FEDERAL ELECTION COMMISSION

[Notice 1995–13]

11 CFR Parts 100, 106, 109 and 114

Express Advocacy; Independent Expenditures; Corporation and Labor Organization Expenditures

AGENCY: Federal Election Commission.

ACTION: Final rules; Announcement of Effective Date.

SUMMARY: On July 6, 1995, the Commission published the text of revised regulations defining the term ''express advocacy'' and describing certain nonprofit corporations that are exempt from the prohibition on independent expenditures. 60 FR 35292. These regulations implement portions of the Federal Election Campaign Act of 1971, as amended. The Commission announces that the rules are effective as of October 5, 1995.

EFFECTIVE DATE: October 5, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 219–3690 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: Today, the Commission is announcing the effective date of new regulations defining the term ''express advocacy'' and describing certain nonprofit corporations that are exempt from the prohibition on independent expenditures. The new rules are being incorporated into parts 100, 106, 109 and 114 of the existing regulations.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 30, 1995. Thirty legislative days expired in the House of Representatives on September 21, 1995. Thirty legislative days expired in the Senate on September 8, 1995.

Announcement of Effective Date: 11 CFR 100.17, 100.22, 106.1(d), 109.1(b)(1), (2) and (3), 114.2(b) and 114.10, as published at 60 FR 35292 (July 6, 1995), are effective as of October 5, 1995.

Dated: September 29, 1995.

Danny L. McDonald,

Chairman, Federal Election Commission.

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11 CFR Part 110

[Notice 1995–14]

Communications Disclaimer Requirements

AGENCY: Federal Election Commission.

ACTION: Final rule and transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission has revised its regulations that govern disclaimers on campaign communications. The revisions clarify how these rules apply to coordinated party expenditures; broadly define ''direct mail'' in this context; require a statement of who paid for a covered communication, the cost of which is exempt from the Federal Election Campaign Act's contribution and expenditure limits; require a disclaimer on all communications included in a package of materials that are intended for separate distribution; and clarify the meaning of ''clear and conspicuous'' as that term is used in these rules.

DATES: Further action, including the publication of a document in the Federal Register announcing the effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d).

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463, (202) 219–3690 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act [''FECA'' or ''the Act''] at 2 U.S.C. 441d(a) requires a disclaimer on communications by any person that expressly advocate the election or defeat of a clearly identified federal candidate, or solicit contributions, through any form of general public political advertising. The Commission is revising the implementing regulations, which are found at 11 CFR 110.00, to address issues that have arisen since the rules were last amended, and to clarify their scope and applicability.

The Commission published a Notice of Proposed Rulemaking [''Notice'' or ''NPRM''] on proposed amendments to the disclaimer rules on October 5, 1994. 59 FR 50708. Comments in response to this Notice were received from Robert Alan Dahl; the Democratic National Committee; a joint comment from the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee; the Internal Revenue Service; the National Association of Broadcasters; the Ohio Right to Life Political Action Committee; United States Representative Carolyn B. Maloney; United States Representative Thomas E. Petri; and Wilson Communication Services. The Commission held a public hearing on March 8, 1995, at which five witnesses presented testimony on the issues addressed in the NPRM.

Section 438(d) of Title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of the FECA be transmitted to the Speaker of the House of Representatives and the President of the Senate for a 30 legislative day review period before they are finally promulgated. These regulations were transmitted to Congress on October 2, 1995.

Explanation and Justification

The FECA at 2 U.S.C. 441d(a) requires disclaimers on communications by any person that expressly advocate the election or defeat of a clearly identified federal candidate, or solicit contributions, through any form of general public political advertising. In most instances the disclaimer must state both who paid for the communication and whether it was authorized by any candidate or authorized committee.

A primary purpose of this rulemaking was to simplify the implementing regulations to this statutory requirement. A number of revisions have accordingly been made, to clarify their scope and applicability. However, after reviewing the comments and testimony presented at the hearing, the Commission has determined that its present regulation is in most instances the most reasonable alternative at this time. A detailed analysis of the new and revised provisions appears below.

Please note that these revisions are limited to 11 CFR 110.11(a). Paragraph 110.11(b), which deals with newspaper and magazine charges for campaign advertisements, has not been amended.

Part 110—Contribution and Expenditure Limitations and Prohibitions

Section 110.11 Communications; Advertising

General Requirements

The language of former paragraph (a)(1) has largely been retained. However, the last sentence of the former paragraph (a)(1), which deals with placement of the disclaimer, and former paragraph (a)(1)(iv)(B), solicitations by separate segregated funds [''SSF''], have been moved to new paragraphs (a)(5)(i) and (a)(7), respectively.

