

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 114

[Notice 2011–18]

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

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Federal Election Commission seeks comments on proposed changes to its rules regarding corporate and labor organization funding of expenditures, independent expenditures and electioneering communications. These and other proposed changes are in response to a Petition for Rulemaking filed by the James Madison Center for Free Speech urging the Commission to amend its regulations in response to the decision of the Supreme Court in *Citizens United v. FEC*. The Commission has made no final decision on the issues presented in this rulemaking.

**DATES:** Comments must be received on or before February 3, 2012. Reply comments must be limited to the issues raised in the initial comments and must be received on or before February 17, 2012. The Commission will hold a hearing on these proposed rules and any modifications or amendments thereto that may be proposed on March 7, 2012. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

**ADDRESSES:** All comments must be in writing. Comments may be submitted electronically via the Commission's Web site at <http://www.fec.gov/fosers/>. Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal Election Commission, Attn.: Robert M. Knop, Assistant General Counsel, 999 E Street NW., Washington, DC 20463. All

comments must include the full name and postal service address of the commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post comments on its Web site at the conclusion of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant General Counsel, or Attorneys Ms. Esther D. Heiden, Mr. Theodore M. Lutz, or Ms. Joanna S. Waldstreicher, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act of 1971,<sup>1</sup> as amended, (“the Act”) prohibits corporations and labor organizations from using general treasury funds to make contributions or expenditures in connection with Federal elections. 2 U.S.C. 441b. The term “contribution or expenditure” includes any “direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value \* \* \* to any candidate, campaign committee, or political party or organization,” in connection with any Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1); see also 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52 and 100.111. The Act’s prohibition on expenditures by corporations and labor organizations includes “independent expenditures,” which are expenditures expressly advocating the election or defeat of a clearly identified candidate that are not made in concert or cooperation with, or at the request or suggestion of, a clearly identified candidate, the candidate’s authorized political committee, or their agents, or a political party committee and its agents. 2 U.S.C. 431(17); 11 CFR 100.16(a).

The Bipartisan Campaign Reform Act of 2002<sup>2</sup> (“BCRA”) amended the Act to also prohibit corporations and labor organizations from using general treasury funds to make electioneering communications. 2 U.S.C. 441b(b)(2). Electioneering communications are broadcast, cable, or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are

targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i) and (f)(3)(C); 11 CFR 100.29(a)(1)–(3). The Commission’s regulations prohibiting independent expenditures and electioneering communication made by corporations and labor organizations are found at 11 CFR part 114. The Act and Commission regulations also require entities that make independent expenditures and electioneering communications to report certain information to the Commission, which the Commission then places on the public record. 2 U.S.C. 434(c) and 434(f); 11 CFR 104.20 and 109.10. In addition, the Act and Commission regulations require communications expressly advocating the election or defeat of a clearly identified candidate, as well as electioneering communications, to include disclaimers stating who paid for the communication and whether the communication was authorized by a Federal candidate or a Federal candidate’s authorized political committee or its agents. 2 U.S.C. 441d(a); 11 CFR 110.11.

In *Citizens United v. FEC*, the Supreme Court held that the two statutory provisions prohibiting corporations from making independent expenditures and electioneering communications violate the First Amendment. 558 U.S. \_\_\_, 130 S. Ct. 876 (2010). At the same time, the Supreme Court reaffirmed the validity of the Act’s reporting, disclosure, and disclaimer requirements for independent expenditures and electioneering communications at 2 U.S.C. 434(f) and 441d(a)(3) and (d)(2). *Id.* at 913–16.<sup>3</sup>

The James Madison Center for Free Speech filed a Petition for Rulemaking urging the Commission to amend its regulations to conform to the decision in *Citizens United*. Specifically, the Petition for Rulemaking asked the

<sup>3</sup> Although *Citizens United* did not directly address whether labor organizations also have a First Amendment right to use their general treasury funds for independent expenditures and electioneering communications, the Act and Commission regulations treat labor organizations in a similar manner to corporations. See 2 U.S.C. 441b; see generally CFR part 114; see also Advisory Opinion 2010–11 (Commonsense Ten) at n.3. When addressing corporations, the Court in *Citizens United* often referred to labor organizations, and provided no basis for treating labor organization communications differently than corporate communications under the First Amendment. Therefore, the Commission proposes to make the same regulatory changes discussed in this Notice of Proposed Rulemaking for both corporations and labor organizations.

<sup>1</sup> Public Law 92–225, 86 Stat. 3 (1971); 2 U.S.C. 431 *et seq.*

<sup>2</sup> Public Law 107–155, 116 Stat. 81 (2002).

Commission to remove 11 CFR 114.2, 114.4, 114.9, and 114.14 to the extent that these regulations implement the Act's ban on the use of general treasury funds by corporations and labor organizations to make independent expenditures and electioneering communications. The Petition for Rulemaking also asked the Commission to remove 11 CFR 114.10, because that regulation implements an exception to the prohibition on independent expenditures and electioneering communications by corporations that is no longer necessary after *Citizens United*. Finally, the petitioners requested that the Commission remove 11 CFR 114.15, because that regulation relating to certain permissible communications by corporations and labor organizations is also no longer necessary after *Citizens United*.

On June 21, 2011, the Commission published a Notice of Availability seeking public comment on the Petition for Rulemaking. Notice of Availability on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 FR 36001 (June 21, 2011). The Commission received three comments in response to the Notice of Availability.

Two commenters urged the Commission to adopt the changes recommended in the Petition for Rulemaking. One of these two comments urged the Commission to repeal portions of 11 CFR 114.2, 114.3, 114.4, 114.9 and 114.14, insofar as these regulations implement the 2 U.S.C. 441b bans on independent expenditures and electioneering communications. The comment went on to request that the Commission either clarify or repeal sections 114.10 and 114.15. The other comment supporting the petition asked the Commission to remove portions of sections 114.2, 114.3, 114.4, 114.9 and 114.14 to the extent that they are invalid after the Court's decision in *Citizens United*. Both of these commenters further stated that any NPRM issued in response to the *Citizens United* decision and the Petition for Rulemaking should address only those regulations clearly invalidated by the Court decision, and should address no other issues.

One of the two commenters supporting the petition stated that further rulemaking is not appropriate at this time because the Commission has had only brief experience with the post-*Citizens United* legal landscape. That commenter suggested that the Commission should wait until "expert research" is conducted on a number of issues before engaging in broader rulemaking. Both commenters also suggested that the Commission should

limit its rulemaking to those regulations directly affected by *Citizens United* so that the Commission can reach consensus.

A third commenter urged the Commission not to amend or remove its regulations in response to the Petition for Rulemaking or *Citizens United*. That commenter noted that the *Citizens United* decision was not unanimous and suggested that the Court's rationale was incorrect. The commenter expressed concern that the Court's decision and any subsequent rulemaking implementing the decision would reduce transparency of corporate spending on Federal elections.

The Commission is issuing this Notice of Proposed Rulemaking to address certain regulations implicated by the *Citizens United* decision and raised by the Petition for Rulemaking, and the comments received in response to its Notice of Availability. The Commission seeks comment on: (1) Eliminating the prohibitions in 11 CFR 114.2 and 114.14 on the use of corporate and labor organization general treasury funds to finance independent expenditures and electioneering communications; (2) eliminating 11 CFR 114.15, which permits corporations and labor organizations to make electioneering communications that are not the functional equivalent of express advocacy; (3) eliminating the prohibitions in 11 CFR 114.3 and 114.4 regarding express advocacy in communications to the general public and revising the standards for voter registration and get-out-the-vote ("GOTV") drives; (4) revising 11 CFR 114.9, which governs the use of corporate and labor organization facilities for political activity; and (5) eliminating or amending the regulation at 11 CFR 114.10, which governs the making of independent expenditures and electioneering communications by qualified nonprofit corporations.

## I. Background

The Act and Commission regulations prohibit corporations and labor organizations from using general treasury funds to make expenditures, including independent expenditures. 2 U.S.C. 441b(a) and (b)(2); 11 CFR 114.2(b)(2).

