, under the new regulation, arrange their affairs so that employees spend up to 24 percent of their time on Federal election activity, yet fund their salaries entirely with soft money. The Commission’s sole stated reason for opening this new loophole was a belief that “[b]y implication, Congress appears to have concluded that salaries for employees spending 25% or less of their time on activities ... do not have to be paid from a mix of Federal funds.” 67 Fed. Reg. at 49,078. Because the Commission acted based on a mistaken understanding of BCRA, and, indeed, acted at odds with Congressional intent, the new allocation rule cannot stand.

Legislative History and Congressional Purpose. The legislative history and unmistakable purpose of BCRA leave no doubt that, as to each of the exceptions that the Commission has created to the definition of “Federal election activity,” the Commission acted contrary to Congressional intent. As the Supreme Court recognized in *McConnell*, Congress’s overriding purpose in enacting the state party soft money rules was to avoid further

circumvention of the federal campaign finance laws. 124 S. Ct. at 670-71. In closing this loophole, Congress took “a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties,” while “not attempt[ing] to regulate State and local party spending where this danger is not present, and where State and local parties engage in *purely non-Federal activities*.”¹¹⁸

The Commission, however, has not, and cannot, explain how a definition of “voter registration” or “GOTV” that carves out well-financed efforts to urge would-be voters to register and to vote can be squared with this clear legislative purpose. It cannot explain how excluding the purchase of voter lists from the definition of “voter identification” or how limiting “generic campaign activity” to “public communications” serves the purposes of BCRA. And, it cannot explain how imposing further temporal limits on GOTV, exempting voter identification and GOTV efforts undertaken by associations of state or local candidates, or revising long-standing allocation rules to open a new loophole in the federal campaign finance laws are consistent with BCRA’s clear purpose. To the contrary, each of these narrowing constructions fundamentally undermines what Congress sought to do — to firmly close the soft money loophole and to do so in a manner that would prevent those who are constantly searching for the next evasion from succeeding in their efforts.¹¹⁹

Congress carefully crafted the contours of Federal election activity to cover only those activities that “in the judgment of Congress ... clearly affect Federal elections” and left

¹¹⁸ 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added), quoted in *McConnell*, 251 F. Supp. 2d at 699 (Kollar-Kotelly, J.) (PX 102).

¹¹⁹ See 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (soft money ban must operate at the state level to “prevent the massive evasion of Federal campaign laws” and “protect the integrity of Federal elections”); 148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (state party provisions are “one of the most important features of the Shays-Meehan bill” and are “necessary to prevent blatant evasion of the Federal campaign finance laws”) (PX 100).

unregulated “activities that affect purely non-Federal elections.”¹²⁰ Because Congress thus addressed the precise question of the scope of Federal election activity, its “interpretation must be given effect,” *see Browner*, 57 F.3d at 1125, and the Commission’s “knowing narrowing” of the provision’s sweep is impermissible.

Additional Flaws. Because each of the narrowing constructions of the definition of “Federal election activity” is at odds with the plain text of BCRA and Congress’s unmistakable purpose, none can stand under *Chevron* step one or step two. In addition to these flaws, the Commission failed to comply with basic dictates of the APA. The Commission, for example, jettisoned prior precedent — such as its prior understanding that “voter registration” and “GOTV” include acts of encouragement, and not merely affirmative assistance — without explaining why, as required under the APA. *See* pp. 6-7 & n.13 *supra*. Similarly, the Commission failed to provide notice in its NPRM that it was contemplating adopting rules that would limit “voter registration” and “GOTV” in this manner or that it might limit “generic campaign activity” to “public communications.” *See* 67 Fed. Reg. at 35,655-57, 35,674, 35,677. In this respect, the final rules were not a “logical outgrowth” of the Commission’s draft rules, but rather “surprisingly distant” from what the Commission initially proposed, in violation of the APA’s notice requirement.¹²¹

F. The Remaining Challenged Soft-Money Regulations Violate BCRA and Invite Further Abuse and Circumvention.

Levin issues. New FECA § 323(b)(1) requires that state, district, and local committees pay for “Federal election activity” with federal funds, “*except* as provided” by the Levin

¹²⁰ 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

¹²¹ *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000).

Amendment provisions in § 323(b)(2) (emphasis added). 2 U.S.C. § 441i(b)(1)-(2). The Commission’s implementing regulations undermine § 323(b) in several respects. *First*, the § 323(b)(2) exemption on its face applies *only* to the extent that covered expenditures or disbursements “are allocated (under regulations prescribed by the Commission) among” federal funds and Levin funds. The Commission’s implementing regulations nevertheless allow the first \$5,000 of Federal election activity to be paid for *entirely* with Levin funds — *i.e.*, with no allocation at all. *See* 11 C.F.R. § 300.32(c)(4). This impermissibly rewrites the statute. *Second*, the new regulations permit state, district, and local parties to use Levin funds to pay for the costs of raising more Levin funds, in clear contravention of new FECA § 323(c).¹²² *Third*, the Levin Amendment regulations fail to establish effective safeguards and accounting procedures for the handling of funds by state, district and local committees in order to ensure compliance with BCRA. The regulations permit party organizations to commingle unregulated soft money funds with Levin funds in a single account, and compound this commingling problem by failing to require standard accounting practices. *See* 11 C.F.R. § 300.30(c)(3). Here again history is repeating itself; these are the same kinds of problems that led Judge Flannery to condemn the Commission’s allocation regime seventeen years ago.¹²³

¹²² New FECA § 323(c) provides that “[a]n amount spent ... to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.” 2 U.S.C. § 441i(c). As the General Counsel’s office advised, “it seem[s] ... pretty clear[.]” that Congress “didn’t want Levin funds to be raised with anything other than Federal funds.” June 22, 2002 Open Meeting Tr. at 55 (PX 182); *see* Plaintiffs’ Mot. *Re* Exhibits at 6-8.

¹²³ *See Common Cause*, 692 F. Supp. at 1396 (“The plain meaning of the FECA is that any improper allocation of nonfederal funds by a state committee would be a violation of the FECA. Yet, the Commission provides no guidance whatsoever on what allocation methods a state or local committee may use; the potential for abuse, intended or no, is obvious. Thus, a revision of the Commission’s regulations to ensure that any method of allocation used by state or local party committees is in compliance with the FECA is warranted. This is especially so given the General Counsel’s strongly worded recommendations.”) Here, too, the Commission rejected the General Counsel’s recommendations for a much stricter accounting regime. *Compare* FEC Agenda Doc. No. 02-36, “Soft Money Rules: Draft Notice of Proposed Rulemaking,” (May 6, 2002), at 24-25, 38-41, 69, 71, 118, 128-29, 145-46 *with* 67 Fed. Reg. at 35,659, 35,671, 35,680, 35,682, 35,686.

Definition of state party committees. New FECA § 323(b) requires state, district and local committees to spend either hard money or Levin funds on Federal election activity. 2 U.S.C. § 441i(b). The FEC regulations improperly limit this restriction on “state,” “district” and “local” party committees to those committees that are a “part of the *official* party structure,” a limitation not found in the statute. *See* 11 C.F.R. § 100.14 (emphasis added). Nor is this limitation found in the FEC’s longstanding (and still existing) definition of “state committee” for purposes of FECA, and the FEC offered no explanation for the change in course. *See* pp. 6-7 & n.13 *supra*.¹²⁴ The new, formalistic definition allows “informal” or “unofficial” committees to be established by state party entities that would be able to spend unregulated soft money on functions previously performed by the formal party apparatus, thereby opening up another avenue for circumvention of BCRA.¹²⁵

III. The Commission’s Regulations On “Electioneering Communications” Violate BCRA Title II-A And The APA.

Title II-A of BCRA — which defines and regulates “electioneering communications” — closed the loophole in FECA opened by the proliferation of sham “issue ads.”¹²⁶ In BCRA, Congress crafted a new category of “electioneering communications,” which includes any ad that

¹²⁴ Compare 11 C.F.R. § 100.14(a); 67 Fed. Reg. at 49,064 (“State committee means the organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level”) with 11 C.F.R. § 100.14(a) (2001) (“State committee means the organization which by virtue of the bylaws of a political party, is responsible for the day-to-day operation of the political party at the State level”).

¹²⁵ Plaintiffs have elected not to press their claim with respect to the “state building fund” issue raised in ¶ 71d of their First Amended Complaint.

¹²⁶ Senator Snowe, a chief sponsor of the provision, explained the intent of this section was to address “the exploding phenomenon of the so-called issue advertising in elections ... broadcast advertisements that are ... in the overwhelming number of instances designed to influence our Federal elections, and yet no disclosure is required and there are none of the funding source prohibitions that for decades have been placed on other forms of campaigning. These are broadcast ads on television and on radio that masquerade as informational or educational but are really stealth advocacy ads for or against candidates.” 147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001) (PX 103).

(i) is broadcast, (ii) refers to a clearly identified Federal candidate, (iii) runs within 30 days of a primary or 60 days of a general election, and (iv) is “targeted” to the electorate of the candidate mentioned.¹²⁷ Such ads are subject to regulation as specified in Title II-A, including full disclosure, 2 U.S.C. § 434(f)(1), (2), and a ban on the use of corporate and union treasury funds to pay for such ads.¹²⁸ The Supreme Court has now adopted this Court’s views and fully upheld the constitutionality of BCRA’s electioneering communications provisions.¹²⁹

In writing its regulations to implement the definition of “electioneering communications,” however, the Commission created two dramatically overbroad exemptions that invite circumvention: (1) an unwarranted *per se* exemption for *any* ad aired by a corporation organized under Section 501(c)(3) of the Internal Revenue Code, notwithstanding explicit Congressional intent to the contrary; and (2) an exemption for *any* ad that is not aired “for a fee,” notwithstanding the Commission’s own recognition that such ads can readily have the effect of promoting or opposing a federal candidate.

A. The Commission’s Regulations Improperly Exempt All Broadcast Ads Sponsored By Any Section 501(c)(3) Corporation.

Congress created three specific and narrow exceptions to the statutory definition of “electioneering communication”: (1) a “news media” exemption for any communication appearing in a news story, editorial, or commentary, BCRA § 201(a); FECA § 304(f)(3)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i);¹³⁰ (2) an exemption for any communication that is otherwise an

¹²⁷ BCRA § 201(a); FECA § 304(f)(3)(A)(i)(I-III); 2 U.S.C. § 434(f)(3)(A)(i)(I-III).

¹²⁸ BCRA § 204; FECA § 316(c); 2 U.S.C. § 441b(c).

¹²⁹ See generally *McConnell*, 124 S. Ct. at 650-52, 686-89; *McConnell*, 251 F. Supp. 2d at 590-650 (Kollar-Kotelly, J.); see also *id.* at 525-87 (Findings ¶¶ 2.1 – 2.13).

¹³⁰ This provision mirrors the identical, and longstanding, “news media” exemption from the definition of “expenditure” in FECA. 2 U.S.C. § 431(9)(B)(i).

“expenditure” or “independent expenditure” under the FECA, *id.* at (ii);¹³¹ and (3) an exemption for any communication that constitutes a “candidate debate or forum” under Commission rules, *id.* at (iii). In addition, Congress provided the Commission with carefully circumscribed discretion to exempt “any other communication ... under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in Section 301(20)(A)(iii).” *Id.* at § 434(f)(3)(B)(iv).¹³²

As can be seen, the Commission’s clause (iv) authority to craft exemptions to the definition of “electioneering communications” has two important constraints: *First*, any such exemption must be “appropriate,” and “consistent” with the requirements of the underlying definition of “electioneering communication” — in other words, the regulatory exemption must not undermine the purpose of the statute to close the sham “issue ad” loophole. *Second*, any clause (iv) exemption must not exempt public communications that “promote, support, attack or oppose” a federal candidate. Such communications fall within the scope of Section 301(20)(A)(iii) of the FECA and therefore are, by definition, outside the scope of the Commission’s clause (iv) authority.

Representative Shays, in discussing clause (iv) on the House floor, explained its purpose and exceedingly narrow scope:

¹³¹ Any such “expenditure” would independently be subject to full disclosure under Section 434 and to the ban on corporate and union spending under Section 441b. Thus, to include such expenditures within the definition of “electioneering communications” would have been redundant.

¹³² Section 301(20)(A)(iii) of FECA (2 U.S.C. § 431(20)(A)(iii)), in turn, describes a public communication which refers to a Federal candidate “and that promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).”

[I]t is possible that the[r]e could be some communications that will fall within this definition [of electioneering communication] even though they are *plainly and unquestionably not related to the election*.

Section 201(3)(B)(iv) was added to the bill to provide [the] Commission *with some limited discretion in administering the statute* so that it can issue regulations to exempt such communications from the definition of “electioneering communications” because they are *wholly unrelated to an election*.

148 Cong. Rec. H410-11 (daily ed. Feb. 13, 2002) (emphasis added) (PX 100). Representative Shays gave an example of the type of communication that would merit an exclusion — a broadcast of a religious service that mentions in passing the name of an elected official who is also a candidate. *Id.* at H411.

Representative Shays pointedly emphasized that clause (iv) would *not* authorize the Commission to promulgate any broad-brush exemption for Section 501(c)(3) organizations: “[W]e do not intend that Section 201(3)(B)(iv) be used by the FEC to create any per se exemption from the definition of ‘electioneering communications’ for speech by Section 501(c)(3) charities.” *Id.* Representative Shays did urge the Commission to consider whether standards developed by the IRS in administering Section 501(c)(3) organizations could be applied “to exempt specific categories of speech where it is clear that such communications are made in a manner that is neutral in nature, wholly unrelated to an election, and cannot be used to promote or attack any federal candidates.” *Id.*, *see also* 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002) (statements of Sens. McCain and Feingold, concurring with Rep. Shays and describing clause (iv) as providing FEC with authority to exempt communications “that are clearly not related to an election and do not promote or attack candidates”). These contemporaneous views by the key sponsors are entitled to substantial weight in the statutory analysis. *See* p. 15 & n.27 *supra*.