The NPRM sought comments on a number of different approaches,

including: A rebuttable presumption that communications by certain political committees that mention a clearly identified federal candidate contain express advocacy, and thus trigger the section 441d(a) disclaimer requirements; and reading the FECA so as to require disclaimers on all communications by all political committees, whether or not they contain express advocacy.

None of the commenters who addressed these issues supported the presumption or any of the other proposed changes, although one suggested the Commission could expand the ''paid for by'' requirements based on its authority to monitor campaign spending. The Commission has determined that adopting the presumption of express advocacy would likely not eliminate the need for case by case examination of challenged communications, and concerns also exist with regard to the other proposals. For this reason the Commission has decided to leave the general disclaimer requirements largely intact at this time. The Commission has submitted legislative recommendations suggesting that Congress might want to consider legislation to address this situation.

Phone Banks

The NPRM also sought comment on a proposal to insert phone banks in the listing of types of activities that constitute general public political advertising. This proposal would have had the effect of requiring oral disclaimers as part of phone bank campaign communications.

Two Members of Congress who commented on these rules supported this proposal. Another commenter asked the Commission to clarify what information a multicandidate committee should include in an oral authorization statement if some but not all of the candidates supported by that committee have authorized a communication.

The Commission considered including phone banks in the listing of types of activities that constitute general public political advertising when it prepared the final rules, but could not reach a majority decision by the required four affirmative votes. See 2 U.S.C. 437c(c). Consequently, this proposal has not been included in the final rules.

Coordinated Party Expenditures

The FECA at 2 U.S.C. 441a(d) permits political party committees to make expenditures on behalf of party candidates in excess of the generally applicable contribution limits set forth at 2 U.S.C. 441a(a). New paragraph (a)(2) clarifies the disclaimer requirements for communications paid for as coordinated party expenditures.

If a state or national party committee chooses not to make the coordinated expenditures permitted by section 441a(d), it may assign its right to do so to a designated agent, such as the senatorial campaign committee of the party. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S.C. 27 (1981). Paragraph (a)(2)(i) clarifies that the disclaimer on a communication made as a coordinated party expenditure should identify the committee that made the actual expenditure as the person who paid for the communication, regardless of whether that committee was acting as a designated agent or in its own capacity.

Paragraph (a)(2)(ii) states that communications made pursuant to 2 U.S.C. 441a(d) prior to the date a party's candidate is nominated need state only who paid for the communication; i.e., no authorization statement is required. The commenters who addressed this issue favored this approach. Please note, however, that this does not change the Commission's long-standing conclusion that such communications count against the committee's coordinated party expenditure limits.

Definition of ''Direct Mailing''

A definition for the term ''direct mailing'' has been added at new paragraph (a)(3). For purposes of these requirements, ''direct mailing'' is broadly defined to include any mailing that consists of more than 100 substantially similar pieces of mail. While the NPRM suggested 50 pieces as the number to trigger this requirement, the Commission believes limiting this to mailings of more than 100 pieces more accurately reflects the size and scope of current campaign operations.

One commenter and witness at the hearing asked that the Commission clarify what is meant by the term ''substantially similar.'' Technological advances now permit what is basically the same communication to be personalized to include the recipient's name, occupation, geographic location, and similar variables. The Commission considers communications to be ''substantially similar'' if they would be the same but for such individualization.

Exempt Activity

New paragraph (a)(4) requires a statement of who paid for the communication on covered communications by a candidate or party committee whether or not they qualify as exempt activities under 11 CFR 100.8(b)(10), (16), (17), or (18). The NPRM proposed requiring an authorization statement on such communications, as well.

Most of the comments that addressed this issue disagreed with the proposed approach. However, the intent of the FECA is that those activities by state and local party committees or candidates that qualify as ''exempt'' under 2 U.S.C. 431(8)(B)(v), (x), (xi), and (xii) not count towards the FECA's contribution and expenditure limits. Requiring a ''paid for by'' statement does not conflict with that intent.

Both the disclaimer rules and the exempt activity provisions contain definitions of general public political advertising and direct mail, although in the former case the list describes covered communications, while in the latter case the list describes communications that do not qualify for exemption. However, these definitions are broader under the disclaimer rules than under the exempt activity provisions. Thus, certain communications covered by the exempt activity provisions, such as phone banks and yard signs, are still general public political advertising for purposes of the disclaimer rules. The Commission notes, however, that some exempt activities will continue to fall under the small items exception, e.g., pins and bumper stickers, and therefore will not require a disclaimer.

The ''Clear and Conspicuous'' Requirement

New paragraph (a)(5) provides guidance on the meaning of the term ''clear and conspicuous'' as that phrase is used in this section. The NPRM proposed that, consistent with the Commission's 1993 rulemaking addressing what constitutes ''best efforts'' to obtain identifying information about certain campaign contributors (*see* 2 U.S.C. 432(i); 11 CFR 104.7; 58 FR 57725 (Oct. 27, 1993)), a disclaimer would not be considered ''clear and conspicuous'' if it was in small type in comparison to the remainder of the material, or if the printing was difficult to read or if the placement was easily overlooked.