In enacting section 203 of BCRA, Congress extended the Act's prohibitions on the use of general treasury funds for corporate and labor organization expenditures under 2 U.S.C. 441b to include electioneering communications. 2 U.S.C. 441b(b)(2); see also 2 U.S.C. 434(f)(3); 11 CFR 100.29, 104.3, 114.2, 114.10, and 114.14.

In *Citizens United*, the Supreme Court held that the Act's prohibitions on financing independent expenditures and electioneering communications with corporate general treasury funds were unconstitutional. *Citizens United*, a non-profit corporation, in January 2008 released a film in theaters and on DVD about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Citizens United* wanted to pay cable companies to make the film available to digital cable subscribers for free through video-on-demand, which allows subscribers to view programming, including movies. *Citizens United* planned to make the film available within thirty days of the 2008 primary elections.

*Citizens United* filed suit seeking a preliminary injunction, arguing that the ban on corporate electioneering communications at 2 U.S.C. 441b(b)(2) was unconstitutional as applied to payments to make the film available through video-on-demand and that the disclosure and disclaimer requirements at 2 U.S.C. 434(f) and 441d were unconstitutional as applied to payments for the film and for three planned advertisements for the movie. The district court denied the request for a preliminary injunction and granted the Commission's motion for summary judgment. 530 F. Supp. 2d 274 (D.D.C. 2008).

The Supreme Court invalidated section 441b's restrictions on corporate independent expenditures and electioneering communications. 130 S.Ct. at 913. The Supreme Court held that the prohibition on corporate independent expenditures and electioneering communications is a ban on speech and concluded that section 441b was therefore "subject to strict scrutiny." *Id.* at 898.

The Court noted that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Id.* at 904 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)). The Court stated that the anti-distortion rationale previously used to justify restrictions on corporate speech "interferes with the 'open marketplace of ideas' protected by the First Amendment." *Id.* at 906.<sup>4</sup> The Supreme Court also disagreed that corporate independent expenditures can be limited because of an interest in

<sup>4</sup> The Court therefore overruled its previous decisions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and, in part, *McConnell*.

protecting dissenting shareholders from being compelled to fund corporate political speech and held that such disagreements may be corrected by shareholders through the procedures of corporate democracy. *Id.* at 911. “All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech.” *Id.* at 905. Accordingly, the Supreme Court held that “the rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.” *Id.*

The Supreme Court further held that, while the government has a compelling interest in preventing corruption or the appearance of corruption, “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 909. Thus, the Court invalidated section 441b’s restrictions on corporate independent expenditures and electioneering communications. *Id.* at 913.

*Citizens United* also challenged the Act’s disclaimer and disclosure provisions at sections 434(f) and 441d as applied to the film and three advertisements for the film. Under the Act, electioneering communications must include a statement identifying the person responsible for payment for the advertisement. 2 U.S.C. 441d(a). Also, any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the Commission identifying the person making the electioneering communication, the election to which the communication pertains, and providing information about certain contributors who gave \$1000 or more within a specified time period. 2 U.S.C. 434(f)(2). The Court rejected the challenge to the statutory requirement and upheld the reporting provisions because “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Citizens United*, 130 S. Ct. at 913–16. The Court recognized that disclaimer and disclosure requirements impose no ceiling on campaign activities, do not prevent anyone from speaking, and advance the public’s “interest in knowing who is speaking about a candidate shortly before an election.” *Id.* at 914–15. “Prompt disclosure of expenditures can provide shareholders and citizens with the information

needed to hold corporations and elected officials accountable for their positions and supporters.” *Id.* at 916.

## II. Overview of Changes to 11 CFR Part 114: Corporate and Labor Organization Activity

Commission regulations implementing the statutory provisions struck down by *Citizens United* are no longer valid. The Commission previously released a statement saying that it would no longer enforce statutory provisions or regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications. FEC Statement on the Supreme Court’s Decision in *Citizens United v. FEC* (Feb. 5, 2010) (available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>). These regulations include portions of current 11 CFR part 114, which concern corporate and labor organization activity. In this rulemaking, the Commission proposes to amend 11 CFR 114.2, 114.3, 114.4, and 114.10, and to remove 11 CFR 114.14, and 114.15. The Commission has not made any determination as to which, if any, of the proposed alternatives it should adopt in its final rules.

The Commission proposes to change 11 CFR part 114 by: (1) Modifying specific language within sections of part 114 that prohibit corporations and labor organizations from using general treasury funds to finance independent expenditures and electioneering communications, and (2) removing language that may be superfluous, given the permissible uses of general treasury funds under *Citizens United*.

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

section 114.4 (with respect to the general public).

With respect to 11 CFR 114.4, the Commission proposes to remove the prohibition on making express advocacy communications to those outside the restricted class, but would maintain the restrictions on coordinating with candidates and political parties when making communications to those outside the restricted class. Regarding 11 CFR 114.9, the Commission seeks comment on whether 11 CFR 114.9 should be revised and, if so, how.<sup>5</sup> Additionally, the Commission seeks comment on whether to repeal or revise certain provisions of 11 CFR 114.10. These provisions currently exempt qualified nonprofit corporations (“QNC”) from the pre-*Citizens United* ban on corporate independent expenditures and electioneering communications. The proposed revisions would apply to all corporations and labor organizations, not limited to QNCs, making independent expenditures and electioneering communications.<sup>6</sup> The existing provisions currently reference other Commission regulations that apply to QNCs making independent expenditures or electioneering communications, including references to the reporting requirements for independent expenditures and electioneering communications under 11 CFR 104.4(a), 109.10(b), and 104.20(b), and the disclaimer provisions of 11 CFR 110.11. The Commission seeks comment on whether to remove section 114.10 or to revise section 114.10 to expand these rules to apply to all corporations and labor organizations that make such independent expenditures or electioneering communications. Finally, the Commission proposes to remove 11 CFR 114.14, and 114.15, which implement exceptions to the general prohibition against corporate and labor organization funding of independent expenditures and electioneering communications.

<sup>5</sup> While the Commission proposes to retain the reporting requirements currently at 11 CFR 114.3(b), which require corporations and labor organizations to report disbursements for communications containing express advocacy made to the restricted class, it recognizes that a communication containing express advocacy may now be made both to the general public and the restricted class, thereby triggering different thresholds for reporting obligations.

<sup>6</sup> Corporations that are foreign nationals, government contractors, or national banks, and corporations that are organized by authority of any law of Congress continue to be prohibited from making independent expenditures or electioneering communications. 2 U.S.C. 441b, 441c and 441e.

### III. Proposed 11 CFR 114.2(b)—Prohibitions on Certain Expenditures

The Commission regulation at 11 CFR 114.2(b) implements 2 U.S.C. 441b(a) by prohibiting corporations and labor organizations from making expenditures, including independent expenditures.<sup>7</sup> This rule also prohibits corporations and labor organizations from making payments for electioneering communications unless certain criteria are met. The Supreme Court's decision in *Citizens United* invalidated the prohibitions on corporate independent expenditures and electioneering communications in 2 U.S.C. 441b(a).<sup>8</sup> Accordingly, certain portions of 11 CFR 114.2(b) are no longer valid. The Commission therefore proposes to revise this regulation to remove the prohibitions on independent expenditures and electioneering communications.

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

Current 11 CFR 114.2(b)(2)(i) prohibits corporations and labor organizations from making "expenditures," as defined in 11 CFR part 100, subpart D. With certain exceptions, this prohibition applies to

all expenditures, whether they are independent, coordinated, or any other form of expenditure, including in-kind contributions.<sup>9</sup>

The Commission is considering two alternatives for revising 11 CFR 114.2(b)(2)(i). Both alternatives would permit corporations and labor organizations to make expenditures from their general treasury funds for communications that are not coordinated with a candidate or political party, and both alternatives would maintain the prohibition on corporate and labor organization expenditures for all activities that are coordinated with a candidate or political party as defined in 11 CFR 109.20 or 109.21. The alternatives differ in that Alternative A would permit corporations and labor organizations to make all types of expenditures from their general treasuries for any non-coordinated activities, whether or not they are communications, while Alternative B would maintain the prohibition on non-expressive expenditures by corporations and labor organizations regardless of whether they are coordinated with a candidate or political party.