Nevertheless, a number of charitable organizations urged the FEC to use its clause (iv) authority to create precisely the across-the-board exemption for Section 501(c)(3) corporations that Congress rejected.¹³³ The General Counsel's proposed final regulations explicitly rejected such an exemption as inconsistent with the law. His proposed E&J accompanying the proposed rule explained:

The Commission has decided not to include a *per se* exemption for a communication by an organization described in 26 U.S.C. 501(c)(3). *Such a blanket exemption is too broad for the limited exemption authority BCRA provides to the Commission.* The Commission also has rejected a limited exemption based on the provisions of the Internal Revenue Code. While the Commission defers to the Internal Revenue Service's enforcement of the Internal Revenue Code, the civil enforcement of BCRA lies within the jurisdiction and responsibility of this Commission and cannot be left to another agency's policing of those subject to another statute.¹³⁴

The Commission, however, ignored both clear expressions of legislative intent and the advice of its General Counsel and amended the proposed final regulations to include an exemption from the definition of "electioneering communication" for *any* communication that "is paid for by any organization operating under Section 501(c)(3) of the Internal Revenue Code of 1986." 11 C.F.R. § 100.29(c)(6). In the final E&J, the Commission makes public policy out of whole cloth, concluding that BCRA "is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their very nature, do not do." 67 Fed. Reg. at 65,200.

¹³³ See, e.g., Aug. 21, 2002 Comments of Alliance for Justice, at 3-5 (PX 22), Independent Sector, at 7-8 (PX 23).

¹³⁴ Agenda Doc. No. 02-68, "Final Rule, Interim Final Rule, and Explanation and Justification for Electioneering Communications," Sept. 24, 2002, at 48-9 (emphasis added) (PX 24).

This exemption is contrary to law, and without rational justification, for multiple reasons: A broad, across-the-board exemption for all ads by all Section 501(c)(3) organizations exceeds the Commission’s narrow authority under clause (iv). On its face, the regulation does *nothing* to ensure that ads which promote or oppose a federal candidate are not run by Section 501(c)(3) groups. Unlike the carefully tailored example offered by Representative Shays “to exempt specific categories of speech,” *see pp. 75-76 supra*, such as the incidental reference to a candidate in a regular broadcast of a church service, the Commission’s total exemption indiscriminately removes a large category of corporate speakers from coverage of the statute. As the Commission’s General Counsel warned, “[s]uch a blanket exemption is too broad for the limited exemption authority BCRA provides to the Commission.”¹³⁵

The exemption is indisputably contrary to the legislative history. Most obviously, it is in direct conflict with Representative Shays’s explicit statement that the sponsors “do not intend” that clause (iv) be used “to create any per se exemption ... for speech by Section 501(c)(3) charities.” 148 Cong. Rec. at H411. If Congress had wanted to exempt all Section 501(c)(3) speakers, it knew how to do so, as illustrated by the provisions of Title II-A that specifically address nonprofit advocacy groups organized under Section 501(c)(4).¹³⁶

Further, there is no evidence in the record either that this exemption is necessary or justified. Although comments by some charitable groups argued that the application of Title II-A to charities would impair legitimate lobbying activities by such groups, the same claims were made by Section 501(c)(4) groups and, indeed, by all corporations and labor unions covered by

¹³⁵ *Id.* at 49.

¹³⁶ Section 203 of BCRA (FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2)) allows corporations organized under Section 501(c)(4) of the tax code to fund “electioneering communications” if paid for “exclusively by funds provided directly by individuals” This provision was essentially superseded by the “Wellstone Amendment,” 2 U.S.C. § 441b(c)(6).

the statute. The Commission did not ask for, nor did the public comments produce, a record of actual ads run by Section 501(c)(3) groups that would improperly be swept up by Title II-A and justify the broad exemption adopted.

The Commission was equally uncurious about the potential opportunities for evasion created by its rule. As its E&J demonstrates, the Commission uncritically accepted the argument that the tax code's prohibition on Section 501(c)(3) groups participating in political campaigns¹³⁷ would prevent them from running the type of sham "issue ads" that Title II-A is aimed at. Yet, as Representative Shays pointed out, "[n]otwithstanding this prohibition, some such charities have run ads in the guise of so-called 'issue advocacy' that clearly have had the effect of promoting or opposing federal candidates." 148 Cong. Rec. at H411.¹³⁸ More importantly, the Commission failed to take into account the possibility that Section 501(c)(3) groups might become the *new* vehicles for evasion of the law, precisely because BCRA now bars those for-profit and nonprofit corporations which had run sham "issue ads" in the past from doing so in the future. Prior to BCRA, there may have been little incentive for Section 501(c)(3) organizations to run such ads simply because Section 501(c)(4) groups could do so, with less risk. Now that

¹³⁷ 26 U.S.C. § 501(c)(3).

¹³⁸ For example, press reports state that the Federation for American Immigration Reform ["FAIR"] ran a radio ad in Michigan in 2000 that stated, in part: "This is an urgent message about our jobs. Senator Spence Abraham is again pushing a bill to import hundreds of thousands more foreign workers to take American jobs – our jobs Recently Abraham killed the requirement that employers hire Americans first. He clearly thinks it's OK to favor foreign workers. Why treat Americans so badly? Money. Abraham has raised big political money from huge corporations that want cheap, foreign labor. And his newest bill gives them everything they want. Is your job next? Let's try to convince Abraham not to sell our jobs. His bill could be voted on any day. So call now: 1-800-504-0031. That's 1-800-504-0031. Tell him you've had enough of his big foreign labor bills, like S. 2045. This message sponsored by the Federation for American Immigration Reform. Visit our web site at fairUS.org." National Journal Group Inc., *Group Says Abraham's Pushing Out Jobs*, (Mar. 23, 2000) (paragraph indents omitted), available at nationaljournal.com (PX 175). FAIR's website identifies the group as a Section 501(c)(3) organization. See <http://www.fairus.org/html/contribute.html> (PX 176).

Section (c)(4) groups are prohibited from using treasury funds to run such ads, the new regulation creates the threat that this activity will shift to (c)(3) groups.

The Commission's entire answer is to rely on the Internal Revenue Service's policing of the restriction in Section 501(c)(3) against "interven[ing]" in political campaigns. But the Commission made no showing that the prohibitions of the tax law are co-extensive with the purposes of Title II-A or that the IRS has the institutional expertise to always recognize political "intervention." Even if the tax law prohibits "intervention" in a campaign, an ad that favorably portrays a candidate (such as a public service announcement) or that criticizes a candidate (such as an ad with a lobbying message), might not be treated by the IRS as "intervention" in a political campaign, yet could promote or oppose the candidate in ways that undermine the purposes of BCRA.¹³⁹

More generally, the Commission erred in functionally delegating the enforcement of Title II-A to the IRS, without regard for IRS interpretations, enforcement resources, or priorities. By simply assuming that IRS application of Section 501(c)(3) standards would be sufficient to

¹³⁹ And there is reason to believe that this may happen. The IRS recently promulgated new guidelines for tax exempt 501(c)(4), (5) and (6) groups which categorizes as lobbying the very kind of sham "issue" ads that Title II-A is aimed at. *See* IRS Rev. Rul. 2004-6, *published in* Int. Rev. Bulletin 2004-4 (Jan. 26, 2004) (PX 162). As an illustration, the ruling discusses an ad financed by a trade association that refers to a Senator, and is distributed in the Senator's state right before an election in which the Senator is a candidate. The ad states that a bill pending in the Senate would "provide manufacturing subsidies" that would benefit manufacturers in the state, but the Senator "has opposed similar measures" in the past. The advertisement ends with the statement: "Call or write Senator C to tell him to vote for S. 24." *Id.* at 5. Although the form of this ad is the classic sham "issue ad" that Title II-A was aimed at, the IRS ruling concludes that, for tax law purposes, this advertisement is lobbying, *not* electioneering.

There is no reason to think the IRS analysis of this question would be different in the context of whether a similar ad by a Section 501(c)(3) group would constitute impermissible "intervention" in a campaign. Indeed, in a recent news article about this revenue ruling, several tax law experts made the same judgment, and expressed concerns that the new IRS interpretations, in light of the Commission's Title II-A regulation exempting charities, "may have inadvertently handed campaign strategists an enormous loophole." Damon Chappie, *New IRS Guidance May Open Loophole*, Roll Call, Jan. 26, 2004, at 2 (PX 177). One expert said the new IRS interpretation, combined with the Commission's Title II-A regulation, "could very well make 501(c)(3) charities 'the ideal vehicle for interventionist advertising.'" *Id.* Another tax expert said the IRS guidance opened up "a very real and likely loophole." *Id.* at 3.

ensure that such corporations did not engage in sham “issue” advocacy, the Commission abdicated its own independent responsibility to enforce BCRA. As the Commission’s General Counsel admonished, “the civil enforcement of BCRA lies within the jurisdiction and responsibility of this Commission and cannot be left to another agency’s policing of those subject to another statute.”¹⁴⁰

Finally, the new regulation creates multiple opportunities for gross abuse and circumvention. Many organizations are structured to have both Section 501(c)(3) and (c)(4) arms. By shifting messages sponsored by these various arms in different time periods, a (c)(3) arm operating under the Commission’s regulation could run “electioneering communications” within the immediate pre-election time period that refer to a candidate and reflect themes stated in more overtly political ads supporting or attacking a candidate and run by the coordinate (c)(4) arm outside the window. The “hard lesson of circumvention [taught] by the entire history of campaign finance regulation,” *McConnell*, 124 S. Ct. at 673, surely suggests that the various messages among the coordinate arms of an organization could be crafted so that the (c)(3) arm’s “electioneering communication” could be narrowly consistent with the tax law while still part of a more general scheme to promote or oppose a candidate. For the Commission to assume that the IRS will prevent such circumvention of BCRA is based on little more than an act of faith, and wholly unsupported by the statute or the record. *See pp. 6-7 & n.13 supra.*

¹⁴⁰ Agenda Doc. No. 02-68, *supra* note 134, at 49. This is no more appropriate in the BCRA context than it would be for the Commission to exempt charities from the longstanding FECA prohibition on all corporations, including Section 501(c)(3) charities, engaging in “express advocacy,” 2 U.S.C. § 441b(a), on the theory that charities are separately prohibited by tax law from doing so. Notwithstanding the arguable overlap between the tax law and election law, the Commission has never repealed by regulation the election law applicable to charities under FECA. Nor should it be permitted to do so under BCRA.

B. The Commission’s Regulations Improperly Exclude All Unpaid Broadcast Communications From the Definition of “Electioneering Communications.”

Although not styled as a clause (iv) exemption, the Commission created another categorical exclusion from the definition of “electioneering communication.” The regulation defining that term requires that any such communications be “publicly distributed” within 30 days before a primary or 60 days before a general election. 11 C.F.R. § 100.29(a)(2). The Commission defined “publicly distributed” to mean aired, broadcast, cablecast, or otherwise distributed “*for a fee ...*” *Id.* at § 100.29(b)(3)(i) (emphasis added). Without any basis in the statute for doing so, the Commission thus excluded any pre-election reference to a candidate that is aired without charge, such as public service announcements, any program run on a public access cable channel or any other ad that a local broadcaster chooses for whatever reason to air without charge (*e.g.*, friendship, ideological reasons, desire to curry favor with a powerful incumbent, etc.).

The Commission rationalized this exclusion by claiming that the focus of Congressional concern extended only to paid advertisements, and by worrying about erroneous coverage of “entertainment programming, educational programming, or documentaries ...” *See* 67 Fed. Reg. at 65,192-93. Neither rationale supports the regulation. Although Congress’s principal concern was undoubtedly and reasonably directed to the paid “issue ads” that were in practice campaign ads, Congress could have, but did not, limit the reach of the statute to paid ads. Nothing in the language of the law, or in any legislative history, suggests that Congress intended to adopt the limit the Commission imposed.

The Commission’s concern about potentially sweeping in incidental references to candidates on entertainment programs or in pre-election documentaries is adequately addressed by the statutory exclusion for news stories, commentary, or editorials. BCRA § 201(a); FECA

§ 304(f)(3)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i); *see also* 11 C.F.R. § 100.29(c)(2). As for documentaries, the Commission has long interpreted the identical exclusion from the definition of “expenditure,” 2 U.S.C. § 431(9)(B)(1), to cover documentary programs, biographies, and similar broadcasts in order to broadly “preserve the traditional role of the press with respect to campaigns.”¹⁴¹ And as for entertainment shows, the Commission has very recently applied this exemption, as well as the identical exemption in Title II-A, to protect a television broadcaster’s fictional entertainment series about presidential elections. *See* Advisory Op. 2003-34 (PX 116). The Commission held that, as fiction, the series was not subject to the campaign finance laws, but also held that incidental references to real life candidates would be exempt “commentary” and thus constitute neither express advocacy nor “electioneering communications.” *Id.* The same reasoning would protect similar references to candidates in other entertainment shows as well.

By excluding in a wholesale fashion all unpaid broadcasts, the Commission has created several new problems that threaten to undermine the law. First, it has, as a practical matter, excluded many, if not most, “public service announcements” involving officeholders — those often-gauzy commercials that cast an officeholder in a favorable light while promoting a sympathetic or popular charitable or social cause.

The Commission noted that, “generally speaking,” PSAs are communications “for which the broadcaster or cable system operator does not charge a fee for publicly distributing” and thus are excluded from the definition of “electioneering communication” under the “for a fee”

¹⁴¹ FEC Advisory Op. 1996-48 (PX 128). The Commission has noted that the legislative history demonstrates that the press exemption “assures the unfettered right of the newspapers, TV networks and other media to cover and comment on political campaigns.” *Id.* (*quoting* H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. at 4 (1974)).

restriction. 67 Fed. Reg. at 65202. But, it said, broadcasters “do sometimes charge fees for publicly distributing other communications commonly known as PSAs and either the person who produced the PSA or some third party pays for its public distribution.” *Id.*

In considering whether to create a specific exemption for such paid PSA’s, the Commission approvingly cited comments that any such exemption “could be easily abused by using a PSA to associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate,” that “historically PSAs have been used for ‘electorally related purposes’ and that such communications are ‘at the very heart of what the statute is trying to get to.’” *Id.* Thus, the Commission correctly refused to create an exemption for PSAs.

However, notwithstanding the potential for abuse it recognized, the Commission effectively did exempt most PSAs through the operation of the “for a fee” restriction. Thus, the Commission recognized both that PSAs pose a threat of evasion and “are at the very heart” of the statute, but also that they are “generally speaking” broadcast without the payment of a “fee” and are thus exempt. These two positions cannot be reconciled.