Several commenters pointed out that the ''comparable size'' requirement, while appropriate for the solicitations addressed in the ''best efforts'' rules, may not be appropriate for communications that, for example, consist only of two lines of large type. The Commission has accordingly deleted this language from the final rule, while retaining the other guidelines. That is, a disclaimer is now stated not to be ''clear and conspicuous'' if the printing is difficult to read or if the

placement is easily overlooked. Technical requirements for televised communications are set forth in new paragraph (a)(5)(iii), discussed *infra*.

Placement of Disclaimer

New paragraph (a)(5)(i) states that the disclaimer need not appear on the front or cover page of a communication as long as it appears within the communication, except on communications such as billboards that contain only a front face. This provision formerly appeared in paragraph (a)(1) of this section.

Packaged Materials

New paragraph (a)(5)(ii) clarifies that all materials included in a package that would require a disclaimer if distributed separately must contain the required disclaimer, even if they are included in a package with solicitations or other materials that already have a disclaimer. Questions have arisen in the past as to whether a single disclaimer per package would satisfy the purposes of this requirement.

One commenter and witness at the hearing sought further clarification on how this will be interpreted. All items intended for separate distribution (e.g., a campaign poster included in a mailing of campaign literature) are covered by this requirement.

Televised Communications

New paragraph (a)(5)(iii) responds to a commenter's request that the Commission incorporate into the text of these rules the Federal Communication Commission's [''FCC''] disclaimer size requirements for televised political advertisements concerning candidates for public office. These requirements, which are set forth at 47 CFR 73.1212(a)(2)(ii), require in any such advertisement that the sponsor be identified with letters equal to or greater than four (4) percent of the vertical picture height that air for not less than four (4) seconds. The new rule states that disclaimers in a televised communication shall be considered clear and conspicuous if they meet these requirements.

In *Dalton Moore*, 7 FCC Rcd 3587 (1992), the FCC explained that twenty (20) scan lines meets the four (4) percent requirement. Also, FCC staff has advised the Commission that the four (4) percent/twenty (20) lines requirement applies to each line of type, and that if the type is upper and lower case, the requirement applies to the smaller (lower case) type.

One commenter, while correctly noting that the FCC and not the FEC has authority over these technical requirements, nevertheless requested that the Commission modify them. However, it is impossible for one agency to amend another's rules. Also, the FCC conducted a lengthy rulemaking, in which the FEC participated, before deciding that the current standards were appropriate. 57 FR 8279 (Mar. 9, 1992).

Exceptions

New paragraph (a)(6) lists the exceptions to the general requirements. Former 11 CFR 110.11(a)(2) has been broken down into new paragraphs (a)(6)(i) and (a)(6)(ii), which address the ''small item'' and ''impracticable item'' exceptions, respectively. In addition, the ''impracticable item'' provision, which formerly included ''skywriting, watertowers or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable,'' has been amended to specifically include ''wearing apparel,'' such as T-shirts or baseball caps, that contain a political message.

While no comments were received on this issue, the question continues to arise as to whether such items require a disclaimer. Since in many instances it is impracticable to include disclaimers on wearing apparel, the Commission believes this further exception is appropriate.

Consistent with the Notice, new paragraph (a)(6)(iii) clarifies that checks, receipts and similar items of minimal value that do not contain a political message and that are used for purely administrative purposes do not require a disclaimer.

Activities by Separate Segregated Funds or Their Connected Organizations

New paragraph (a)(7) corresponds to former 11 CFR 110.11(a)(1)(iv)(B). It exempts from the disclaimer requirements solicitations for contributions to an SSF from those persons the fund may solicit under the applicable provisions of 11 CFR part 114, or communications to such persons, because this does not constitute general public political advertising. This language encompasses mailings by a corporation or labor organization to the corporation's or labor organization's restricted class, as well as comparable activities conducted by membership organizations and trade associations pursuant to 11 CFR 114.7 and 114.8.

Other Issues

Disclaimers on the Internet

In AO 1995–9, the Commission determined that Internet communications and solicitations that constitute general public political advertising require disclaimers as set forth in 2 U.S.C. 441d(a) and former 11 CFR 110.11(a)(1). These communications and others that are indistinguishable in all material aspects from those addressed in the advisory opinion will now be subject to the requirements of paragraph (a)(1) of this section.