Alternative A proposes treating all expenditures the same on the ground that *Citizens United* did not distinguish among different types of expenditures so long as they are made independently of any campaign or political party. By contrast, Alternative B suggests distinguishing between expenditures for communications and other types of expenditures, on the ground that the Court's holding in *Citizens United* struck down prohibitions on political speech as inconsistent with the First Amendment, but did not address non-communicative conduct because "independent expenditures" are defined as communications. The Commission invites comment on which of the two approaches reflects the more appropriate response to *Citizens United* and why. In considering both alternatives, the Commission seeks comment on whether it should distinguish between communicative and non-communicative expenditures and how. For example, how should the Commission treat corporate or labor organization expenditures for transporting voters to polling places as part of a non-coordinated get-out-the-

vote ("GOTV") campaign supporting or opposing a specific candidate which includes both communicative and non-communicative elements? Such expenses might include the driver's salary, vehicle rental, and fuel, and, if workers were brought in from another geographical area to assist in the efforts, the payment for their travel, lodging, and food costs.

#### Alternative A—Permit Corporations and Labor Organizations To Make Expenditures Except for Coordinated Expenditures and Coordinated Communications

Alternative A would remove the existing broad prohibition on corporate and labor organization expenditures from general treasury funds and replace it with a regulation specifically prohibiting only (a) expenditures that are coordinated with a candidate or a political party committee and (b) coordinated communications. Alternative A would permit independent corporate and labor organization communications that contain express advocacy, which is one component of the statutory and regulatory definition of an "independent expenditure" (e.g., a television advertisement that urges its audience to vote for a clearly identified Senate candidate), and those that do not contain express advocacy (e.g., a mass mailing that exhorts readers to vote for unspecified candidates who support a particular cause). Expenditures that are not for communications would also be permitted under Alternative A as long as these expenditures are not in-kind contributions, such as expenditures that are coordinated with candidates or political party committees. Permissible expenditures would include: (a) Payment for transportation of volunteers to campaign events, (b) payment for expenses of voter registration drives, (c) the provision of food to campaign volunteers, or (d) the provision of babysitting services to enable voters supporting a particular candidate or political party to vote.

The Commission seeks comment on Alternative A. Does Alternative A eliminate too much or too little of the prohibition on corporate and labor organization expenditures? Does Alternative A provide clear guidance on the types of expenditures corporations and labor organizations may make in accordance with *Citizens United*?

The Commission also seeks comment on whether Alternative A should distinguish between expenditures for communications and other types of non-coordinated expenditures. If spending by corporations or labor organizations—

<sup>7</sup> An "independent expenditure" is defined by the Act as "an expenditure by a person— (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. 431(17); see also 11 CFR 100.16(a). Express advocacy is defined in 11 CFR 100.22 as "any communication that—(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."

<sup>8</sup> See discussion above regarding the applicability of the *Citizens United* holding to labor organizations.

<sup>9</sup> An in-kind contribution is an expenditure. 11 CFR 100.111(e)(1). All corporate and labor organization contributions, including in-kind contributions, continue to be prohibited after *Citizens United*. Coordinated communications and coordinated expenditures continue to be prohibited because they are a form of in-kind contribution. 11 CFR 109.20(b) and 109.21(b).

whether for communicative or non-communicative expenditures—is neither coordinated with a federal candidate or political party nor is an in-kind contribution, can it be banned post-*Citizens United*? Does Alternative A's removal of the ban on non-coordinated corporate and labor organization expenditures accurately reflect the Court's holding and rationale?

**Alternative B—Permit Corporations and Labor Organizations To Make Independent Expenditures But Not Coordinated Communications or Non-Communicative Expenditures**

Alternative B would amend the prohibition on corporate and labor organization expenditures to permit independent expenditures from general treasury funds for non-coordinated communications, but would continue to prohibit non-communicative expenditures (including in-kind contributions) and coordinated communications. Alternative B would distinguish expenditures for communications from other types of expenditures. Under Alternative B, corporations and labor organizations would be permitted to make expenditures from general treasury funds solely for “political speech presented to the electorate that is not coordinated with a candidate.” *Citizens United*, 130 S. Ct. at 910. Coordinated communications as well as all non-communicative expenditures would continue to be prohibited.

The Commission seeks comment on whether the decision in *Citizens United* should be read to apply to non-communicative activities, and whether Alternative B is consistent with *Citizens United*. Is Alternative B specific enough as to the types of expenditures corporations and labor organizations may make? To what extent does the Act contemplate the distinction between speech and non-speech expenditures? Would maintaining the ban on non-speech expenditures further the government's interest in preventing corruption or the appearance of corruption?

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

Currently, 11 CFR 114.2(b)(2)(ii) prohibits corporations and labor organizations from “making expenditures with respect to a Federal election \* \* \* for communications to those outside the restricted class that

expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party.” Because the Supreme Court held in *Citizens United* that corporations and labor organizations have a constitutional right to make expenditures for communications containing express advocacy to those not in their restricted classes, the Commission proposes to remove paragraph (b)(2)(ii).

Similarly, 11 CFR 114.2(b)(3) prohibits corporations and labor organizations from making payments for electioneering communications to those outside their restricted classes unless permissible under 11 CFR 114.10 or 114.15.<sup>10</sup> Because *Citizens United* held that corporations may make electioneering communications, including to audiences outside their restricted classes, the Commission proposes to remove paragraph (b)(3) of section 114.2. The Commission seeks comment on this proposal.

**IV. Proposed 11 CFR 114.3—Disbursements for Communications to the Restricted Class by Corporations and Labor Organizations in Connection With a Federal Election**

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

The Commission's current regulations at 11 CFR 114.4 set out the restrictions and prohibitions for communications by corporations and labor organizations beyond the restricted class. The Act establishes specific reporting requirements for communications made by corporations and labor organizations to their restricted class and exempts

disbursements for such communications from the definition of expenditure, whether or not the communications contain express advocacy. 2 U.S.C. 431(9)(B)(iii). The Commission proposes to maintain the current structure in which 11 CFR 114.3 addresses disbursements for communications made to the restricted class and 11 CFR 114.4 addresses disbursements for communications made to those outside the restricted class, with certain proposed changes discussed below. The Commission requests comment on this approach. Should the Commission maintain the separate regulations as they are now, or divide them in a different way? Would combining 11 CFR 114.3 and 114.4 be more readily understandable to the public now that corporations and labor organizations can make express advocacy communications beyond the restricted class?

**A. 11 CFR 114.3(b)—Reporting of Disbursements for Express Advocacy Communications**

**1. Reporting of Disbursements for Express Advocacy Communications Solely to the Restricted Class Under Current 11 CFR 114.3(b)**

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

**2. Reporting of Disbursements for Express Advocacy Communications Beyond the Restricted Class**

As discussed in Section VII.B below, proposed 11 CFR 114.10(b) would require corporations and labor organizations that make independent expenditures for communications to persons outside the restricted class to report these independent expenditures

<sup>10</sup> This provision does not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that: (1) The committee is not a political committee as defined in 11 CFR 100.5; (2) the committee incorporated for liability purposes only; (3) the committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and (4) the committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

under 2 U.S.C. 434(c). This provision requires that “every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year” report such expenditures to the Commission.

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

### 3. Reporting of Express Advocacy Communications Both to the Restricted Class and Outside the Restricted Class

Prior to *Citizens United*, corporations and labor organizations were prohibited from making payments for independent expenditures directed to individuals outside of the restricted class. Now that the Court has struck down the prohibition on independent expenditures, the Commission seeks comment on how a corporation or labor organization should report spending for communications containing express advocacy directed both to the restricted class and outside the restricted class. If a corporation or labor organization makes a single disbursement for a communication containing express advocacy that is made both to the general public, which is an independent expenditure, and the restricted class, which is exempt from the definition of expenditure, should the fact that the communication went outside the restricted class result in the entire disbursement being treated as an independent expenditure, subject to the relevant reporting requirements? Alternatively, should the corporation or labor organization allocate the expense between the cost of the communication made to the restricted class and the cost of the communication made outside the restricted class and report the allocated expenses separately under the two reporting regimes?