The same restriction also operates to exempt all communications distributed on a public access cable station. Corporate or union treasury funds could be used to pay the production costs of such ads, and they plainly could promote or support a candidate. Indeed, this exclusion allows precisely the same kinds of sham “issue ads” that lie at the heart of the Title II-A prohibition to be run on public access cable stations without limitation. This exemption is both unsupported by the statute, and violates the intent of clause (iv) that *any* exclusions from the definition of

“electioneering communication” not permit public communications that can promote, support, attack, or oppose federal candidates.¹⁴²

IV. Plaintiffs Have Standing, And Their Facial Challenges To The Commission’s Final Regulations Are Ripe For Immediate Resolution.

Standing. The three-judge District Court in *McConnell* unanimously held that it was “clear from the face of the pleadings” that Representatives Shays and Meehan had Article III standing to defend BCRA from constitutional challenge. May 3, 2002 Order Granting Mot. to Intervene, at 8; *see generally id.* at 5-9 (Dkt. No. 40) (PX 163). The District Court’s detailed standing analysis in *McConnell* applies with equal force here. Just as Representatives Shays and Meehan had a “concrete and particularized” personal interest in defending BCRA from constitutional attack, *id.* at 5, so too do they have a strong personal stake in seeking to overturn unlawful agency rules that threaten to subvert, erode, and circumvent the reforms enacted by BCRA.

The District Court in *McConnell* quoted approvingly from the declarations submitted by Representatives Shays and Meehan, and held that “[t]hese allegations are sufficient to support Article III standing,” *id.* at 6:

[A]s federal officeholders and candidates for, or potential candidates for, election to federal office, [Representatives Shays and Meehan] are among those whose conduct the Act regulates, and among those whom the Act seeks to insulate from the actual or apparent corrupting influence of special interest money. They want to run in elections, participate in a political system, and serve in a government in which all participants comply with the reasonable contribution restrictions and other federal campaign finance regulations that the Act imposes in order to stop evasion and to prevent actual and apparent corruption. If any of the reforms

¹⁴² The “for a fee” exemption also provides unbounded discretion to a local broadcaster to effectively create an *ad hoc* exemption to “electioneering communications” by choosing not to charge for the broadcast of a particular ad, or all ads for a particular candidate. By waiving the fee, the broadcaster can allow a corporation or union to underwrite and air that ad right before an election, in clear contravention of the statute. There are no suggested bounds on the exercise of this discretion by a broadcaster, and no way for the Commission to police abuse of it.

embodied in the Act are struck down, ... [they] will once again be forced to attempt to discharge their public responsibilities, raise money, and campaign in a system that [they believe to be] significantly corrupted by special-interest money.

Id. As the District Court emphasized, this is not a matter of “seek[ing] to vindicate a ‘sponsorship’ interest in the Act.” *Id.* at 7. Rather, Representatives Shays and Meehan have Article III standing as direct *individual* participants in the electoral process — *e.g.*, as elected Members of Congress, candidates for reelection, fundraisers, recipients, and party members. Thus, “as opposed to members of the general public, [plaintiffs] have a concrete, direct, and personal stake — as candidates and potential candidates — in the outcome of a constitutional challenge to a law regulating the processes by which they may attain office.” *Id.*¹⁴³ By the same token, they have a similarly tangible stake in the outcome of an APA challenge to rules that once again threaten to undermine federal campaign finance law, that seek to *deregulate* conduct that Congress specifically ordered to be regulated, and that would perpetuate much of the corrupt soft-money system that BCRA was intended to eradicate root and branch.¹⁴⁴

¹⁴³ See generally *Buckley*, 424 U.S. at 7-8, 12 n.11; *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 (1st Cir. 1993) (challenge by gubernatorial candidate to public campaign finance eligibility incentives) (“[A]n impact on the strategy and conduct of an office-seeker’s political campaign constitutes an injury of a kind sufficient to confer standing.”); *Meek v. Metro. Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) (movants seeking to preserve the current election system had an Article III stake in “maintaining the election system that governed their exercise of political power, a democratically established system that the district court’s order had altered”); *Buchanan v. FEC*, 112 F. Supp. 2d 58, 65 (D.D.C. 2000) (“Precluding candidates from challenging [election] rules under the FECA would leave few others to do so [I]t is relatively self-evident that the people who have the most to gain and lose from the criteria governing [the electoral process] are the candidates themselves.”); *Marshall v. Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996) (Member of Congress had Article III standing because he “has ‘as a practical matter’ a vital interest in a procedure through which he is currently seeking election and toward which he has expended considerable money and time”), *appeal dismissed*, 105 F.3d 904 (4th Cir. 1997). Courts evaluate claims of political injury on a deferential basis, and “do not think it proper to second-guess a candidate’s reasonable assessment” of how a challenged practice might “force[] him to make significant adjustments to his campaign strategy and use of funds. ... To probe any further into these situations would require the clairvoyance of campaign consultants or political pundits — guises that members of the apolitical branch should be especially hesitant to assume.” *Becker v. FEC*, 230 F.3d 381, 386-87 (1st Cir. 2000), *cert. denied sub nom. Nader v. FEC*, 532 U.S. 1007 (2001).

¹⁴⁴ Plaintiffs in this case have submitted updated declarations in support of their motion for summary judgment. Those declarations track nearly verbatim the declarations and the additional allegations in the supporting legal memoranda that the three-judge District Court held were facially sufficient to establish Article III standing.
(Footnote continued)

The Commission contends that “[i]t is noteworthy that the Supreme Court decided not to determine whether the intervenors-candidates had standing, ... but did determine that the Adams plaintiffs-candidates, who alleged competitive injury due to their ‘wish [not] to solicit or accept large campaign contributions’ permitted by BCRA, failed to allege an injury in fact that is ‘fairly traceable’ to BCRA.” Joint Status Rep. at 4 (Dkt. No. 14), *quoting McConnell*, 124 S. Ct. at 709 (citation omitted). The Commission’s argument fails for many reasons. The Supreme Court did not address the intervenors’ standing because the issue was immaterial to the resolution of the appeals; there was no hint of disagreement with the District Court on the merits. *See* 124 S. Ct. at 711-12. Nor is there any tension with the *Adams* disposition; the three-judge District Court, after all, unanimously found that the Adams candidates lacked standing while unanimously finding in the same case that Representatives Shays and Meehan did have standing.¹⁴⁵ The difference lies in the underlying theories of the claims. The Adams candidates claimed that BCRA’s increase in contribution limits would put them at a “fundraising disadvantage” because other candidates would take advantage of the new authorized limits while they would not, due to their own personal objections to accepting large donations. The Supreme Court unanimously rejected standing based on this theory, because the fundraising disadvantage claimed by the *Adams* candidates flowed not from BCRA, “but from their own personal ‘wish’ not to solicit or accept large contributions, *i.e.*, their personal choice.” *Id.* at 709. Representatives Shays and Meehan, on the other hand, object to Commission regulations that violate BCRA, will directly undermine the reforms enacted by Congress, and will directly and adversely harm them as

See Feb. 24, 2004 Decl. of Christopher Shays; Feb. 24, 2004 Decl. of Martin Meehan; *compare McConnell* Dkt. Nos. 6 and 22, pp. 6-8.

¹⁴⁵ *Compare* May 3, 2002 Order, at 5-9 *with McConnell*, 251 F. Supp. 2d at 186 (*per curiam*); *id.* at 429-30 (Henderson, J.).

candidates for federal office in 2004. Plaintiffs' claimed injuries are thus fairly traceable directly to the challenged rules themselves, which open the loopholes ("safe harbors") that provide legal cover and authorization for practices that Congress intended to prohibit.¹⁴⁶

Ripeness. The Commission's ripeness defense is equally untenable. This case is not like the challenge to the BCRA Section 214 rulemaking in *McConnell*, where the Commission's rules were not yet final while the case was being litigated. *See McConnell*, 251 F. Supp. 2d at 260-64 (*per curiam*); 124 S. Ct. at 706. Here the BCRA rules clearly constitute "final agency action" within the meaning of 5 U.S.C. § 704, and have the force and effect of law. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) ("The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive.") Moreover, the issues in this facial challenge involve purely legal questions of statutory construction and compliance with the APA. Courts repeatedly have held that such cases are fit for immediate judicial review.¹⁴⁷

¹⁴⁶ For these same reasons, Representatives Shays and Meehan clearly meet Article III's redressability requirement. Their claimed injury in this case would certainly be redressed by an order setting aside the Commission's unlawful regulations and thereby closing the new loopholes created by those rules. *Compare* May 3, 2002 Order, at 8. In addition, plaintiffs readily satisfy the "prudential standing requirement" imposed by § 10(a) of the APA, 5 U.S.C. § 702, because they clearly fall "within the zone of interests to be protected or regulated by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (citation and internal quotation marks omitted). Representatives Shays and Meehan are directly regulated by BCRA, and they are within the class intended to be protected by the reform provisions. *See* Shays Decl. ¶¶ 3-4; Meehan Decl. ¶¶ 3-4.

¹⁴⁷ *See, e.g., Whitman*, 531 U.S. at 479 ("The question before us here is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented.'") (citation omitted); *Harris v. FAA*, 353 F.3d 1006, 1012 (D.C. Cir. 2004) (Henderson, J.) ("[T]he question of whether an agency decision is arbitrary and capricious is a purely legal question, and '[f]itness ... is more likely to be found where the issue tendered is a purely legal one.'") (collecting authorities); *United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1014 (D.C. Cir. 2002) ("purely legal issues" involved in a rulemaking challenge were immediately fit for review); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) ("[T]he issues in this case are fit for judicial review because the questions presented are purely legal ones: whether the Commission's determination was arbitrary and capricious or contrary to law."); *Chamber of Commerce*, 69 F.3d at 604 (rejecting FEC's "weak" ripeness defense where "[t]he issue presented is a relatively pure legal one that subsequent enforcement proceedings will not elucidate").

The Commission relies on “pre-enforcement” cases that are entirely off point. In those cases, a plaintiff claims it will be harmed by the *enforcement* of the rule but it is unclear whether the rule will ever be applied to that particular plaintiff. Where the agency has discretion to grant an exemption from the rule, or where further fact-finding is necessary in order to determine the rule’s applicability to the plaintiff, or where the agency’s position is tentative, prudential concerns often counsel holding off on judicial intervention unless and until the agency actually seeks to apply its rule against the plaintiff.¹⁴⁸

That does not describe the situation here at all. Here, there will *not* be any further enforcement proceedings on certain issues, because the Commission’s rules have carved out a number of “safe harbors” and have deregulated a variety of conduct that Congress specifically intended to regulate. The rules purport to “grant ... authority” and to “give anyone a legal right” to engage in certain activities that plaintiffs believe are illegal under FECA, BCRA, and a generation of precedent from *Buckley* to *McConnell*. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998). Moreover, FECA provides complete immunity to anyone who relies in “good faith” on the Commission’s rules. 2 U.S.C. § 438(e); *see McConnell*, 251 F. Supp. 2d at 263-64 (*per curiam*). There can never be a successful enforcement proceeding in these circumstances; the rules provide a complete defense. The D.C. Circuit has “repeatedly” held that the “lifting” of “regulatory restrictions” in alleged violation of the law is immediately reviewable at the behest of one who claims harm from the deregulation. *La. Energy & Power Auth. v.*

¹⁴⁸ The Commission relies on *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999); and *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003). *See* Joint Status Rep. at 4. In *Sprint*, the D.C. Circuit explained “that where the agency retains substantial discretion to implement its decision, the decision is not ripe for judicial review until it has been implemented in particular circumstances.” 331 F.3d at 956. *See also Media Access Project v. FCC*, 883 F.2d 1063, 1070 (D.C. Cir. 1989) (“Where an agency has discretion in the application of the challenged regulations, ... a purely facial challenge may not be ripe for review if the agency could grant the requested relief and thereby obviate the need for judicial review.”).

FERC, 141 F.3d 364, 367 (D.C. Cir. 1998) (collecting authorities). This is precisely such a case. Where, as here, “[t]he rule constitutes the purported legal norm that binds the class regulated by statute,” facial challenges to the rule are immediately ripe for review. *Chamber of Commerce*, 69 F.3d at 603.

With the issues so clearly fit for review, only the most compelling case of hardship to the Commission or courts could justify a delay in resolution.¹⁴⁹ There is no such justification here. Indeed, history teaches that both institutional interests and the public interest are best served by prompt judicial review and correction of improper Commission regulations that open up loopholes enabling the subversion, erosion, and circumvention of federal campaign finance laws. “Money, like water, will always find an outlet.” *McConnell*, 124 S. Ct. at 706. The hardships that result when such loopholes are not plugged are amply documented in the history of campaign finance over the past generation, as summarized in the voluminous record and the hundreds of pages of judicial findings and opinions in *McConnell*. See p. 1 & n.2 *supra*.

Conclusion


For all of the reasons set forth above, this Court should “hold unlawful and set aside,” 5 U.S.C. § 706(2), the challenged FEC regulations. As set forth in the accompanying proposed Order, this Court should order the Commission to commence new rulemaking proceedings within fifteen days of the Court’s decision; should order the Commission to issue, within thirty days of the Court’s decision, appropriate interim regulations to govern during the pendency of

¹⁴⁹ “[W]here there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong. However, where there are strong interests militating in favor of postponement, we must weigh the potential hardship of delay on the appellant.” *AT&T Corp. v. FCC*, 349 F.3d 692, 700 (D.C. Cir. 2003). Even if hardship to the plaintiffs were required to make a challenge ripe, “[t]he ‘prospect’ of hardship is sufficient to make a claim fit for judicial review.” *Harris*, 353 F.3d at 1012 (emphasis added, citation omitted). Of course, plaintiffs can readily satisfy any “hardship” standard — the Court need only consider what happened the last time that misguided FEC rules were allowed to remain on the books. See p. 1 & n.2 *supra*.

the Commission's rulemaking proceedings; and should retain jurisdiction over this matter to ensure the Commission's timely and sufficient compliance with the Court's decision.¹⁵⁰

Dated this 27th day of February, 2004.