Disclaimers on ''Push Polls''

Two commenters and several witnesses at the hearing discussed the possibility that the Commission require disclaimers on ''push polls.'' This term has generally been used to refer to phone bank activities or written surveys that provide false or misleading information about a candidate under the guise of conducting a legitimate poll. For example, if the person being polled states a preference for candidate X, the poll might ask whether X would still be the preferred choice if ''you knew he or she had a drunken driving record,'' ''a history of recreational drug use,'' ''was soft on crime,'' or the like. Such slanted surveys can result in both skewed poll results (if a poll is in fact conducted) and damage to the candidate's reputation.

One of the commenters, Congresswoman Maloney, has introduced a bill, H.R. 324 in the 104th Congress, that would include phone banks in the listing of types of communications set forth in 2 U.S.C. 441d(a) that trigger the disclaimer requirements. As discussed above, the Commission proposed in the NPRM that phone banks be added to the comparable listing in the disclaimer rules, but during consideration of the final rules, the Commission did not reach a majority decision by the required four affirmative votes. Consequently, the final disclaimer rules do not apply to push polls conducted by using phone banks.

The question of requiring disclaimers during telephone push polling also involves significant legal and constitutional issues that have not been put out for notice and comment as required by the Administrative Procedure Act at 5 U.S.C. 553. As noted by some of the witnesses, it may require amendments to the FECA before the Commission can take further action. For example, it does not appear that all push polls contain ''express advocacy'' or contribution solicitations, a critical point under these rules.

Thus, the new regulations only require disclaimers for push polls that qualify as general public political advertising and that either contain a

solicitation or express advocacy of a clearly identified candidate.

Certification of no Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

The attached final regulations will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any affected entities are already required to comply with the Act's requirements in this area.

List of Subjects

11 CFR Part 110

Campaign Funds, Political Candidates, Political Committees and Parties.

For reasons set out in the preamble, Subchapter A, chapter I of Title 11 of the Code of Federal Regulations is amended as follows:

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

1. The authority citation for 11 CFR Part 110 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, and 441h.

2. Part 110 is amended by revising paragraph (a) of section 110.11 to read as follows:

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

(a)(1) *General rules.* Except as provided at paragraph (a)(6) of this section, whenever any person makes an expenditure for the purpose of financing a communication that expressly advocates the election or defeat of a clearly identified candidate, or that solicits any contribution, through any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or any other form of general public political advertising, a disclaimer meeting the requirements of paragraphs (a)(1) (i), (ii), (iii), (iv) or (a)(2) of this section shall appear and be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication.

(i) Such communication, including any solicitation, if paid for and authorized by a candidate, an authorized committee of a candidate, or its agent, shall clearly state that the communication has been paid for by the authorized political committee; or

(ii) Such communication, including any solicitation, if authorized by a candidate, an authorized committee of a candidate or an agent thereof, but paid for by any other person, shall clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee or agent; or

(iii) Such communication, including any solicitation, if made on behalf of or in opposition to a candidate, but paid for by any other person and not authorized by a candidate, authorized committee of a candidate or its agent, shall clearly state that the communication has been paid for by such person and is not authorized by any candidate or candidate's committee.

(iv) For solicitations directed to the general public on behalf of a political committee which is not an authorized committee of a candidate, such solicitation shall clearly state the full name of the person who paid for the communication.

(2) *Coordinated Party Expenditures.*

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

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

(3) *Definition of ''direct mailing.''* For purposes of paragraph (a)(1) of this section only, ''direct mailing'' includes any number of substantially similar pieces of mail but does not include a mailing of one hundred pieces or less by any person.

(4) *Exempt Activities.* For purposes of paragraph (a)(1) of this section only, the term ''expenditure'' includes a communication by a candidate or party committee that qualifies as an exempt activity under 11 CFR 100.8(b)(10), (16), (17), or (18). Such communications, unless excepted under paragraph (a)(6) of this section, shall clearly state who paid for the communication but do not have to include an authorization statement.

(5) *Placement of Disclaimer.* The disclaimers specified in paragraph (a)(1) of this section shall be presented in a clear and conspicuous manner, to give the reader, observer or listener adequate notice of the identity of the person or committee that paid for, and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if the printing is difficult to read or if the placement is easily overlooked.

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

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

(iii) Disclaimers in a televised communication shall be considered clear and conspicuous if they appear in letters equal to or greater than four (4) percent of the vertical picture height that air for not less than four (4) seconds.

(6) *Exceptions.* The requirements of paragraph (a)(1) of this section do not apply to:

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

(ii) skywriting, watertowers, wearing apparel or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

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

(7) *Activities by separate segregated fund or its connected organization.* For purposes of paragraph (a)(1) of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a form of general public political advertising and need not contain the disclaimer set forth in paragraph (a)(1) of this section.

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Dated: October 2, 1995.

Danny Lee McDonald,

Chairman.

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