#### B. Proposed 11 CFR 114.3(c)(4)—Voter Registration and Get-Out-the-Vote Drives

Current 11 CFR 114.3(c)(4) provides that a corporation or a labor organization may conduct voter registration and GOTV drives “aimed at its restricted class.” Section 114.3(c)(4) states that voter registration and GOTV drives include providing transportation

to the place of registration and to the polls. The current provision further permits such drives to include communications containing express advocacy, “such as urging individuals to register with a particular political party or to vote for a particular candidate.” 11 CFR 114.3(c)(4). However, the current provision prohibits corporations and labor organizations from withholding or refusing to give information and other assistance regarding registering or voting “on the basis of support for or opposition to particular candidates, or a particular political party.” *Id.*

The Commission is proposing two alternatives to revise paragraph (c)(4). Alternative A would also remove the existing requirement that corporations or labor organizations may not withhold or refuse to give information or other assistance on the basis of support for, or opposition to, particular candidates or a particular political party, but maintain the exemption from the definition of “contribution or expenditure” under 2 U.S.C. 441b(b)(2)(B) for voter registration and GOTV drives that meet that requirement. Alternative B would not make any changes to current 11 CFR 114.3(c)(4) except the technical change, and therefore retain the current prohibition on withholding or refusing to give information and other assistance regarding registering or voting “on the basis of support for or opposition to particular candidates, or a particular political party.” The Commission invites comment on which, if either, of the two proposals better comports with *Citizens United* and the Act.

#### Alternative A—Remove Requirement That Corporations and Labor Organizations Not Withhold or Refuse To Provide Assistance on the Basis of Support for, or Opposition to, Particular Candidates or a Particular Party

This alternative would remove the prohibition on withholding or refusing to provide information or other assistance regarding registering or voting based on support for or opposition to particular candidates, or a particular party. Instead, Alternative A would prohibit corporations and labor organizations from conducting voter registration or GOTV drives only if the activity is coordinated with a candidate or political party. As discussed in Section III.A above, one approach to revising the Commission’s regulations would be to eliminate the existing broad prohibition on corporate and labor organization expenditures, and instead prohibit only those expenditures that are coordinated with a candidate or a political party committee. Similarly,

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

Alternative A, however, would adhere to the statutory exception to the definition of “contribution or expenditure” for nonpartisan voter registration and GOTV drives. See 2 U.S.C. 441b(b)(2)(B). Under existing regulations, corporations and labor organizations do not have to report to the Commission disbursements for voter registration and GOTV drives that meet the conditions of the statutory exception, since such disbursements are neither contributions nor expenditures. While voter registration and GOTV drives are permissible under Alternative A, regardless of whether the drives meet the conditions of the statutory exception, corporations or labor organizations conducting drives that meet those conditions are not required to report disbursements for those drives. Thus, Alternative A would specify that disbursements for voter registration and GOTV drives are not contributions or expenditures if the drives are conducted in such a manner that the corporation or labor organization does not withhold or refuse to provide information or other assistance regarding registering or voting on the basis of support for or opposition to particular candidates or a particular political party, consistent with the statutory exception in 2 U.S.C. 441b(b)(2)(B).

The Commission requests comment on this proposal. Is Alternative A consistent with *Citizens United*? Does the proposal eliminate too much or too little in implementing the remaining prohibitions on corporate and labor organization expenditures? Is this consistent with the uniform treatment of all expenditures under Alternative A? Should this reporting regime inform the Commission’s choice of alternatives for amending section 114.4?

In *Citizens United*, the Court rejected an “intricate case-by-case determination” to determine whether political speech is banned, given that a corporation has a constitutional right to speak. 130 S. Ct. at 892. By not weighing the expressive elements of expenditures, does Alternative A avoid the need for such “intricate case-by-case determinations”?

#### Alternative B—Retain Existing Regulation at 11 CFR 114.3(c)(4)

Alternative B would make no changes to the existing regulation at 11 CFR 114.3(c)(4) other than the technical change discussed above. As discussed

in Section III.A above, one alternative for revising the Commission's regulations to comply with the decision in *Citizens United* would be to specifically exclude expenditures for communications (i.e., "independent expenditures") from the broader prohibition on expenditures, while still prohibiting corporate and labor organization expenditures such as in-kind contributions, coordinated expenditures, or expenditures that do not involve communications. Like proposed Alternative B for 11 CFR 114.2(b)(2)(i) discussed above, Alternative B for 11 CFR 114.3(c)(4) would also distinguish between speech and non-speech activity.

In promulgating the current regulation at 11 CFR 114.3(c)(4), the Commission distinguished between the "pure speech" aspects of the drives [that] may be partisan," and the non-speech activity aspects of the drives that "must be conducted in a nonpartisan manner." 1977 E&J at 105 (1977). The Commission's implementation of the nonpartisan requirement of 2 U.S.C. 441b(b)(2)(B) reflects this distinction between "pure speech" and non-speech elements of voter registration and GOTV drives. Because Alternative B takes the approach that *Citizens United* did not overturn the prohibition on corporate and labor organization disbursements that do not involve political speech in the form of independent expenditures and electioneering communications, under Alternative B the Commission would continue to regulate the non-speech aspects of voter registration and GOTV drives in order to implement 2 U.S.C. 441b. These expenses might include, for example, the driver's salary, vehicle rental and fuel, and travel, lodging, and food costs in instances where volunteers or workers were brought in from other locations to participate in a voter registration or GOTV drive. These expenses might also include office leasing and other general office costs, as well as child care costs for voter registration and GOTV workers and for voters.

In Alternative B, as in Alternative A, a corporation or labor organization would continue to be able to make voter registration or GOTV communications, including express advocacy, to its restricted class under 11 CFR 114.3(c)(4). Furthermore, in Alternative B, as in Alternative A, voter registration and GOTV drives conducted in accordance with proposed 11 CFR 114.3(c)(4) would remain exempt from the definition of "expenditure" under 2 U.S.C. 441b(b)(2)(B). However, Alternative B would maintain the prohibition on withholding or refusing

to provide information or other assistance regarding registering or voting based on support for or opposition to particular candidates, or a particular party. Additionally, under Alternative B, corporations and labor organizations would remain prohibited from engaging in *non-communicative* activities related to voter registration and GOTV drives other than those conducted in accordance with proposed 11 CFR 114.3(c)(4).

The Commission also notes the significance of this reporting regime for the Commission's choice of alternatives for amending section 114.4, discussed below. Corporations and labor organizations are not required to report disbursements associated with qualifying voter registration or GOTV drives, such as driver salaries and the cost of fuel, while persons who file reports with the Commission must report all expenditures for communications (both independent expenditures and electioneering communications). Does the statute implicitly distinguish between communications and voter registration and GOTV drives?

The Commission requests comments on this approach. Is Alternative B consistent with the holding in *Citizens United*? Is it appropriate to interpret *Citizens United*'s holding as related only to pure speech and therefore not to extend these holdings to these types of non-communicative conduct? Alternatively, do all aspects of voter registration and GOTV drives possess inherently communicative qualities that would prohibit such regulation? The Commission seeks comment on where voter registration and GOTV drives fall on the spectrum ranging from speech to conduct.

#### **V. Proposed 11 CFR 114.4—Disbursements for Communications by Corporations and Labor Organizations Beyond the Restricted Class in Connection With a Federal Election**

Current 11 CFR 114.4 sets out a number of exceptions to the prohibitions on corporations and labor organizations making expenditures. The regulation permits certain communications and activities directed outside the restricted class, both to employees outside the restricted class and the general public. This section also permits certain communications made to those outside the restricted class to be coordinated, to a limited extent, with candidates. Specifically, section 114.4(b) covers candidate and party appearances on corporate or labor organization premises or at a meeting, convention, or other function that is

attended by employees outside the restricted class.

Current section 114.4(c) identifies the types of communications that corporations and labor organizations can make to the general public, namely: (1) Voter registration and voting communications; (2) official registration and voting information; (3) voting records; (4) voter guides; (5) endorsements; (6) candidate appearances on educational institution premises; and (7) electioneering communications, and the relevant requirements and restrictions that apply to each. The proposed changes to 11 CFR 114.4 would eliminate the prohibition on express advocacy communications made outside the restricted class, but would maintain the restrictions on coordination with candidates and political parties in communications outside the restricted class.