Respectfully submitted,



Roger M. Witten (Bar No. 163261)
David A. O'Neil (*pro hac vice*)
WILMER CUTLER PICKERING LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800

Charles G. Curtis, Jr. (*pro hac vice*)
Michelle M. Umberger (Bar No. 480620)
Michael M. Markman
Sarah E. Reindl
HELLER EHRMAN WHITE & McAULIFFE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
(608) 663-7460

Randolph D. Moss (Bar No. 417749)
Stacy E. Beck (Bar No. 480540)
WILMER CUTLER PICKERING LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Brent N. Rushforth (Bar No. 331074)
Carl S. Nadler (Bar No. 395279)
Martina M. Stewart
HELLER EHRMAN WHITE & McAULIFFE LLP
1666 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 912-2000

Donald J. Simon (Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Fred Wertheimer (Bar No. 154211)
Alexandra Edsall (Bar No. 453518)
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, D.C. 20006
(202) 429-2008

*Attorneys for Plaintiffs Christopher Shays
and Martin Meehan*

¹⁵⁰ See especially *Common Cause v. FEC*, 692 F. Supp. 1397, 1402 (D.D.C. 1988) (“retain[ing] jurisdiction” and “requir[ing] the FEC to report its progress toward the promulgation of new rules” governing soft money); see also *Cobell v. Norton*, 240 F.3d 1081, 1107-10 (D.C. Cir. 2001) (affirming District Court’s retention of jurisdiction and imposition of detailed reporting requirements) (citing numerous authorities); *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1975) (in APA cases, “[t]he authority to set enforceable deadlines both of an ultimate and an intermediate nature is an appropriate procedure for exercise of the court’s equity powers to vindicate the public interest”). As discussed in plaintiffs’ stay briefing in this case last summer, Congress expected that true *reform* regulations would be in place in time to govern the 2004 campaign. See Dkt. No. 11 at 3 & n.3. This Court should order the Commission to take all feasible steps to achieve that goal, and should retain jurisdiction to monitor and ensure the FEC’s timely compliance.

APPENDIX A
SELECTED REGULATIONS

APPENDIX A

CODE OF FEDERAL REGULATIONS

Selected Provisions

TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER I--OFFICE OF PERSONNEL MANAGEMENT

SUBCHAPTER B--CIVIL SERVICE REGULATIONS

PART 734--POLITICAL ACTIVITIES OF FEDERAL EMPLOYEES

SUBPART B--PERMITTED ACTIVITIES

January 30, 2004

§ 734.208 Participation in fundraising.

(a) An employee may make a political contribution to a political party, political group, campaign committee of a candidate for public office in a partisan election and multicandidate political committee of a Federal labor or Federal employee organization.

(b) Subject to the prohibitions stated in section 734.303, an employee may--

(1) Attend a political fundraiser;

(2) Accept and receive political contributions in a partisan election described in 5 CFR part 733;

(3) Solicit, accept, or receive uncompensated volunteer services from any individual; and

(4) Solicit, accept, or receive political contributions, as long as:

(i) The person who is solicited for a political contribution belongs to the same Federal labor organization, or Federal employee organization, as the employee who solicits, accepts, or receives the contribution;

(ii) The person who is solicited for a political contribution is not a subordinate employee; and

(iii) The request is for a contribution to the multicandidate political committee of a Federal labor organization or to the multicandidate political committee of a Federal employee organization in existence on October 6, 1993.

(c) Subject to the provisions of § 734.306, an employee may make a financial contribution to a political action committee through a voluntary allotment made under § 550.311(b) of this chapter, if the head of the employee's agency permits agency employees to make such allotments to political action committees.

(d) An employee who is covered under this subpart and is a payroll official in an agency where employees are permitted to make allotments to political action committees may process the completed direct deposit forms for voluntary allotments which have been made to such committees under section 550.311(b) of this title.

Example 1: An GS-12 employee of the Department of Treasury who belongs to the same Federal employee organization as a GS-5 employee of the Department of Treasury may solicit a

contribution for the multicandidate political committee when she is not on duty as long as the GS-5 employee is not under the supervisory authority of the GS-12 employee.

Example 2: An employee of the National Park Service may give a speech or keynote address at a political fundraiser when he is not on duty, as long as the employee does not solicit political contributions, as prohibited in § 734.303(b) of this part.

Example 3: An employee's name may appear on an invitation to a political fundraiser as a guest speaker as long as the reference in no way suggests that the employee solicits or encourages contributions, as prohibited in § 734.303 of this part and described in example 2 thereunder. However, the employee's official title may not appear on invitations to any political fundraiser, except that an employee who is ordinarily addressed using a general term of address, such as "The Honorable," may use or permit the use of that term of address for such purposes.

Example 4: When an employee of the Department of Transportation is not on duty, he or she may engage in activities which do not require personal solicitations of contributions, such as organizing mail or phone solicitations for political contributions. Activities such as stuffing envelopes with requests for political contributions also are permitted. However, he or she may not sign the solicitation letter unless the solicitation is for the contribution of uncompensated volunteer services of individuals who are not subordinate employees. An employee may not knowingly send to his or her subordinate employees a letter soliciting the contribution of their uncompensated services. However, he or she may sign a letter that solicits contributions of uncompensated volunteer services as part of a general mass mailing that might reach a subordinate employee, as long as the mass mailing is not specifically targeted to his or her subordinate employees.

Example 5: An employee who is not on duty may participate in a phone bank soliciting the uncompensated services of individuals. However, an employee may not make phone solicitations for political contributions even anonymously.

Example 6: An employee of the Department of Agriculture who is on official travel and is not in a pay status nor officially representing the Department may write invitations in his hotel room to a meet-the-candidate reception which he plans to hold in his home.

Example 7: An employee may serve as an officer or chairperson of a political fundraising organization or committee as long as he or she does not personally solicit, accept, or receive political contributions. For example, the employee may organize or manage fundraising activities as long as he or she does not violate the above prohibition.

Example 8: The head of a cabinet-level department may contribute one of her worn-out cowboy boots to the campaign committee of a Senatorial candidate to be auctioned off in a fundraising raffle for the benefit of the candidate's campaign.

Example 9: An employee may help organize a fundraiser including supplying names for the invitation list as long as he or she does not personally solicit, accept, or receive contributions.

Example 10: An employee on travel may engage in political activity when he or she is not on duty without taking annual leave.

Example 11: A Federal employee may solicit, accept, or receive the uncompensated volunteer services of any individual, except a subordinate employee, to work on behalf of a partisan political candidate or organization. However, such solicitation, acceptance, or receipt must comply with part 2635 of this title as well as any other directives that may apply, e.g., the Federal Property Management Regulations in 41 CFR chapter 101. Further, Federal employees are subject to criminal anti-coercion provisions found at 18 U.S.C. 610.

Example 12: An employee who desires to make a financial contribution to a political

action committee through a voluntary allotment personally may obtain blank direct deposit forms from his or her payroll office. However, he or she may not complete the form while he or she is on duty, on Federal property, or in a Federally owned or leased vehicle. Moreover, he or she may not personally deliver his or her completed form, or the completed form of another employee, to the payroll office. However, the employee may mail his or her direct deposit form to his or her agency payroll office.

Example 13: Employees who are permitted to solicit, accept, or receive political contributions under the circumstances described in § 734.208(b)(4) may not solicit, accept, or receive such contributions either while they are on duty, or while they are on Federal premises, or both.

* * * * *

TITLE 11--FEDERAL ELECTIONS
CHAPTER I--FEDERAL ELECTION COMMISSION
SUBCHAPTER A--GENERAL
PART 100--SCOPE AND DEFINITIONS (2 U.S.C. 431)
SUBPART A--GENERAL DEFINITIONS

January 1, 2003

§ 100.5 Political committee (2 U.S.C. 431 (4), (5), (6)).

Political committee means any group meeting one of the following conditions:

(a) Except as provided in 11 CFR 100.5(b), (c) and (d), any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 or which makes expenditures aggregating in excess of \$1,000 during a calendar year is a political committee.

(b) Any separate segregated fund established under 2 U.S.C. 441b(b)(2)(C) is a political committee.

(c) Any local committee of a political party is a political committee if: it receives contributions aggregating in excess of \$5,000 during a calendar year; it makes payments exempted from the definition of contribution, under 11 CFR 100.80, 100.87, and 100.89, and expenditure, under 11 CFR 100.140, 100.147 and 100.149, which payments aggregate in excess of \$5,000 during a calendar year; or it makes contributions aggregating in excess of \$1,000 or makes expenditures aggregating in excess of \$1,000 during a calendar year.

(d) An individual's principal campaign committee or authorized committee(s) becomes a political committee(s) when that individual becomes a candidate pursuant to 11 CFR 100.3.

(e) The following are examples of political committees:

(1) Principal campaign committee. Principal campaign committee means a political committee designated and authorized by a candidate pursuant to 11 CFR 101.1 and 102.1.

(2) Single candidate committee. Single candidate committee means a political committee other than a principal campaign committee which makes or receives contributions or makes expenditures on behalf of only one candidate.

(3) Multi-candidate committee. Multi-candidate committee means a political committee which (i) has been registered with the Commission or Secretary of the Senate for at least 6 months; (ii) has received contributions for Federal elections from more than 50 persons; and (iii) (except for any State political party organization) has made contributions to 5 or more Federal candidates.

(4) Party committee. Party committee means a political committee which represents a political party and is part of the official party structure at the national, State, or local level.

(5) Delegate committee. A delegate committee is a group of persons that receives contributions or makes expenditures for the sole purpose of influencing the selection of one or more delegates to a national nominating convention. The term delegate committee includes a group of delegates, a group of individuals seeking selection as delegates and a group of individuals supporting delegates. A delegate committee that qualifies as a political committee under 11 CFR 100.5 must register with the Commission pursuant to 11 CFR part 102 and report its receipts and disbursements in accordance with 11 CFR part 104. (See definition of delegate at 11 CFR 110.14(b)(1).)

(f) A political committee is either an authorized committee or an unauthorized committee.

(1) Authorized committee. An authorized committee means the principal campaign committee or any other political committee authorized by a candidate under 11 CFR 102.13 to receive contributions or make expenditures on behalf of such candidate, or which has not been disavowed pursuant to 11 CFR 100.3(a)(3).

(2) Unauthorized committee. An unauthorized committee is a political committee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate, or which has been disavowed pursuant to 11 CFR 100.3(a)(3).

(g) Affiliated committee.

(1) All authorized committees of the same candidate for the same election to Federal office are affiliated.

(2) All committees (including a separate segregated fund, see 11 CFR part 114) established, financed, maintained or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. Local unit may include, in appropriate cases, a franchisee, licensee, or State or regional association.

(3) Affiliated committees sharing a single contribution limitation under paragraph (g)(2) of this section include all of the committees established, financed, maintained or controlled by--

(i) A single corporation and/or its subsidiaries;

(ii) A single national or international union and/or its local unions or other subordinate organizations;

(iii) An organization of national or international unions and/or all its State and local central bodies;

(iv) A membership organization, (other than political party committees, see 11 CFR 110.3(b)) including trade or professional associations, see 11 CFR 114.8(a), and/or related State and local entities of that organization or group; or

(v) The same person or group of persons.

(4)(i) The Commission may examine the relationship between organizations that sponsor committees, between the committees themselves, or between one sponsoring organization and a committee established by another organization to determine whether committees are affiliated.

(ii) In determining whether committees not described in paragraphs (g)(3) (i)-(iv) of this section are affiliated, the Commission will consider the circumstantial factors described in paragraphs (g)(4)(ii) (A) through (J) of this section. The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization. Such factors include, but are not limited to:

(A) Whether a sponsoring organization owns controlling interest in the voting stock or securities of the sponsoring organization of another committee;

(B) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;

(C) Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decisionmaking employees or members of another sponsoring organization or committee;

(D) Whether a sponsoring organization or committee has a common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(E) Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(F) Whether a sponsoring organization or committee has any members, officers or employees who were members, officers or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees, or which indicates the creation of a successor entity;

(G) Whether a sponsoring organization or committee provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(H) Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(I) Whether a sponsoring organization or committee or its agent had an active or significant role in the formation of another sponsoring organization or committee; and

(J) Whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees.

* * * * *

January 1, 2001

Sec. 100.14 State committee, subordinate committee (2 U.S.C. 431(15)).

(a) State committee means the organization which by virtue of the bylaws of a political party, is responsible for the day-to-day operation of the political party at the State level, as determined by the Commission.

(b) Subordinate committee of a State committee means any organization which is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee.

* * * * *

February 10, 2004

§ 100.14 State committee, subordinate committee, district, or local committee (2 U.S.C. 431(15)).

(a) State committee means the organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level, including an entity that is directly or indirectly established, financed, maintained, or controlled by that organization, as determined by the Commission.

(b) District or local committee means any organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure, and is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State.

(c) Subordinate committee of a State, district, or local committee means any organization that at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee, and is directly or indirectly established, financed, maintained, or controlled by the State, district, or local committee.

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January 1, 2001

Sec. 100.23 Coordinated General Public Political Communications.

(a) Scope--(1) This section applies to expenditures for general public political communications paid for by persons other than candidates, authorized committees, and party committees.

(2) Coordinated party expenditures made on behalf of a candidate pursuant to 2 U.S.C. 441a(d) are governed by 11 CFR 110.7.

(b) Treatment of expenditures for general public political communications as expenditures and contributions. Any expenditure for general public political communication that includes a clearly identified candidate and is coordinated with that candidate, an opposing candidate or a party committee supporting or opposing that candidate is both an expenditure under 11 CFR 100.8(a) and an in-kind contribution under 11 CFR 100.7(a)(1)(iii).

(c) Coordination with candidates and party committees. An expenditure for a general public political communication is considered to be coordinated with a candidate or party committee if the communication--

(1) Is paid for by any person other than the candidate, the candidate's authorized committee, or a party committee, and

(2) Is created, produced or distributed--

(i) At the request or suggestion of the candidate, the candidate's authorized committee, a party committee, or the agent of any of the foregoing;

(ii) After the candidate or the candidate's agent, or a party committee or its agent, has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication; or

(iii) After substantial discussion or negotiation between the creator, producer or distributor of the communication, or the person paying for the communication, and the candidate, the candidate's authorized committee, a party committee, or the agent of such candidate or committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement. Substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.

(d) Exception. A candidate's or political party's response to an inquiry regarding the candidate's or party's position on legislative or public policy issues does not alone make the communication coordinated.

(e) Definitions. For purposes of this section:

(1) General public political communications include those made through a broadcasting station (including a cable television operator), newspaper, magazine, outdoor advertising facility, mailing or any electronic medium, including the Internet or on a web site, with an intended audience of over one hundred people.

(2) Clearly identified has the same meaning as set forth in 11 CFR 100.17.

(3) Agent has the same meaning as set forth in 11 CFR 109.1(b)(5).

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January 30, 2004

§ 100.24 Federal election activity (2 U.S.C. 431(20)).

(a) As used in this section, and in part 300 of this chapter,

(1) In connection with an election in which a candidate for Federal office appears on the ballot means:

(i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

(ii) In an odd-numbered year, the period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

(2) Voter registration activity means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. Voter registration activity includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms.

(3) Get-out-the-vote activity means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity shall not include any communication by an association or similar group of candidates for State or local office or of individuals holding State or local office if such communication refers only to one or more State or local candidates. Get-out-the-vote activity includes, but is not limited to:

(i) Providing to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and the location of particular polling places; and

(ii) Offering to transport or actually transporting voters to the polls.

(4) Voter identification means creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. This paragraph shall not apply to an association or similar group of candidates for State or local office or of individuals holding State or local office if the association or group engages in voter identification that refers only to one or more State or local candidates.

(b) As used in part 300 of this chapter, Federal election activity means any of the activities described in paragraphs (b)(1) through (b)(4) of this section.

(1) Voter registration activity during the period that begins on the date that is 120 calendar days before the date that a regularly scheduled Federal election is held and ends on the date of the election. For purposes of voter registration activity, the term "election" does not include any special election.

(2) The following activities conducted in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot):

(i) Voter identification.

(ii) Generic campaign activity, as defined in 11 CFR 100.25.

(iii) Get-out-the-vote activity.

(3) A public communication that refers to a clearly identified candidate for Federal office, regardless of whether a candidate for State or local election is also mentioned or identified, and that promotes or supports, or attacks or opposes any candidate for Federal office. This paragraph applies whether or not the communication expressly advocates a vote for or against a Federal

candidate.

(4) Services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(c) Exceptions. Federal election activity does not include any amount expended or disbursed by a State, district, or local committee of a political party for any of the following activities:

(1) A public communication that refers solely to one or more clearly identified candidates for State or local office and that does not promote or support, or attack or oppose a clearly identified candidate for Federal office; provided, however, that such a public communication shall be considered a Federal election activity if it constitutes voter registration activity, generic campaign activity, get-out-the-vote activity, or voter identification.

(2) A contribution to a candidate for State or local office, provided the contribution is not designated to pay for voter registration activity, voter identification, generic campaign activity, get-out-the-vote activity, a public communication, or employee services as set forth in paragraphs (a)(1) through (4) of this section.

(3) The costs of a State, district, or local political convention, meeting or conference.

(4) The costs of grassroots campaign materials, including buttons, bumper stickers, handbills, brochures, posters, and yard signs, that name or depict only candidates for State or local office.

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§ 100.25 Generic campaign activity (2 U.S.C. 431(21)).

Generic campaign activity means a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate.

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§ 100.26 Public communication (2 U.S.C. 431(22)).

Public communication means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet.

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§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) Electioneering communication means any broadcast, cable, or satellite

communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section--

(1) Broadcast, cable, or satellite communication means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) Publicly distributed means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons--

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, <http://www.fcc.gov>. A link to that site is available on the Federal Election Commission's Web site, <http://www.fec.gov>. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

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

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

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

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

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

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

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

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

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

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

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

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

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

lying outside the broadcast contour, is 50,000 or more; or

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

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

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

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

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

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

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SUBPART E--EXCEPTIONS TO EXPENDITURES

§ 100.133 Voter registration and get-out-the-vote activities.

Any cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote, except that corporations and labor organizations shall engage in such activity in accordance with 11 CFR 114.4(c) and (d). See also 11 CFR 114.3(c)(4)

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SUBCHAPTER A--GENERAL

PART 106--ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES

January 30, 2004

§ 106.5 Allocation of expenses between federal and non-federal activities by national party committees.

(a) General rules.

(1) Disbursements from Federal and non-Federal accounts. National party committees that make disbursements in connection with Federal and non-Federal elections shall make those disbursements entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5. Political committees that have established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate expenses between those accounts according to this section. Organizations that are not political committees but have established separate Federal and non-Federal accounts under 11 CFR 102.5(b)(1)(i), or that make Federal and non-Federal disbursements from a single account under 11 CFR 102.5(b)(1)(ii), shall also allocate their Federal and non-Federal expenses according to this section. This section covers:

(i) General rules regarding allocation of Federal and non-Federal expenses by party committees;

(ii) Percentages to be allocated for administrative expenses and costs of generic voter drives by national party committees;

(iii) Methods for allocation of administrative expenses, costs of generic voter drives, and of fundraising costs by national party committees; and

(iv) Procedures for payment of allocable expenses. Requirements for reporting of allocated disbursements are set forth in 11 CFR 104.10.

(2) Costs to be allocated. National party committees that make disbursements in connection with Federal and non-Federal elections shall allocate expenses according to this section for the following categories of activity:

(i) Administrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate;

(ii) The direct costs of a fundraising program or event including disbursements for

solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-Federal funds are collected by one committee through such program or event; and

(iii) [Reserved]

(iv) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

(b) National party committees other than Senate or House campaign committees; fixed percentages for allocating administrative expenses and costs of generic voter drives.

(1) General rule. Each national party committee other than a Senate or House campaign committee shall allocate a fixed percentage of its administrative expenses and costs of generic voter drives, as described in paragraph (a)(2) of this section, to its Federal and non-Federal account(s) each year. These percentages shall differ according to whether or not the allocable expenses were incurred in a presidential election year. Such committees shall allocate the costs of each combined Federal and non-Federal fundraising program or event according to paragraph (f) of this section, with no fixed percentages required.

(2) Fixed percentages according to type of election year. National party committees other than the Senate or House campaign committees shall allocate their administrative expenses and costs of generic voter drives according to paragraphs (b)(2) (i) and (ii) as follows:

(i) Presidential election years. In presidential election years, national party committees other than the Senate or House campaign committees shall allocate to their Federal accounts at least 65% each of their administrative expenses and costs of generic voter drives.

(ii) Non-presidential election years. In all years other than presidential election years, national party committees other than the Senate or House campaign committees shall allocate to their Federal accounts at least 60% each of their administrative expenses and costs of generic voter drives.

(c) Senate and House campaign committees of a national party; method and minimum Federal percentage for allocating administrative expenses and costs of generic voter drives.

(1) Method for allocating administrative expenses and costs of generic voter drives. Subject to the minimum percentage set forth in paragraph (c)(2) of this section, each Senate or House campaign committee of a national party shall allocate its administrative expenses and costs of generic voter drives, as described in paragraph (a)(2) of this section, according to the funds expended method, described in paragraphs (c)(1)(i) and (ii) as follows:

(i) Under this method, expenses shall be allocated based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year Federal election cycle. This ratio shall be estimated and reported at the beginning of each Federal election cycle, based upon the committee's Federal and non-Federal disbursements in a prior comparable Federal election cycle or upon the committee's reasonable prediction of its disbursements for the coming two years. In calculating its Federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific federal candidates. Calculation of total Federal and non-Federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs.

(ii) On each of its periodic reports, the committee shall adjust its allocation ratio to reconcile it with the ratio of actual Federal and non-Federal disbursements made, to date. If the non-Federal account has paid more than its allocable share, the committee shall transfer funds

from its Federal to its non-Federal account, as necessary, to reflect the adjusted allocation ratio. The committee shall make note of any such adjustments and transfers on its periodic reports, submitted pursuant to 11 CFR 104.5.

(2) Minimum Federal percentage for administrative expenses and costs of generic voter drives. Regardless of the allocation ratio calculated under paragraph (c)(1) of this section, each Senate or House campaign committee of a national party shall allocate to its Federal account at least 65% each of its administrative expenses and costs of generic voter drives each year. If the committee's own allocation calculation under paragraph (c)(1) of this section yields a Federal share greater than 65%, then the higher percentage shall be applied. If such calculation yields a Federal share lower than 65%, then the committee shall report its calculated ratio according to 11 CFR 104.10(b), and shall apply the required minimum Federal percentage.

(3) Allocation of fundraising costs. Senate and House campaign committees shall allocate the costs of each combined Federal and non-Federal fundraising program or event according to paragraph (f) of this section, with no minimum percentages required.

(d) [Reserved]

(e) [Reserved]

(f) National party committees; method for allocating direct costs of fundraising.

(1) If Federal and non-Federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising, as described in paragraph (a)(2) of this section, according to the funds received method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its Federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its Federal and non-Federal revenue from that program or event, and shall be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event shall be allocated according to this estimated ratio.

(2) No later than the date 60 days after each fundraising program or event from which both Federal and non-Federal funds are collected, the committee shall adjust the allocation ratio for that program or event to reflect the actual ratio of funds received. If the non-Federal account has paid more than its allocable share, the committee shall transfer funds from its Federal to its non-Federal account, as necessary, to reflect the adjusted allocation ratio. If the Federal account has paid more than its allocable share, the committee shall make any transfers of funds from its non-federal to its federal account to reflect the adjusted allocation ratio within the 60-day time period established by this paragraph. The committee shall make note of any such adjustments and transfers in its report for any period in which a transfer was made, and shall also report the date of the fundraising program or event that serves as the basis for the transfer. In the case of a telemarketing or direct mail campaign, the date for purposes of this paragraph is the last day of the telemarketing campaign, or the day on which the final direct mail solicitations are mailed.

(g) Payment of allocable expenses by committees with separate Federal and non-Federal accounts.

(1) Payment options. Committees that have established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) or (b)(1)(i) shall pay the expenses of joint Federal and non-Federal activities described in paragraph (a)(2) of this section according to either paragraph (g)(1)(i) or (ii), as follows:

(i) Payment by Federal account; transfers from non-Federal account to Federal account.

The committee shall pay the entire amount of an allocable expense from its Federal account and shall transfer funds from its non-Federal account to its Federal account solely to cover the non-Federal share of that allocable expense.

(ii) Payment by separate allocation account; transfers from Federal and non-Federal accounts to allocation account.

(A) The committee shall establish a separate allocation account into which funds from its Federal and non-Federal accounts shall be deposited solely for the purpose of paying the allocable expenses of joint Federal and non-Federal activities. Once a committee has established a separate allocation account for this purpose, all allocable expenses shall be paid from that account for as long as the account is maintained.

(B) The committee shall transfer funds from its Federal and non-Federal accounts to its allocation account in amounts proportionate to the Federal or non-Federal share of each allocable expense.

(C) No funds contained in the allocation account may be transferred to any other account maintained by the committee.

(2) Timing of transfers between accounts.

(i) Under either payment option described in paragraphs (g)(1)(i) or (ii) of this section, the committee shall transfer funds from its non-Federal account to its Federal account or from its Federal and non-Federal accounts to its separate allocation account following determination of the final cost of each joint Federal and non-Federal activity, or in advance of such determination if advance payment is required by the vendor and if such payment is based on a reasonable estimate of the activity's final cost as determined by the committee and the vendor(s) involved.

(ii) Funds transferred from a committee's non-Federal account to its Federal account or its allocation account are subject to the following requirements:

(A) For each such transfer, the committee must itemize in its reports the allocable activities for which the transferred funds are intended to pay, as required by 11 CFR 104.10(b)(3); and

(B) Except as provided in paragraph (f)(2) of this section, such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

(iii) Any portion of a transfer from a committee's non-Federal account to its Federal account or its allocation account that does not meet the requirements of paragraph (g)(2)(ii) of this section shall be presumed to be a loan or contribution from the non-Federal account to a Federal account, in violation of the Act.

(3) Reporting transfers of funds and allocated disbursements. A political committee that transfers funds between accounts and pays allocable expenses according to this section shall report each such transfer and disbursement pursuant to 11 CFR 104.10(b).

(h) Sunset provision. This section applies from November 6, 2002, to December 31, 2002. After December 31, 2002, see 11 CFR 106.7(a).

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PART 109--INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c))

January 1, 2001

Sec. 109.1 Definitions (2 U.S.C. 431(17)).

(a) Independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate.

(b) For purposes of this definition--

(1) Person means an individual, partnership, committee, association, qualified nonprofit corporation under 11 CFR 114.10(c), or any organization or group of persons, including a separate segregated fund established by a labor organization, corporation, or national bank (see part 114) but does not mean a labor organization, corporation not qualified under 11 CFR 114.10(c), or national bank.

(2) Expressly advocating shall have the same meaning as set forth at 11 CFR 100.22.

(3) Clearly identified shall have the same meaning as set forth at 11 CFR 100.17.

(4) Made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate--

(i) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is--

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent;

(ii) But does not include providing to the expending person upon request Commission guidelines on independent expenditures.

(5) Agent means any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate, or means any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

(c) An expenditure not qualifying under this section as an independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted.

(d)(1) The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered a contribution for the purpose of contribution limitations and reporting responsibilities by the person making the expenditure but shall not be considered an expenditure by the candidate or his authorized committees unless made with the cooperation or with the prior

consent of, or in consultation with, or at the request or suggestion of, a candidate or any authorized agent or committee thereof.

(2) This paragraph does not affect the right of a State or subordinate party committee to engage in such dissemination, distribution, or republication as agents designated by the national committee pursuant to Sec. 110.7(a)(4).

(e) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

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January 1, 2002

Sec. 109.1 Definitions (2 U.S.C. 431(17)).

(a) Independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made with the cooperation of, or in consultation with, or in concert with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate.

(b) For purposes of this definition--

(1) Person means an individual, partnership, committee, association, qualified nonprofit corporation under 11 CFR 114.10(c), or any organization or group of persons, including a separate segregated fund established by a labor organization, corporation, or national bank (see part 114) but does not mean a labor organization, corporation not qualified under 11 CFR 114.10(c), or national bank.

(2) Expressly advocating shall have the same meaning as set forth at 11 CFR 100.22.