#### **A. Proposed 11 CFR 114.4(a)—General**

Current 11 CFR 114.4(a) provides that any communications that a corporation or labor organization makes to the general public may also be made to the restricted class and to its employees outside the restricted class. Paragraph (a) also provides that communications described in section 114.4 may be coordinated with candidates and political committees only to the extent permitted in section 114.4. The Commission is proposing minor changes to the language of paragraph (a) to clarify the meaning of the provisions.

#### **B. Proposed 11 CFR 114.4(c)—Communications by a Corporation or Labor Organization to the General Public**

Current 11 CFR 114.4(c) addresses communications by corporations and labor organizations to the general public, and currently includes specific provisions on seven types of communications, listed above, that corporations and labor organizations may make to the general public. Each of the provisions within paragraph (c) prohibits coordinating the communication with a candidate or a candidate's committee or agent, with the exception of paragraph (c)(7) addressing candidate appearances on incorporated non-profit educational institution premises and paragraph (c)(8) regarding electioneering communications. The Commission proposes to restructure paragraph (c) by adding to paragraph (c)(1) a general prohibition on a corporation or labor organization acting in cooperation, consultation, or concert with or at the request or suggestion of a candidate, a candidate's committee or



agent, or a political party committee or its agent regarding the preparation, contents, and distribution of any of the specific types of communications described at proposed 11 CFR 114.4(c)(2) through (c)(6). This language would replace the separate prohibitions on coordination contained in each of the specific paragraphs at current 11 CFR 114.4(c)(2) through (c)(6). The Commission seeks comment on this approach.

#### 1. Removal of Express Advocacy Prohibition

Proposed 11 CFR 114.4(c)(1) would remove the current language specifically permitting qualified nonprofit corporations (“QNCs”) under 11 CFR 114.10(c) to include express advocacy in any communication made to the general public. *See* Section VII, below. After *Citizens United*, all corporations and labor organizations may include express advocacy in any communication made to the general public so long as the communication is not coordinated with candidates or political parties. Hence, this language is now superfluous.

Current 11 CFR 114.4(c)(2) through (c)(6) govern several types of communications that corporations and labor organizations may make to the general public and set out the conditions under which corporations and labor organizations may make them. These communications are: voter registration and GOTV communications; official voter registration and voting information; voting records; voter guides; and endorsements. Proposed 11 CFR 114.4(c)(1) would include a reference to proposed 11 CFR 114.10 to make clear that corporations and labor organizations are no longer limited to the specific types of communications listed in these paragraphs. Nonetheless, the Commission proposes to retain these paragraphs to provide specific information about some of the types of election-related communications that corporations and labor organizations may make. All five of these paragraphs currently prohibit corporations or labor organizations from expressly advocating the election or defeat of clearly identified candidates in these communications. Proposed 11 CFR 114.4(c)(2) through (6) would eliminate the prohibition on express advocacy contained in each of the current paragraphs when these communications are not coordinated with any candidate or political party. The Commission requests comment on these proposed deletions.

#### 2. Proposed 11 CFR 114.4(c)(2)—Voter Registration and GOTV Communications

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

#### 3. Proposed 11 CFR 114.4(c)(5)—Voter Guides

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

candidates in communications to the general public and may make electioneering communications so long as such communications are not coordinated with candidates. The Commission requests comments on these proposed changes.

#### 4. Proposed 11 CFR 114.4(c)(6)—Endorsements

Current 11 CFR 114.4(c)(6) permits corporations and labor organization to endorse candidates, and sets out certain requirements and restrictions on such endorsements. Current 11 CFR 114.4(c)(6) permits a corporation or labor organization to communicate the endorsement only to its restricted class through specific types of publications, and prohibits these publications from being distributed to the general public other than at a *de minimis* level. Current 11 CFR 114.4(c)(6) then sets out the circumstances under which a corporation and labor organization may announce an endorsement to the general public. The Commission proposes to remove these restrictions on the manner of announcing a corporation or labor organization’s endorsement of a candidate in proposed 11 CFR 114.4(c)(6) consistent with *Citizens United*. The Commission requests comments on these proposed deletions.

#### 5. Proposed 11 CFR 114.4(c)(8)—Electioneering Communications

Current 11 CFR 114.4(c)(8) permits corporations and labor organizations to make electioneering communications to the general public only to the extent permitted under current 11 CFR 114.15. Section 114.15 permits corporations and labor organizations to make electioneering communications, unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. As noted below, the Commission proposes to remove Section 114.15.

Current 11 CFR 114.4(c)(8) further permits QNCs to make electioneering communications to the general public in accordance with current 11 CFR 114.10. Section 114.10(d)(2), in turn, permits QNCs to make any electioneering communication. Because *Citizens United* struck down the prohibition on corporations and labor organizations making electioneering communications, the exception to the prohibition on electioneering communications at 11 CFR 114.4(c)(8) is superfluous. Therefore, the Commission proposes to eliminate current 11 CFR 114.4(c)(8) in its entirety. The Commission seeks comment on this approach.



*C. Proposed 11 CFR 114.4(d)—Voter Registration and GOTV Drives*

Current 11 CFR 114.4(d) permits corporations and labor organizations to conduct voter registration and GOTV drives aimed at the general public. It states that registration and GOTV drives include providing transportation to the place of registration and to the polls. The current provision prohibits such drives from including communications containing express advocacy and states that the drives may not be coordinated with any candidate or political party. The current provision also prohibits corporations or labor organizations (1) from withholding or refusing to give information and other assistance regarding registering or voting on the basis of support for, or opposition to, particular candidates or a particular political party; (2) from directing the drives primarily at individuals based on registration with a particular party; and (3) from paying individuals conducting such drives on the basis of number of individuals registered or transported to the polls who support a particular candidate or candidates or political party.

In light of *Citizens United*, the Commission is proposing two alternatives to revise 11 CFR 114.4(d). Both Alternatives A and B would remove the prohibition on communications expressly advocating the election or defeat of candidates or political parties made in connection with a voter registration or GOTV drive. Alternative A, however, as discussed in more detail below, would also remove all of the existing requirements and prohibitions regarding voter registration and GOTV drives, with the exception of the prohibition on coordination with candidates or political parties. Alternative A would maintain the exemption from the definition of “expenditure” under 2 U.S.C. 431(9)(B)(ii) and 11 CFR 100.133 for voter registration and GOTV drives that meet the existing requirements and prohibitions. In contrast, as discussed in more detail below, Alternative B would retain current 11 CFR 114.4(d), except that it would remove the prohibition on express advocacy currently at 11 CFR 114.4(d)(1). The Commission invites comment on which, if either, of the two proposals better comports with *Citizens United* and why.

**Alternative A—Remove All Restrictions on Voter Registration and GOTV Drives Except for the Prohibition on Coordinating With Candidates and Political Parties**

This alternative would remove all the requirements for and restrictions on voter registration and GOTV drives at current 11 CFR 114.4(d)(3) through (6), while retaining the prohibition on coordinating drives with candidates or political parties, currently at 11 CFR 114.4(d)(2). As discussed in Sections III.A and IV.E above, one approach to revising the Commission’s regulations to make them consistent with *Citizens United* would be to eliminate the existing broad prohibition on corporate and labor organization expenditures, and instead prohibit only those expenditures that are coordinated with a candidate or a political party committee, including coordinated communications, or in-kind contributions. Similarly, Alternative A would permit corporations and labor organizations to conduct voter registration and GOTV drives without restriction, as long as they were not coordinated with a candidate or political party.

Alternative A, however, would maintain the statutory exemption from the definition of “expenditure” at 2 U.S.C. 431(9)(B)(ii) for voter registration and GOTV drives. Under the Commission’s existing rules, corporations and labor organizations do not have to report to the Commission disbursements for voter registration and GOTV drives that meet the conditions of the statutory exception because such disbursements are neither contributions nor expenditures. While voter registration and GOTV drives are permissible under Alternative A regardless of whether the drives meet the conditions of the statutory exception, corporations or labor organizations conducting drives that meet those conditions are not required to report disbursements for those drives. Proposed Alternative A would state that disbursements for voter registration and GOTV drives are not expenditures if the drive meets the requirements for, and restrictions on, voter registration and GOTV drives that are currently located at 11 CFR 114.4(d)(1) and (3)–(6). These requirements would include the prohibition on express advocacy, as well as the prohibition on withholding or refusing to provide information or other assistance regarding registration or voting on the basis of support for, or opposition to, particular candidates or a particular political party.

The Commission requests comment on this proposal. Is this alternative appropriately consistent with *Citizens United*? Does the proposal eliminate too much or too little in implementing the remaining prohibitions on corporate and labor organization expenditures?

**Alternative B—Retain Existing Regulation at 11 CFR 114.4(d) Except for the Prohibition on Express Advocacy**

Alternative B would make no changes to the existing regulation at 11 CFR 114.4(d), except to remove the prohibition on corporations and labor organizations making communications expressly advocating the election or defeat of clearly identified candidates currently at 11 CFR 114.4(d)(1). As discussed in Sections III.A and IV.E above, Alternative B would exclude expenditures for communications from the prohibition on expenditures, while still prohibiting other corporate and labor organization expenditures, such as in-kind contributions, coordinated expenditures, and expenditures that are not for communications.

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

The current rule at 11 CFR 114.4, like the rule at 114.3, recognizes the distinction between expenditures for communications and for non-communicative activities. Current

114.4(c)(2) specifically allows for voter registration or GOTV *communications* to the general public, provided that the communications do not contain express advocacy, while current 114.4(d), following 2 U.S.C. 441b(b)(2)(B), exempts voter registration and GOTV *drives* conducted in a nonpartisan manner from the definition of “expenditure.” In Alternative B, as in Alternative A, a corporation or labor organization would be able to make voter registration or GOTV *communications*, including express advocacy, to the general public under proposed 11 CFR 114.4(c)(2). Furthermore, under both Alternative A and Alternative B, voter registration and GOTV drives conducted in accordance with proposed 11 CFR 114.4(d) would remain exempt from the definition of “expenditure” in 2 U.S.C. 441b(b)(2)(B). However, under Alternative B, corporations and labor organizations would continue to be prohibited from engaging in *non-communicative* activities related to voter registration and GOTV drives other than those conducted in accordance with proposed 11 CFR 114.4(d).

The Commission requests comments on this proposal. Is this alternative consistent with *Citizens United*? Does the proposal eliminate too much or too little in implementing the remaining prohibitions on corporate and labor organization expenditures?

#### **VI. Proposed 11 CFR 114.9—Use of Corporate and Labor Organization Facilities**

The use of corporate or labor organization facilities in connection with Federal elections is generally treated as both a contribution and an expenditure under the Act. Section 114.9 establishes certain limited exceptions to this requirement for minimal usage of these facilities by certain individuals, and also requires corporations and labor organization to obtain reimbursement from individuals who use their facilities in connection with Federal elections for more than minimal usage. 1977 E&J at 115; *see also* Explanation and Justification for Final Rules for Internet Communications, 71 FR 18589, 18611 (Apr. 12, 2006); Advisory Opinion 1985–26 (General Mills) (concluding that, under 114.9(c), an employee’s failure to reimburse a corporation for the corporation’s distribution of campaign materials could result in prohibited corporate expenditure). *Citizens United* invalidated the prohibition on corporate and labor organization independent expenditures at 2 U.S.C. 441b(a). The *Citizens United* decision did not address

the prohibition on contributions by corporations and labor organizations at 2 U.S.C. 441b.

The Commission seeks comment on whether 11 CFR 114.9 should be revised in light of the *Citizens United* decision. If so, how should the Commission revise the regulation? To what extent should 11 CFR 114.9 be revised, if at all, to account for the continued validity of the contribution ban at 2 U.S.C. 441b?

#### **VII. Proposed Revision of 11 CFR 114.10—Corporations and Labor Organizations Making Independent Expenditures and Electioneering Communications**

The Commission promulgated 11 CFR 114.10 primarily in response to the Supreme Court’s decision in *MCFL v. FEC*, 479 U.S. 238 (1986). In *MCFL*, the Court considered the application of the independent expenditure prohibition in 2 U.S.C. 441b to MCFL, a nonprofit corporation organized to promote certain ideological views. The Court concluded that, because MCFL did not have the potential to corrupt the electoral process, it did not implicate the concerns that prompted regulation of corporations by Congress. *See MCFL*, 479 U.S. at 259. In response to *MCFL*, the Commission adopted 11 CFR 114.10, creating a regulatory exception to the independent expenditure ban in section 441b for organizations with the same characteristics as MCFL, referred to as “qualified nonprofit corporations” or “QNCs.” After Congress enacted BCRA’s electioneering communications provisions in 2002, the Commission added an exception in 11 CFR 114.10 for QNCs making electioneering communications. Because *Citizens United* struck down the statutory bans on independent expenditures and electioneering communications for all corporations and labor organizations, the regulatory exceptions for QNCs are now superfluous.

To determine if the Commission should revise 11 CFR 114.10, or remove the provision in its entirety, the Commission seeks comments on a proposal to remove current paragraphs (a) through (c) and (e)(1), as these regulations specifically apply only to QNCs. The Commission proposes to redesignate the provision currently at 11 CFR 114.10(d) and revise it to recognize explicitly the right of all corporations and labor organizations to make independent expenditures and electioneering communications. The Commission further proposes to retain and redesignate the regulations at 11 CFR 114.10(e)(2) through (i), and would expand them to apply to *all* corporations and labor organizations

that make independent expenditures and electioneering communications. These provisions include: (1) The reporting requirements for QNCs making independent expenditures or electioneering communications at 11 CFR 114.10(e); (2) the solicitation disclaimer requirement at 11 CFR 114.10(f); (3) the non-authorization disclaimer requirement at 11 CFR 114.10(g); (4) the provision in 11 CFR 114.10(h) permitting QNCs to establish segregated bank accounts for disbursements for electioneering communications; and (5) 11 CFR 114.10(i), which states that nothing in section 114.10 authorizes any organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code. The Commission seeks comment as to whether maintaining any or all of these regulations is necessary or appropriate.

#### **A. Proposed 11 CFR 114.10(a)—Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations**

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

#### **B. Proposed 11 CFR 114.10(b)—Reporting Independent Expenditures and Electioneering Communications**

Current 11 CFR 114.10(e)(2) sets forth the reporting requirements for QNCs making independent expenditures and

electioneering communications. Proposed 11 CFR 114.10(b) would expand this language to include independent expenditures and electioneering communications made by all corporations and labor organizations. Proposed 11 CFR 114.10(b)(1) would state that corporations and labor organizations that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year must file reports according to 11 CFR 104.4(a) and 109.10(b) through (e). Section 104.4(a) requires that “every person that is not a political committee must report independent expenditures in accordance with paragraphs (e) and (f) of this section and 11 CFR 109.10” (emphasis added).

Proposed 11 CFR 114.10(b)(2) would state that corporations or labor organizations that make electioneering communications aggregating in excess of \$10,000 in a calendar year must file statements as required by 11 CFR 104.20(b). Section 104.20(b), in turn, requires that “every person who has made an electioneering communication \* \* \* aggregating in excess of \$10,000 during any calendar year” file a statement on FEC Form 9, disclosing information set out in paragraph (c) of that section (emphasis added). Given that the definition of “person” already covers corporations and labor organizations, is it necessary or helpful to have an additional regulation that specifically states that corporations and labor organizations are subject to these requirements? See 2 U.S.C. 431(11); 11 CFR 100.10.

#### C. Proposed 11 CFR 114.10(c)—Solicitation; Disclosure of Use of Contributions for Political Purposes

Current 11 CFR 114.10(f) requires that solicitations for donations by QNCs disclose to potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

Proposed 11 CFR 114.10(c) would maintain this requirement, and would expand it to cover solicitations for donations that may be used for political purposes where the solicitations are made by any corporation or labor organization.