(3) Clearly identified shall have the same meaning as set forth at 11 CFR 100.17.

(4) A communication is "made with the cooperation of, or in consultation with, or in concert with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate" if it is a coordinated general public political communication under 11 CFR 100.23.

(5) Agent means any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate, or means any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

(c) An expenditure not qualifying under this section as an independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted.

(d)(1) The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities by the person making the expenditure but shall not be considered an expenditure by the candidate or his authorized committees unless the dissemination, distribution, or republication of campaign materials is a coordinated general public political communication under 11 CFR 100.23

(2) This paragraph does not affect the right of a State or subordinate party committee to engage in such dissemination, distribution, or republication as agents designated by the national committee pursuant to Sec. 110.7(a)(4).

(e) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

* * * * *

January 30, 2004

§ 109.3 Definitions.

For the purposes of 11 CFR part 109 only, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:

(a) In the case of a national, State, district, or local committee of a political party, any one or more of the activities listed in paragraphs (a)(1) through (a)(5) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).

(3) To create, produce, or distribute any communication at the request or suggestion of a candidate.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or,

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(5) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a candidate.

(b) In the case of an individual who is a Federal candidate or an individual holding Federal office, any one or more of the activities listed in paragraphs (b)(1) through (b)(6) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).

(3) To request or suggest that any other person create, produce, or distribute any communication.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

- (v) The timing or frequency of the communication;
 - (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.
- (5) To provide material or information to assist another person in the creation, production, or distribution of any communication.
- (6) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a different candidate.

* * * * *

§ 109.21 What is a "coordinated communication"?

(a) Definition. A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

- (1) Is paid for by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing;
- (2) Satisfies at least one of the content standards in paragraph (c) of this section; and
- (3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

(b) Treatment as an in-kind contribution and expenditure; Reporting.

(1) General rule. A payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate, authorized committee, or political party committee with whom or which it is coordinated, unless excepted under 11 CFR part 100, subpart C, and must be reported as an expenditure made by that candidate, authorized committee, or political party committee under 11 CFR 104.13, unless excepted under 11 CFR part 100, subpart E.

(2) In-kind contributions resulting from conduct described in paragraphs (d)(4) or (d)(5) of this section. Notwithstanding paragraph (b)(1) of this section, the candidate, authorized committee, or political party committee with whom or which a communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure, that results from conduct described in paragraphs (d)(4) or (d)(5) of this section, unless the candidate, authorized committee, or political party committee, or an agent of any of the foregoing, engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.

(3) Reporting of coordinated communications. A political committee, other than a political party committee, that makes a coordinated communication must report the payment for the communication as a contribution made to the candidate or political party committee with whom or which it was coordinated and as an expenditure in accordance with 11 CFR 104.3(b)(1)(v). A candidate, authorized committee, or political party committee with whom or which a communication paid for by another person is coordinated must report the usual and normal value of the communication as an in-kind contribution in accordance with 11 CFR 104.13, meaning that it must report the amount of the payment as a receipt under 11 CFR 104.3(a) and as an expenditure under 11 CFR 104.3(b).

(c) Content standards. Each of the types of content described in paragraphs (c)(1) through (c)(4) satisfies the content standard of this section.

(1) A communication that is an electioneering communication under 11 CFR 100.29.

(2) A public communication that disseminates, distributes, or republishes, in whole or in

part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

(d) Conduct standards. Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) Request or suggestion.

(i) The communication is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee, political party committee, or agent of any of the foregoing; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, assents to the suggestion.

(2) Material involvement. A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) Substantial discussion. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) Common vendor. All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, in the current election cycle:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media advice; and

(iii) That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the clearly identified candidate's campaign plans, projects, activities, or needs, or his or her opponent's campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

(5) Former employee or independent contractor. Both of the following statements in paragraph (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, during the current election cycle; and

(ii) That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the clearly identified candidate's campaign plans, projects, activities, or needs, or his or her opponent's campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or his or her authorized

committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, and that information is material to the creation, production, or distribution of the communication.

(6) Dissemination, distribution, or republication of campaign material. A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs.

(e) Agreement or formal collaboration. Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing, is not required for a communication to be a coordinated communication. Agreement means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. Formal collaboration means planned, or systematically organized, work on the communication.

(f) Safe harbor for responses to inquiries about legislative or policy issues. A candidate's or a political party committee's response to an inquiry about that candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in paragraph (d) of this section.

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SUBCHAPTER A--GENERAL

PART 110--CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

January 30, 2004

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) Scope. This section applies only to public communications, defined for this section to include the communications at 11 CFR 100.26 plus unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public, and electioneering communications as defined in 11 CFR 100.29. The following types of such communications must include disclaimers, as specified in this section:

(1) All public communications for which a political committee makes a disbursement.
(2) All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) General content requirements. A disclaimer required by paragraph (a) of this section

must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) Disclaimer specifications--

(1) Specifications for all disclaimers. A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

(2) Specific requirements for printed communications. In addition to the general requirement of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on any printed public communication must comply with all of the following:

(i) The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer in twelve (12)-point type size satisfies the size requirement of this paragraph (c)(2)(i) when it is used for signs, posters, flyers, newspapers, magazines, or other printed material that measure no more than twenty-four (24) inches by thirty-six (36) inches.

(ii) The disclaimer must be contained in a printed box set apart from the other contents of the communication.

(iii) The disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(2)(iii) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(iv) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(v) A communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(3) Specific requirements for radio and television communications authorized by candidates. In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication that is authorized or paid for by a candidate or the authorized committee of a candidate (see paragraph (b)(1) or (b)(2) of this section) that is transmitted through radio or television, or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio must include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication; or

(ii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must include a statement that identifies the candidate and states that he or she has approved the communication. The candidate shall convey the statement either:

(A) Through an unobscured, full-screen view of himself or herself making the statement, or

(B) Through a voice-over by himself or herself, accompanied by a clearly identifiable photographic or similar image of the candidate. A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the television communication. To be clearly readable, this statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the text of the statement. A statement satisfies the color contrast requirement of this paragraph (c)(3)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the statement is no less than the color contrast between the background and the largest type size used in the communication.

(iv) The following are examples of acceptable statements that satisfy the spoken statement requirements of paragraph (c)(3) of this section with respect to a radio, television, or other broadcast, cable, or satellite communication, but they are not the only allowable statements:

(A) "I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement."

(B) "My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message."

(4) Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate. In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, "XXX is responsible for the content of this advertising," spoken clearly, with the blank to be filled in with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the "XXX is responsible" statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative

of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

(d) Coordinated party expenditures and independent expenditures by political party committees.

(1)(i) For a communication paid for by a political party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a) of this section must identify the political party committee that makes the expenditure as the person who paid for the communication, regardless of whether the political party committee was acting in its own capacity or as the designated agent of another political party committee.

(ii) A communication made by a political party committee pursuant to 2 U.S.C. 441a(d) and distributed prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.

(2) For purposes of this section, a communication paid for by a political party committee, other than a communication covered by paragraph (d)(1)(ii) of this section, that is being treated as a coordinated expenditure under 2 U.S.C. 441a(d) and that was made with the approval of a candidate, a candidate's authorized committee, or the agent of either shall identify the political party that paid for the communication and shall state that the communication is authorized by the candidate or candidate's authorized committee.

(3) For a communication paid for by a political party committee that constitutes an independent expenditure under 11 CFR 100.16, the disclaimer required by this section must identify the political party committee that paid for the communication, and must state that the communication is not authorized by any candidate or candidate's authorized committee.

(e) Exempt activities. A public communication authorized by a candidate, authorized committee, or political party committee, that qualifies as an exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149, must comply with the disclaimer requirements of paragraphs (a), (b), (c)(1), and (c)(2) of this section, unless excepted under paragraph (f)(1) of this section, but the disclaimer does not need to state whether the communication is authorized by a candidate, or any authorized committee or agent of any candidate.

(f) Exceptions.

(1) The requirements of paragraphs (a) through (e) of this section do not apply to the following:

(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) Skywriting, water towers, wearing apparel, or other means of displaying an

advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) Checks, receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message.

(2) For purposes of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a type of public communication and need not contain the disclaimer required by paragraphs (a) through (c) of this section.

(g) Comparable rate for campaign purposes.

(1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes.

(2) For purposes of this section, comparable rate means the rate charged to a national or general rate advertiser, and shall include discount privileges usually and normally available to a national or general rate advertiser.

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PART 114--CORPORATE AND LABOR ORGANIZATION ACTIVITY

February 10, 2004

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

(a) General. A corporation or labor organization may communicate beyond the restricted class in accordance with this section. Any communications which a corporation or labor organization may make to the general public under paragraph (c) of this section may also be made to the corporation's or labor organization's restricted class and to other employees and their families. Communications which a corporation or labor organization may make only to its employees (including its restricted class) and their families, but not to the general public, are found in paragraph (b) of this section. Communications which a corporation or labor organization may make only to its restricted class are found at 11 CFR 114.3. The activities permitted under paragraphs (b) and (c) of this section may involve election-related coordination with candidates and political committees only to the extent permitted by this section. See 11 CFR 100.16 and 114.2(c) regarding independent expenditures and coordination with candidates. Incorporated membership organizations, incorporated trade associations, incorporated cooperatives and corporations without capital stock will be treated as corporations for the purpose of making communications beyond the restricted class under this section.

(b) Communications by a corporation or labor organization to employees beyond its restricted class--

(1) Candidate and party appearances on corporate premises or at a meeting, convention or other function. Corporations may permit candidates, candidates' representatives or representatives of political parties on corporate premises or at a meeting, convention, or other function of the corporation to address or meet its restricted class and other employees of the corporation and their families, in accordance with the conditions set forth in paragraphs (b)(1)(i)

through (b)(1)(viii) of this section. Other guests of the corporation who are being honored or speaking or participating in the event and representatives of the news media may be present. A corporation may bar all candidates, candidates' representatives and representatives of political parties from addressing or meeting its restricted class and other employees of the corporation and their families on corporate premises or at any meeting, convention or other function of the corporation.

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

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

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

(iv) The candidate's representative or party representative (other than an officer, director or other representative of a corporation) or the candidate, may ask for contributions to his or her campaign or party, or ask that contributions to the separate segregated fund of the corporation be designated for his or her campaign or party. The candidate, candidate's representative or party representative shall not accept contributions before, during or after the appearance while at the meeting, convention or other function of the corporation, but may leave campaign materials or envelopes for members of the audience. A corporation, its restricted class, or other employees of the corporation or its separate segregated fund shall not, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party in conjunction with any appearance by any candidate or party representative under this section, and shall not facilitate the making of contributions to any such candidate or party (see 11 CFR 114.2(f));

(v) A corporation or its separate segregated fund shall not, in conjunction with any candidate, candidate representative or party representative appearance under this section, expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party and shall not promote or encourage express advocacy by employees;

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

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

(viii) Representatives of the news media may be allowed to be present during a candidate, candidate representative or party representative appearance under this section, in accordance

with the procedures set forth at 11 CFR 114.3(c)(2)(iv).

(2) Candidate and party appearances on labor organization premises or at a meeting, convention or other function. A labor organization may permit candidates, candidates' representatives or representatives of political parties on the labor organization's premises or at a meeting, convention, or other function of the labor organization to address or meet its restricted class and other employees of the labor organization, and their families, in accordance with the conditions set forth in paragraphs (b)(1) (i) through (iii), (vi) through (viii), and paragraphs (b)(2) (i) and (ii) of this section. Other guests of the labor organization who are being honored or speaking or participating in the event and representatives of the news media may be present. A labor organization may bar all candidates, candidates' representatives and representatives of political parties from addressing or meeting its restricted class and other employees of the labor organization and their families on the labor organization's premises or at any meeting, convention or other function of the labor organization.

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

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

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

(1) General. A corporation or labor organization may make the communications described in paragraphs (c)(2) through (c)(5) of this section to the general public. The general public includes anyone who is not in the corporation's or labor organization's restricted class. The provisions of paragraph (c) of this section shall not prevent a qualified nonprofit corporation under 11 CFR 114.10(c) from including express advocacy in any communication made to the general public under paragraphs (c)(2) through (c)(5)(i) of this section.

(2) Registration and voting communications. A corporation or labor organization may make registration and get-out-the-vote communications to the general public, provided that the communications do not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party. The preparation and distribution or registration and get-out-the-vote communications shall not be coordinated with any candidate(s) or political party. A corporation or labor organization may make communications permitted under this section through posters, billboards, broadcasting media, newspapers, newsletter, brochures, or similar means of communication with the general public.

(3) Official registration and voting information.

(i) A corporation or labor organization may distribute to the general public, or reprint in whole and distribute to the general public, any registration or voting information, such as

instructional materials, which has been produced by the official election administrators.

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

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

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

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

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

(5) Voter guides. A corporation or labor organization may prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues, including voter guides obtained from a nonprofit organization which is described in 26 U.S.C. 501 (c)(3) or (c)(4), provided that the voter guides comply with either paragraph (c)(5)(i) or (c)(5)(ii) (A) through (E) of this section. The sponsor may include in the voter guide biographical information on each candidate, such as education, employment positions, offices held, and community involvement.

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

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

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

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

(2) Appear on the general election ballot in the state(s) 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 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 therefor, 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).

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

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

(7) Candidate appearances on educational institution premises--

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

(ii) Use of facilities at no charge or at less than the usual and normal charge. An incorporated nonprofit educational institution exempt from federal taxation under 26 U.S.C. 501(c)(3), such as a school, college or university, may sponsor appearances by candidates, candidates' representatives or representatives of political parties at which such individuals address or meet the institution's academic community or the general public (whichever is invited) on the educational institution's premises at no charge or at less than the usual and normal charge, if:

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

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

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

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

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

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

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

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

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

(e) Incorporated membership organizations, incorporated trade associations, incorporated cooperatives and corporations without capital stock. An incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock may permit candidates, candidates' representatives or representatives of political parties to address or meet members and employees of the organization, and their families, on the organization's premises or at a meeting, convention or other function of the organization, in accordance with the conditions set forth in paragraphs (b)(1) (i) through (viii) of this section.

(f) Candidate debates.

(1) A nonprofit organization described in 11 CFR 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under paragraph (f)(3) of this section to defray costs incurred in staging candidate debates held in accordance with 11 CFR 110.13.

(2) A broadcaster (including a cable television operator, programmer or producer), bona fide newspaper, magazine or other periodical publication may use its own funds to defray costs incurred in staging public candidate debates held in accordance with 11 CFR 110.13.

(3) A corporation or labor organization may donate funds to nonprofit organizations qualified under 11 CFR 110.13(a)(1) to stage candidate debates held in accordance with 11 CFR 110.13 and 114.4(f).

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SUBCHAPTER C--BIPARTISAN CAMPAIGN REFORM ACT OF 2002--(BCRA)
REGULATIONS

PART 300--NON-FEDERAL FUNDS

January 30, 2004

§ 300.2 Definitions.

(a) 501(c) organization that makes expenditures or disbursements in connection with a Federal election. A 501(c) organization that makes expenditures or disbursements in connection with a Federal election as that term is used in 11 CFR 300.11, 300.37, 300.50, and 300.51 includes an organization that, within the current election cycle, plans to:

(1) Make expenditures or disbursements in connection with an election for Federal office including for Federal election activity; or

(2) Pay a debt incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(b) Agent. For the purposes of part 300 of chapter I, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:

(1) In the case of a national committee of a political party:

(i) To solicit, direct, or receive any contribution, donation, or transfer of funds; or,

(ii) To solicit any funds for, or make or direct any donations to, an organization that is described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a) (or has submitted an application for determination of tax exempt status under 26 U.S.C. 501(a)), or an organization described in 26 U.S.C. 527 (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(2) In the case of a State, district, or local committee of a political party:

(i) To expend or disburse any funds for Federal election activity; or

(ii) To transfer, or accept a transfer of, funds to make expenditures or disbursements for Federal election activity; or

(iii) To engage in joint fundraising activities with any person if any part of the funds raised are used, in whole or in part, to pay for Federal election activity; or

(iv) To solicit any funds for, or make or direct any donations to, an organization that is described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a) (or has submitted an application for determination of tax exempt status under 26 U.S.C. 501(a)), or an organization described in 26 U.S.C. 527 (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(3) In the case of an individual who is a Federal candidate or an individual holding Federal office, to solicit, receive, direct, transfer, or spend funds in connection with any election.

(4) In the case of an individual who is a candidate for State or local office, to spend funds for a public communication (see 11 CFR 100.26).

(c) Directly or indirectly establish, finance, maintain, or control.

(1) This paragraph (c) applies to national, State, district, and local committees of a political party, candidates, and holders of Federal office, including an officer, employee, or agent

of any of the foregoing persons, which shall be referred to as "sponsors" in this section.

(2) To determine whether a sponsor directly or indirectly established, finances, maintains, or controls an entity, the factors described in paragraphs (c)(2)(i) through (x) of this section must be examined in the context of the overall relationship between sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity. Such factors include, but are not limited to:

(i) Whether a sponsor, directly or through its agent, owns controlling interest in the voting stock or securities of the entity;

(ii) Whether a sponsor, directly or through its agent, has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;

(iii) Whether a sponsor, directly or through its agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity;

(iv) Whether a sponsor has a common or overlapping membership with the entity that indicates a formal or ongoing relationship between the sponsor and the entity;

(v) Whether a sponsor has common or overlapping officers or employees with the entity that indicates a formal or ongoing relationship between the sponsor and the entity;

(vi) Whether a sponsor has any members, officers, or employees who were members, officers or employees of the entity that indicates a formal or ongoing relationship between the sponsor and the entity, or that indicates the creation of a successor entity;

(vii) Whether a sponsor, directly or through its agent, provides funds or goods in a significant amount or on an ongoing basis to the entity, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17, and otherwise lawfully;

(viii) Whether a sponsor, directly or through its agent, causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the entity, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17, and otherwise lawfully;

(ix) Whether a sponsor, directly or through its agent, had an active or significant role in the formation of the entity; and

(x) Whether the sponsor and the entity have similar patterns of receipts or disbursements that indicate a formal or ongoing relationship between the sponsor and the entity.

(3) Safe harbor. On or after November 6, 2002, an entity shall not be deemed to be directly or indirectly established, maintained, or controlled by another entity unless, based on the entities' actions and activities solely after November 6, 2002, they satisfy the requirements of this section. If an entity receives funds from another entity prior to November 6, 2002, and the recipient entity disposes of the funds prior to November 6, 2002, the receipt of such funds prior to November 6, 2002 shall have no bearing on determining whether the recipient entity is financed by the sponsoring entity within the meaning of this section.

(4) Determinations by the Commission.

(i) A sponsor or entity may request an advisory opinion of the Commission to determine whether the sponsor is no longer directly or indirectly financing, maintaining, or controlling the entity for purposes of this part. The request for such an advisory opinion must meet the

requirements of 11 CFR part 112 and must demonstrate that the entity is not directly or indirectly financed, maintained, or controlled by the sponsor.

(ii) Notwithstanding the fact that a sponsor may have established an entity within the meaning of paragraph (c)(2) of this section, the sponsor or the entity may request an advisory opinion of the Commission determining that the relationship between the sponsor and the entity has been severed. The request for such an advisory opinion must meet the requirements of 11 CFR part 112, and must demonstrate that all material connections between the sponsor and the entity have been severed for two years.

(iii) Nothing in this section shall require entities that are separate organizations on November 6, 2002 to obtain an advisory opinion to operate separately from each other.

(d) Disbursement. Disbursement means any purchase or payment made by:

(1) A political committee; or

(2) Any other person, including an organization that is not a political committee, that is subject to the Act.

(e) Donation. For purposes of part 300, donation means a payment, gift, subscription, loan, advance, deposit, or anything of value given to a person, but does not include contributions.

(f) Federal account. Federal account means an account at a campaign depository that contains funds to be used in connection with a Federal election.

(g) Federal Funds. Federal funds mean funds that comply with the limitations, prohibitions, and reporting requirements of the Act.

(h) Levin account. Levin account means an account at a campaign depository established by a State, district, or local committee of a political party pursuant to 11 CFR 300.30, for purposes of making expenditures or disbursements for Federal election activity or non-Federal activity (subject to State law) under 11 CFR 300.32.

(i) Levin funds mean funds that are raised pursuant to 11 CFR 300.31 and are or will be disbursed pursuant to 11 CFR 300.32.

(j) Non-Federal account means an account that contains funds to be used in connection with a State or local election or allocable expenses under 11 CFR 106.7, 300.30, or 300.33.

(k) Non-Federal funds mean funds that are not subject to the limitations and prohibitions of the Act.

(l) [Reserved]

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

(n) To direct. For the purposes of part 300, to direct means to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary. Direction does not include merely providing information or guidance as to the requirement of particular law.

(o) Individual holding Federal office. Individual holding Federal office means an individual elected to or serving in the office of President or Vice President of the United States; or a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress of the United States.

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SUBCHAPTER C--BIPARTISAN CAMPAIGN REFORM ACT OF 2002--(BCRA)
REGULATIONS

PART 300--NON-FEDERAL FUNDS

SUBPART B--STATE, DISTRICT, AND LOCAL PARTY COMMITTEES AND
ORGANIZATIONS

January 30, 2004

§ 300.30 Accounts

(a) Scope and introduction. This section applies to State, district, or local committees or organizations of a political party, whether or not the committee is a political committee under 11 CFR 100.5, that have receipts or make disbursements for Federal election activity. Paragraph (b) of this section describes and explains the types of accounts available to a political party committee or organization covered by this section. Paragraph (c) of this section sets out the account structure that must be maintained by a political party committee or organization covered by this section.

(b) Types of accounts. Each State, district, and local party organization or committee that has receipts or makes disbursements for Federal election activity must establish one or more of the following types of accounts, pursuant to paragraph (c) of this section.

(1) Non-Federal accounts. The funds deposited into this account are governed by State law. Disbursements, contributions, and expenditures made wholly or in part in connection with Federal elections must not be made from any non-Federal account, except as permitted by paragraph (c)(3)(ii) of this section, 11 CFR 102.5(a)(4), 11 CFR 106.7(d)(1)(i), 11 CFR 300.33 and 11 CFR 300.34.

(2) Levin account. The funds deposited into this account must comply with 11 CFR 300.31. Such funds may be used for the categories of activities described at 11 CFR 300.32(b).

(3) Federal account. Federal accounts may be used for the deposit of contributions and the making of expenditures pursuant to the following conditions:

(i) Only contributions that are permissible pursuant to the limitations and prohibitions of the Act may be deposited into any Federal account, regardless of whether such contributions are for use in connection with Federal or non-Federal elections. See 11 CFR 103.3 regarding impermissible funds.

(ii) Only contributions solicited and received pursuant to the following conditions may be deposited in a Federal account:

(A) Contributions must be designated by the contributors for the Federal account;

(B) The solicitation must expressly state that contributions may be used wholly or in part in connection with a Federal election; or

(C) The contributor must be informed that all contributions are subject to the limitations and prohibitions of the Act.

(iii) All disbursements, contributions, and expenditures made wholly or in part by any State, district, or local party organization or committee in connection with a Federal election must be made from either:

(A) A Federal account, except as permitted by 11 CFR 300.32; or

(B) A separate allocation account (see paragraph (b)(4) of this section).

(iv) If all payments in connection with a Federal election, including payments for Federal

election activities, are to be made from a Federal account, expenditures and disbursements for costs that are allocable pursuant to 11 CFR 106.7 or 11 CFR 300.33 must be made from the Federal account in their entirety, with the shares of a non-Federal account or of a Levin account being transferred to the Federal account pursuant to 11 CFR 106.7 and 11 CFR 300.33.

(v) No transfers may be made to a Federal account from any other account(s) maintained by a State, district, or local party committee or organization from any other party organization or committee at any level for the purpose of financing activity in connection with Federal elections, except as provided by paragraph (b)(3)(iv) of this section or 11 CFR 300.33 and 300.34.

(4) Allocation accounts. At the discretion of the party committee or organization, separate allocation accounts may be established for purposes of making allocable expenditures and disbursements.

(i) Only funds from the party organization's or committee's Federal and non-Federal accounts may be deposited into an allocation account used to make allocable expenditures and disbursements for activities in connection with Federal and non-Federal elections.

(ii) Only funds from the party organization's or committee's Federal account and Levin funds from its non-Federal or Levin account(s) may be deposited into an allocation account used to make allocable expenditures and disbursements for activities undertaken pursuant to 11 CFR 300.32(b).

(iii) Once a party organization or committee has established a separate allocation account for activities in connection with Federal and non-Federal elections and a separate account for activities undertaken pursuant to 11 CFR 300.32(b), all allocable expenses must be paid from the appropriate allocation account for as long as that account is maintained.

(iv) The party organization or committee must transfer to the appropriate allocation account funds from its Federal and non-Federal or Levin accounts in amounts proportionate to the Federal, non-Federal and Levin shares of each allocable expense pursuant to 11 CFR 106.7 and 11 CFR 300.33. The transfers must be made pursuant to 11 CFR 300.33 and 300.34.

(v) No funds contained in an allocation account may be transferred to any other account maintained by the party committee or organization.

(vi) For reporting purposes, all allocation accounts must be treated as Federal accounts.

(c) Required account or accounts. Each State, district, and local party organization or committee that has receipts or makes disbursements for Federal election activity must establish its accounts in accordance with paragraphs (c)(1), or (c)(2), or (c)(3) of this section.

(1) One or more Federal accounts in a campaign depository, in accordance with 11 CFR part 103, which must be treated as a separate political committee and be required to comply with the requirements of the Act including the registration and reporting requirements of 11 CFR part 102 and part 104. State, district, and local party organizations or committees may choose to make non-Federal disbursements, subject to State law, and disbursements for Federal election activity from a Federal account provided that such disbursements are reported pursuant to 11 CFR 104.17 and 11 CFR 300.36, and provided that contributors of the Federal funds so used were notified that their contributions were subject to the limitations and prohibitions of the Act.

(2) Establish at least three separate accounts in depositories as follows--

(i) One or more Federal accounts;

(ii) One or more Levin accounts; and

(iii) One or more Non-Federal accounts.

(3) Establish two separate accounts in depositories as follows:

(i) One or more Federal accounts, and;

(ii) An account that must function as both a non-Federal account and a Levin account. If such an account is used, the State, district, and local party must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that whenever such organization makes a disbursement for activities undertaken pursuant to 11 CFR 300.32(b), that organization had received sufficient contributions or Levin funds to make such disbursement.

(d) Recordkeeping. All party organizations or committees must keep records of deposits into and disbursements from such accounts, and, upon request, must make such records available for examination by the Commission.

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§ 300.32 Expenditures and disbursements.

(a) Federal funds.

(1) An association or similar group of candidates for State or local office, or an association or similar group of individuals holding State or local office, must make any expenditures or disbursements for Federal election activity solely with Federal funds.

(2) Except as provided in this part, a State, district, or local committee of a political party that makes expenditures or disbursements for Federal election activity must use Federal funds for that purposes, subject to the provisions of this chapter.

(3) State, district, and local party committees that raise Federal funds to be used, in whole or in part, for Federal election activities must pay the direct costs of such fundraising only with Federal funds. The direct costs of a fundraising program or event include expenses for the solicitation of funds and for the planning and administration of actual fundraising programs and events.

(4) State, district, and local party committees that raise Levin funds to be used, in whole or in part, for Federal election activity must pay the direct costs of such fundraising with either Federal or Levin funds. The direct costs of a fundraising program or event include expenses for the solicitation of funds and for the planning and administration of actual fundraising programs and events.

(b) Levin funds. A State, district, or local committee of a political party may spend Levin funds in accordance with this part on the following types of activity:

(1) Subject to the conditions set out in paragraph (c) of this section, only the following types of Federal election activity:

(i) Voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; and

(ii) Voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot).

(2) Any use that is lawful under the laws of the State in which the committee is organized, other than the Federal election activities defined in 11 CFR 100.24(b)(3) and (4). A disbursement of Levin funds under this paragraph need not comply with paragraphs (c)(1) and (c)(2) of this section, except as required by State law.

(c) Conditions and restrictions on spending Levin funds.

(1) The Federal election activity for which the disbursement is made must not refer to a clearly identified candidate for Federal office.