The requirement at current section 114.10(f) derives from the Supreme Court’s decision in *MCFL*. Explanation and Justification for Final Rules on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 FR 35292, 35303 (July 6, 1995). In holding the prohibition on independent expenditures unconstitutional as

applied to QNCs, the Supreme Court reasoned that “[t]he rationale for regulation is not compelling with respect to independent expenditures by [MCFL]” because “[i]ndividuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.” *MCFL*, 479 U.S. at 260–61. “Given a contributor’s awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest [of] protecting contributors is simply insufficient to support § 441b’s restriction on the independent spending of MCFL.” *Id.* at 262 (emphasis added).

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

Although the Supreme Court’s decision in *Citizens United* to strike down the independent expenditure and electioneering communications ban in section 441b appears to have rendered the QNC exception unnecessary, is the solicitation disclosure requirement in *MCFL* still important in ensuring that those solicited have the information necessary to make informed decisions about how their donations may be used? The Commission seeks comment as to whether any or all of these proposed regulations are necessary. If the statutory basis for such a requirement remains sound, does language in the Court’s opinion in *Citizens United* regarding disclosure and disclaimers mean that the Commission may and should continue to have a specific requirement that QNCs provide disclosure to potential donors and contributors? If so, should the rules at current 11 CFR 114.10(c) defining

“QNC” be retained so that these entities will be apprised of this requirement? Should the Commission establish a broader disclosure requirement so that all corporations and labor organizations must disclose to those they solicit that any money given to the corporation or labor organization may be used for political purposes, such as making communications supporting or opposing candidates? Should the Commission require corporations and labor organizations to state in such disclosures that the funds received may be used specifically for independent expenditures or electioneering communications, as opposed to for “political purposes” generally?

Because *Citizens United* struck down the statutory bans on independent expenditures and electioneering communications for all corporations and labor organizations, is the regulatory requirement that QNC include a solicitation disclaimer now superfluous? Should the Commission remove 11 CFR 114.10(f) in its entirety instead of revising it?

#### D. Proposed 11 CFR 114.10(d)—Non-Authorization Notice

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

Section 110.11 implements the requirements of 2 U.S.C. 441d. Because the requirements of 2 U.S.C. 441d and 11 CFR 110.11 apply to public communications containing express advocacy and electioneering communications made by any person, the provision applies equally to corporations and labor organizations. Therefore, if a corporation or labor organization makes an independent expenditure or electioneering communication as permitted after *Citizens United*, the communication must include a statement identifying, among other things, the name and

address of the corporation or labor organization that paid for the communication. Proposed 11 CFR 114.10(d) would follow current 11 CFR 114.10(g), but would expand it to require that all corporations and labor organizations comply with 11 CFR 110.11. Although the requirements at 2 U.S.C. 441d and 11 CFR 110.11 already apply to corporations and labor organizations because they are considered “persons” under the Act, should proposed section 114.10(d) explicitly state that all corporations and labor organizations must comply with the requirements of 11 CFR 110.11?

*E. Proposed 11 CFR 114.10(e)—Segregated Bank Account*

The Commission proposes a regulation to state affirmatively that a corporation or labor organization may establish a segregated bank account for funds to be used for the making of electioneering communications. This regulation would not affect other restrictions and limitations applicable to those that make electioneering communications. Current 11 CFR 114.10(h) states that a QNC may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, and from which it makes disbursements for electioneering communications. Proposed 11 CFR 114.10(e) would adopt this language and expand it to state that all corporations or labor organizations may establish such accounts.<sup>11</sup> The current regulation at 11 CFR 114.10(h) implements 2 U.S.C. 434(f)(2)(E) and (F), which sets out the reporting requirements for every person making disbursements for electioneering communications paid out of segregated bank accounts. Aside from this reporting requirement, however, the Act does not otherwise affirmatively state that a person may establish such a segregated account. Furthermore, 11 CFR 114.10(h) is the only place in the current regulations that affirmatively states that a person may, but is not required to, set up such a segregated bank account, and this regulation is limited to QNCs.

The Commission requests comment on the proposed regulation that would affirmatively state that any corporation or labor organization may, but is not required to, set up a segregated bank account for the purpose of making electioneering communications, as

described in 2 U.S.C. 434(f)(2)(E). Is such a regulation necessary, given that the reporting requirements in the Act already contemplate the existence of such a segregated bank account? Should the Commission adopt a broader regulation that would permit, but not require, any person (other than a political committee) to set up such an account? Alternatively, should the Commission require corporations and labor organizations that make independent expenditures and electioneering communications to use a segregated bank account?

*F. Proposed 11 CFR 114.10(f)—Activities Prohibited by the Internal Revenue Code*

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

**VIII. Proposed Removal of 11 CFR 114.14 and 114.15**

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

The Court held in *Citizens United* that corporations may make electioneering communications. Because 11 CFR 114.14 is a prophylactic regulation designed to prohibit corporations and labor organizations from doing through other persons what the corporation or labor organization could not do directly, the decision in *Citizens United* could be interpreted to have rendered unnecessary the prohibition in 11 CFR 114.14. The Commission therefore seeks comment on whether it should remove the prohibition in this section.

In considering this issue, the Commission notes that section 434(f) of the Act requires that entities making electioneering communications report certain information to the Commission, including the identification of persons who have provided funds to segregated bank accounts for the purpose of making such communications. 2 U.S.C. 434(f). The Commission promulgated 11 CFR 104.20(c)(7) to implement this statutory

requirement. Explanation and Justification for Final Rules on Bipartisan Campaign Reform Act of 2002 Reporting, 68 FR 404, 413 (Jan. 3, 2003). In doing so, the Commission interpreted the statute to treat funds provided for the purpose of making electioneering communications as “donations,” rather than as “contributions” under the Act. *Id.* Should this same interpretation of section 434(f) apply to corporate and labor organization funds provided to other persons for the purpose of making electioneering communications? If such funds are donations, they would not violate the prohibition on corporate and labor organization contributions in section 441b(a) of the Act. The Commission seeks comment on whether there should be a distinction drawn between the treatment of funds provided by individuals to other persons for electioneering communications as donations in 11 CFR 104.20(c)(7) and the treatment of funds provided by corporations and labor organizations to other persons for electioneering communications as contributions in 2 U.S.C. 441b(b)(2). If so, why, and if not, why not?

In addition to current section 114.14, the Commission seeks comment on the proposed removal of section 114.15, which provides a safe harbor for certain electioneering communications made by corporations and labor organizations. If the prohibition in section 114.14 is removed as proposed, should any portion of section 114.15 be retained? Is section 114.15 relevant to any remaining valid Commission regulations, such that they should not be removed? The Commission notes that, if the Commission decides to remove section 114.15, references to this section in other rules will need to be deleted. If the Commission decides to remove section 114.15, should the Commission consider revising other relevant cross-references?

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

The Commission certifies that the attached proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. There are two bases for this certification. First, there are few small entities that would be affected by these proposed rules. The Commission’s proposed revisions may affect some for-profit corporations, labor organizations, individuals, and some non-profit organizations. Individuals and labor organizations are not “small entities” under 5 U.S.C. 601(6). Many non-profit

<sup>11</sup> This provision applies to corporation and labor organizations but not to political committees, because, by definition, political committees do not make electioneering communications. 2 U.S.C. 434(f)(3); see also 11 CFR 104.20(b).

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

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

#### List of Subjects in 11 CFR Part 114

Business and industry, elections, Labor.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

#### PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

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

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

2. Section 114.2 is amended by revising the section heading and paragraph (b)(2), and removing paragraph (b)(3), to read as follows:

##### § 114.2 Prohibitions on contributions and expenditures.

\* \* \* \* \*

(b) \* \* \*

*Alternative A for paragraph (b)(2).*

(2) Corporations and labor organizations are prohibited from making coordinated expenditures as defined in 11 CFR 109.20 and coordinated communications as defined in 11 CFR 109.21.

*Alternative B for paragraph (b)(2).*

(2) Corporations and labor organizations are prohibited from making expenditures as defined in 11 CFR part 100, subpart D, except for payments for communications that are not coordinated communications as defined in 11 CFR 109.21.

\* \* \* \* \*

3. In § 114.3, paragraph (c)(4) is revised to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

*Alternative A for paragraph (c)(4).*

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

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

(ii) Disbursements for certain voter registration and get-out-the-vote drives not expenditures or contributions. Disbursements for voter registration and get-out-the-vote drives are not contributions or expenditures, provided that the drive is conducted so that information and other assistance regarding registering or voting,

including transportation and other services offered, is not withheld or refused on the basis of support for or opposition to particular candidates, or a particular political party. *See* 2 U.S.C. 441b(b)(2)(B). Such drives may include communications containing express advocacy, such as urging individuals to register with a particular party or to vote for a particular candidate or candidates.

*Alternative B for paragraph (c)(4).*

(4) *Registration and get-out-the-vote drives.* A corporation or a labor organization may conduct registration and get-out-the-vote drives aimed at its restricted class. Registration and get-out-the-vote drives include providing transportation to the place of registration and to the polls. Such drives may include communications containing express advocacy, such as urging individuals to register with a particular party or to vote for a particular candidate or candidates. 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.

4. Section 114.4 is amended by revising the section heading, paragraphs (a), (c)(1), (c)(2), (c)(3)(i), (c)(4), (c)(5), (c)(6) and (d), and by removing paragraphs (c)(3)(iv), (c)(3)(v), and (c)(8) to read as follows:

##### § 114.4 Disbursements for communications by corporations and labor organizations 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. Communications that 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 set forth in paragraph (b) of this section. Any communications that a corporation or labor organization may make to the general public are set forth in paragraph (c) of this section, and may also be made to the corporation's or labor organization's restricted class and to other employees and their families. Communications that a corporation or labor organization may make only to its restricted class are set forth at 11 CFR 114.3. The activities described in paragraphs (b) and (c) of this section may be coordinated with candidates and political committees only to the extent permitted by this section. *See* 11 CFR 100.16, 109.21, 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 this section.

\* \* \* \* \*

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

(1) *General.* A corporation or labor organization may make independent expenditures or electioneering communications pursuant to 11 CFR 114.10. This section addresses specific communications, described in paragraphs (c)(2) through (c)(7) of this section, a corporation or labor organization may make to the general public. The general public includes anyone who is not in the corporation's or labor organization's restricted class. The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party committee or party committee's agent regarding the preparation, contents and distribution of any of the communications described in paragraphs (c)(2) through (7) of this section.

(2) *Voter registration and get-out-the-vote communications.* A corporation or labor organization may make voter registration and get-out-the-vote communications to the general public. A corporation or labor organization may make communications permitted under this paragraph (c)(2) through posters, billboards, broadcasting media, newspapers, newsletters, brochures, mail, Internet communications, emails, text messages, telephone calls, 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, that has been produced by the official election administrators.

\* \* \* \* \*

(4) *Voting records.* A corporation or labor organization may prepare and distribute to the general public the voting records of Members of Congress.

(5) *Voter guides.* A corporation or labor organization may prepare and distribute to the general public voter guides, including voter guides obtained from a nonprofit organization that is described in 26 U.S.C. 501(c)(3) or (c)(4).

(6) *Endorsements.* A corporation or labor organization may endorse a candidate, and may communicate the endorsement to its restricted class or to the general public. 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).

\* \* \* \* \*

*Alternative A for paragraph (d).*

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

(1) *Voter registration and get-out-the-vote drives permitted.* A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public. The corporation or labor organization must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party regarding the planning, organization, timing, or administration of a voter registration or get-out-the-vote drive. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

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

(i) 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.

(ii) The voter 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.

(iii) 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.

(iv) Individuals conducting the voter 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.

(v) 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.

*Alternative B for paragraph (d).*

(d) *Voter registration and get-out-the-vote drives.* A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that 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)(5) of this section. Voter 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 must not act in cooperation, consultation, or concert with or at the request or suggestion of any candidates, candidates' committees or agents, or political party regarding the planning, organization, timing, or administration of a voter registration or get-out-the-vote drive.

(2) The voter 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.

(3) 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.

(4) Individuals conducting the voter 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.

(5) The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(3) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.

5. Section 114.10 is revised to read as follows:

**§ 114.10 Corporations and labor organizations making independent expenditures and electioneering communications.**

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

(b) *Reporting independent expenditures and electioneering communications.* (1) Corporations and labor organizations that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year shall file reports as required by 11 CFR 104.4(a) and 11 CFR 109.10(b) through (e).

(2) Corporations and labor organizations that make electioneering communications aggregating in excess of \$10,000 in a calendar year shall file the statements required by 11 CFR 104.20(b).

(c) *Solicitation; disclosure of use of contributions for political purposes.* Whenever a corporation or labor organization solicits donations that may be used for political purposes, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

(d) *Non-authorization notice.* Corporations or labor organizations making independent expenditures or electioneering communications shall comply with the requirements of 11 CFR 110.11.

(e) *Segregated bank account.* A corporation or labor organization may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, from which it makes disbursements for electioneering communications.

(f) *Activities prohibited by the Internal Revenue Code.* Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a) to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501 *et seq.*

**§§ 114.14 and 114.15 [Removed].**

6. Sections 114.14 and 114.15 are removed.

Dated: December 15, 2011.

On behalf of the Commission.

**Cynthia L. Bauerly,**

*Chair, Federal Election Commission.*

[FR Doc. 2011-32632 Filed 12-23-11; 8:45 am]

BILLING CODE 6715-01-P

## FARM CREDIT ADMINISTRATION

### 12 CFR Part 615

#### RIN 3052-AC54

### Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; Liquidity and Funding

**AGENCY:** Farm Credit Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The Farm Credit Administration (FCA, we or us) proposes to amend its liquidity regulation. The purpose of the proposed rule is to strengthen liquidity risk management at Farm Credit System (FCS or System) banks, improve the quality of assets in the liquidity reserve, and bolster the ability of System banks to fund their obligations and continue their operations during times of economic, financial, or market adversity.

**DATES:** Comments should be received on or before February 27, 2012.

**ADDRESSES:** We offer a variety of methods for you to submit your comments. For accuracy and efficiency, commenters are encouraged to submit comments by email or through the FCA's Web site. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at [reg-comm@fca.gov](mailto:reg-comm@fca.gov).
- *FCA Web site:* <http://www.fca.gov>. Select "Public Comments" and follow the directions for "Submitting a Comment."
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Gary K. Van Meter, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our Web site at <http://www.fca.gov>. Once you are in the Web site, select "Public Commenters," then "Public Comments," and follow

the directions for "Reading Submitted Public Comments." We will show your comments as submitted, but for technical reasons we may omit items such as logos and special characters. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce Internet spam.

#### FOR FURTHER INFORMATION CONTACT:

David J. Lewandowski, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA, (703) 883-4498, TTY (703) 883-4434; or

Richard A. Katz, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102-5090, (703) 883-4020, TTY (703) 883-4020.

#### SUPPLEMENTARY INFORMATION:

##### I. Objectives

The objectives of the proposed rule are to:

- Improve the capacity of FCS banks to pay their obligations and fund their operations by maintaining adequate liquidity to withstand various market disruptions and adverse financial or economic conditions;
- Strengthen liquidity management at all FCS banks;
- Enhance the marketability of assets that System banks hold in their liquidity reserve;
- Require that cash and highly liquid investments comprise the first 30 days of the 90-day liquidity reserve;
- Establish a supplemental liquidity buffer that a bank can draw upon during an emergency and that is sufficient to cover the bank's liquidity needs beyond the 90-day liquidity reserve; and
- Strengthen each bank's Contingency Funding Plan (CFP).

##### II. Background

The FCS is a nationwide network of borrower-owned financial cooperatives that lend to farmers, ranchers, aquatic producers and harvesters, agricultural cooperatives, rural utilities, farm-related service businesses, and rural homeowners. By law, FCS institutions are instrumentalities of the United States,<sup>1</sup> and Government-sponsored enterprises (GSEs).<sup>2</sup> According to section 1.1(a) of the Farm Credit Act of 1971, as amended, (Act), Congress established the System for the purpose

<sup>1</sup> See sections 1.3(a), 2.0(a), 2.10(a), 3.0, 4.25, and 8.1(a)(1) of the Act; 12 U.S.C. 2011(a), 2071(a), 2091(a), 2121, 2211, and 2279aa-1.

<sup>2</sup> See Public Law 101-73, sec. 1404(e)(1)(A), 103 Stat. 183, 552-53 (Aug. 9, 1989).