(2) The disbursement must not pay for any part of the costs of any broadcasting, cable, or satellite communication, other than a communication that refers solely to a clearly identified candidate for State or local office.

(3) The disbursement must be made from funds raised in accordance with 11 CFR 300.31.

(4) The disbursements for allocable Federal election activity that exceed in the aggregate \$5,000 in a calendar year may be paid for entirely with Federal funds or may be allocated between Federal funds and Levin funds according to 11 CFR 300.33. Disbursements for Federal election activity that may be allocated and that aggregate \$5,000 or less in a calendar year may be paid for entirely with Federal funds, entirely with Levin funds, or may be allocated between Federal funds and Levin funds according to 11 CFR 300.33.

(d) Non-Federal activities. A State, district, or local committee of a political party that makes disbursements for non-Federal activity may make those disbursements from its Federal, Levin, or non-Federal funds, subject to the laws of the State in which it is organized. A State, district, or local party committee that engages in fundraising for solely non-Federal funds may pay the costs related to such fundraising from any account, subject to State law, including a Federal account.

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§ 300.33 Allocation of costs of Federal election activity.

(a) Costs of Federal election activity allocable by State, district, and local party committees and organizations.

(1) Costs of voter registration. Subject to the conditions of 11 CFR 300.32(c), State, district, and local party committees and organizations may allocate disbursements or expenditures, except salaries and wages for employees, between Federal funds and Levin funds for voter registration activity, as defined in 11 CFR 100.24(a)(2), that takes place during the period that begins on the date that is 120 days before the date of a regularly scheduled Federal election and that ends on the date of the election, provided that the activity does not refer to a clearly identified Federal candidate.

(2) Costs of voter identification, get-out-the-vote activity, or generic campaign activities within certain time periods. Subject to the conditions of 11 CFR 300.32(c), State, district, and local party committees and organizations may allocate disbursements or expenditures, except salaries and wages for employees, between Federal funds and Levin funds for voter identification, get-out-the-vote activity, or generic campaign activities, as defined in 11 CFR 100.24(a)(3) and (4) and 11 CFR 100.25, that are conducted in connection with an election in which a candidate for Federal office is on the ballot and within the time periods set forth in 11 CFR 100.24(a)(1), provided that the activity does not refer to a clearly identified Federal candidate.

(b) Allocation percentages. State, district, and local party committees and organizations that choose to allocate between Federal funds and Levin funds their expenditures and disbursements, except for salaries and wages, in connection with activities described in paragraph (a) of this section that take place within the time periods set forth in 11 CFR

100.24(a)(1) or paragraph (a) of this section must allocate the following minimum percentages to their Federal funds:

(1) Presidential election years. If a Presidential candidate, but no Senate candidate appears on the ballot, State, district, and local party committees and organizations must allocate at least 28% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(2) Presidential and Senate election year. If a Presidential candidate and a Senate candidate appear on the ballot, State, district, and local party committees and organizations must allocate at least 36% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(3) Senate election year. If a Senate candidate, but no Presidential candidate, appears on the ballot, State, district, and local party committees and organizations must allocate at least 21% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(4) Non-Presidential and non-Senate year. If neither a Presidential nor a Senate candidate appears on the ballot, State, district, and local party committees and organizations must allocate at least 15% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(c) Costs of Federal election activity not allocable by State, district, and local party committees. The following costs incurred by State, district, and local party committees and organizations must be paid only with Federal funds:

(1) Public communications. Expenditures for public communications as defined in 11 CFR 100.26 by State, district, and local party committees and organizations that refer to a clearly identified candidate for Federal office and that promote, support, attack, or oppose any such candidate for Federal office must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used.

(2) Salaries and wages. Salaries and wages for employees who spend more than 25% of their compensated time in a given month on Federal election activity or activities in connection with a Federal election must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used. Salaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity or activities in connection with a Federal election shall be paid from funds that comply with State law.

(3) Fundraising costs. Disbursements for direct fundraising costs incurred by State, district, and local party committees and organizations for funds to be used, in whole or in part, for Federal election activity, including the activities described in paragraph (a) of this section, must not be allocated between or among Federal, non-Federal and Levin funds. Only Federal or Levin funds may be used.

(d) Transfers between accounts to cover allocable expenses. State, district, and local party committees and organizations may transfer Levin funds from their Levin or non-Federal accounts to their Federal accounts or to allocation accounts solely to meet expenses allocable pursuant to paragraphs (a)(1) and (2) of this section and only pursuant to the following methods:

(1) Payments from Federal accounts or from allocation accounts.

(i) If Federal accounts are used to make payments for allocable activities, State, district, and local party committees and organizations must pay the entire amount of allocable expenses from their Federal accounts and transfer Levin funds from their Levin or non-Federal accounts to their Federal accounts solely to cover the portions of the expenses for which Levin funds may be used; or

(ii) State, district, and local party committees and organizations may establish separate allocation accounts into which Federal funds and Levin funds may be deposited solely for the purpose of paying allocable expenses.

(2) Timing.

(i) If Federal or allocation accounts are used to make allocable expenditures and disbursements, State, district, and local party committees and organizations must transfer Levin funds to their Federal or allocation accounts to meet allocable expenses no more than 10 days before and no more than 60 days after the payments for which they are designated are made from a Federal or allocation account, except that transfers may be made more than 10 days before a payment is made from the Federal or allocation account if advance payment is required by the vendor(s) and if such payment is based on a reasonable estimate of the activity's final costs as determined by the committee and the vendor(s) involved.

(ii) Any portion of a transfer of Levin funds to a party committee or organization's Federal or allocation account that does not meet the requirement of paragraph (d)(2)(i) of this section shall be presumed to be a loan or contribution from the Levin or non-Federal account to the Federal or allocation account, in violation of the Act.

* * * * *

SUBCHAPTER C--BIPARTISAN CAMPAIGN REFORM ACT OF 2002--(BCRA)
REGULATIONS

PART 300--NON-FEDERAL FUNDS

SUBPART D--FEDERAL CANDIDATES AND OFFICEHOLDERS

January 30, 2004

§ 300.64 Exemption for attending, speaking, or appearing as a featured guest at fundraising events (2 U.S.C. 441i(e)(3)).

Notwithstanding the provisions of 11 CFR 100.24, 300.61 and 300.62, a Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including but not limited to a fundraising event at which Levin funds are raised, or at which non-Federal funds are raised. In light of the foregoing:

(a) State, district, or local committees of a political party may advertise, announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications; and

(b) Candidates and individuals holding Federal office may speak at such events without restriction or regulation.

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APPENDIX B

SELECTED STATUTORY PROVISIONS

APPENDIX B

TITLE 2. THE CONGRESS

CHAPTER 14. FEDERAL ELECTION CAMPAIGNS

Selected Provisions

(Material added by BCRA in bold)
(Material removed by BCRA stricken)

§ 431. Definitions¹

* * * *

- (8)(A) The term "contribution" includes —
- (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
 - (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.
- (B) The term "contribution" does not include —
- (i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;
 - (ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed \$1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed \$2,000 in any calendar year;
 - (iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the

¹ BCRA § 402. Effective dates and regulations.

* * * *

- (c) Regulations —
- (1) In general. Except as provided in paragraph (2), the Federal Election Commission shall promulgate regulations to carry out this Act and the amendments made by this Act that are under the Commission's jurisdiction not later than 270 days after the date of enactment of this Act.
 - (2) Soft money of political parties. Not later than 90 days after the date of enactment of this Act, the Federal Election Commission shall promulgate regulations to carry out title I of this Act and the amendments made by such title.

normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed \$1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed \$2,000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed \$1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed \$2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan--

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

~~(viii) any gift, subscription, loan, advance, or deposit of money or anything of value to a national or a State committee of a political party specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office;~~

~~(ixviii) any legal or accounting services rendered to or on behalf of —~~

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

~~(ix)~~ the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided, That* —

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

~~(ix)~~ the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or referenced to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): *Provided, That* such payments are made from contributions subject to the limitations and prohibitions of this Act;

~~(ixi)~~ the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided, That--*

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

~~(xii)~~ payments made by a candidate or the authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access;

~~(xiii)~~ any honorarium (within the meaning of section 441 i of this title); and

~~(xiv)~~ any loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, if such loan is made in accordance with applicable law and under commercially reasonable terms and if the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business.

[(xv) Redesignated (xiv)]

(9)(A) The term "expenditure" includes —

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include —

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed \$2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b) of this title, but all such costs shall be reported in accordance with section 434(b) of this title;

(vii) the payment of compensation for legal or accounting services —

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of Title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) of this title by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids,

and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided, That* —

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided, That* —

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

* * * *

(17) Independent expenditure.

The term 'independent expenditure' means 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.

* * * *

(20) Federal election activity.

(A) In general. The term “Federal election activity” means —

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) Excluded activity. The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

(21) Generic campaign activity

The term 'generic campaign activity' means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

(22) Public communication

The term 'public communication' means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.

* * * * *

§ 434. Reporting requirements

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than \$200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication

For purposes of this subsection—

(A) In general

(i) The term “electioneering communication” means any broadcast, cable, or satellite communication which--

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term “electioneering communication” means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term “electioneering communication” does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is “targeted to the relevant electorate” if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date

For purposes of this subsection, the term “disclosure date” means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of \$10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of \$10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Internal Revenue Code

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986.

* * * * *

§ 437c. Federal Election Commission

(a) Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2) (A) Members of the Commission shall serve for a single term of 6 years, except that of the members first appointed —

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of Title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) Voting requirements; delegation of authorities. All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of Title 26.

(d) Meetings. The Commission shall meet at least once each month and also at the call of any member.

(e) Rules for conduct of activities; judicial notice of seal; principal office. The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) Staff director and general counsel; appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments; counsel for defense of actions:

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable without regard to the provisions of Title 5 governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3190(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either (A) by attorneys employed in its office, or (B) by counsel whom it may appoint, on a temporary basis as may be necessary for such purpose, without regard to the provisions of Title 5 governing

appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

* * * * *

§ 438. Administrative provisions

(e) Scope of protection for good faith reliance upon rules or regulations. Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

* * * * *

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions-

~~—(1) No~~**(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions—**

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed ~~\$1,000~~ **2,000**;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed ~~\$20,000~~ **25,000**;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed \$5,000; or

~~—(C) to any other political committee in any calendar year which, in the aggregate, exceed \$ 5,000.~~

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed \$10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$ 5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed \$ 15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed \$ 5,000.

~~—(3) No individual shall~~**(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than \$ 25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in**

~~which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held. —~~

(A) \$37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) \$57,500, in the case of any other contributions, of which not more than \$37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

* * * *

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that

(A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection² —

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate’s authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

—~~(ii)(iii)~~ the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 434(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee; such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering

² BCRA § 214. Coordination with candidates or political parties.

* * * * *

(b) Repeal of current regulations. The regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees adopted by the Federal Election Commission and published in the Federal Register at page 76138 of volume 65, Federal Register, on December 6, 2000, are repealed as of the date by which the Commission is required to promulgate new regulations under subsection (c) (as described in section 402(c)(1)).

(c) Regulations by the Federal Election Commission. The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address —

(1) payments for the republication of campaign materials;

(2) payments for the use of a common vendor;

(3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and

(4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

communication or that candidate’s party and as an expenditure by that candidate or that candidate’s party; and

—~~(C)~~**(D)** contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

* * * *

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office-

* * * *

(4) Independent versus coordinated expenditures by party

(A) In general

On or after the date on which a political party nominates a candidate, no committee of the political party may make—

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) Application

For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) Transfers

A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

* * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident

Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section ~~12(h) of the Public Utility Holding Company Act (15 U.S.C. 791(h))~~, **791(h) of Title 15**, the term “contribution or expenditure” ~~shall include~~ **includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes** any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section **or for any applicable electioneering communication**, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

* * * *

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful —

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families; and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

* * * *

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term “applicable electioneering communication” means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term “applicable electioneering communication” does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term “provided directly by individuals” does not include funds the source of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) of this section if an entity described in subsection (a) of this section directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) of this section shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 434(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection —

(A) the term “section 501(c)(4) organization” means—

(i) an organization described in section 501(c)(4) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with Internal Revenue Code

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of Title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term “targeted communication” means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television ser-

vice and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is “targeted to the relevant electorate” if it meets the requirements described in section 434(f)(3)(C) of this title.

* * * * *

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes an expenditure a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct-mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 304(f)(3)), such communication —

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by the candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name **and permanent street address, telephone number, or World Wide Web address** of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

* * * * *

§ 441i. ~~Repealed~~ **Soft money of political parties**

(a) National committees

(1) In general

A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

(b) State, district, and local committees

(1) In general

Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

(A) In general

Notwithstanding clause (i) or (ii) of section 431(20)(A) of this title, and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to the extent the amounts expended or disbursed for such activity are allocated (under regulations prescribed by the Commission) among amounts—

(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

(B) Conditions

Subparagraph (A) shall only apply if—

(i) the activity does not refer to a clearly identified candidate for Federal office;

(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than \$10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—

(I) any other State, local, or district committee of any State party,

(II) the national committee of a political party (including a national congressional campaign committee of a political party),

(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

(C) Prohibiting involvement of National parties, Federal candidates and officeholders, and State parties acting jointly

Notwithstanding subsection (e) of this section (other than subsection (e)(3) of this section), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts--

(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e) of this section; and

(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committees of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

(c) Fundraising costs

An amount spent by a person described in subsection (a) or (b) of this section to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(d) Tax-exempt organizations

A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to—

(1) an organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a) of such title (or has submitted an application for determination of tax exempt status under such section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

(2) an organization described in section 527 of such title (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(e) Federal candidates

(1) In general

A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 441a(a) of this title; and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) State law

Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

(3) Fundraising events

Notwithstanding paragraph (1) or subsection (b)(2)(C) of this section, a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) Permitting certain solicitations

(A) General solicitations

Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a) of such title (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 431(20)(A) of this title) where such solicitation does not specify how the funds will or should be spent.

(B) Certain specific solicitations

In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 431(20)(A) of this title, or for an entity whose principal purpose is to conduct such activities, if—

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed \$20,000.

(f) State candidates

(1) In general

A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication de-

scribed in section 431(20)(A)(iii) of this title unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Exception for certain communications

Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.