

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 Parts 100, 104, 109, and 110

[Notice 1997-8]

Independent Expenditures and Party Committee Expenditure Limitations

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission is considering proposed new rules regarding independent expenditures and coordinated expenditures made by national, state and local party committees on behalf of federal candidates. The Commission is also considering possible changes to the regulations regarding the definition of "coordination," which would apply to party committees as well as other committees, corporations, labor organizations, and individuals. These topics were the subject of a recent Supreme Court opinion concerning portions of the Federal Election Campaign Act of 1971, as amended (the Act or FECA). This notice addresses issues raised by the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee in a Petition for Rulemaking filed with the Commission on July 11, 1996. The draft rules which follow do not represent a final decision by the Commission regarding the petition or the Supreme Court opinion. Further information is provided in the supplementary information which follows.

DATES: Comments must be received on or before May 30, 1997. If the Commission receives requests to testify, it will hold a hearing on June 18, 1997 at 10:00 a.m. Persons wishing to testify should so indicate in their written comments.

ADDRESSES: Comments must be made in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463. The hearing will be held in the

Commission's ninth floor meeting room, 999 E Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rosemary C. Smith, Senior Attorney, or Ms. Teresa A. Hennessy, Attorney, at (202) 219-3690 or toll free (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is seeking public comment on proposed revisions to 11 CFR 110.7 regarding coordinated and independent expenditures by party committees. In addition, comment is sought on a revised definition of coordination, located in new 11 CFR 100.23, which would apply to determining whether payments constitute independent expenditures, coordinated expenditures, or in-kind contributions. Corresponding amendments would also be made to sections 100.7(a) (contributions), 104.4(a) (reporting), 109.1(b) (definitions), 110.1 (contribution limits), 110.2 (multicandidate committee limits), and 110.11 (disclaimers). These proposals are intended to implement the Supreme Court's plurality opinion in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309 (1996) (*Colorado*) concerning the expenditure limitations of section 441a(d) of the FECA, 2 U.S.C. 431 *et seq.* In that decision, the Court concluded that political parties are capable of making independent expenditures on behalf of their candidates for federal office, and that it would violate the First Amendment to subject such independent expenditures to the expenditure limits found in section 441a(d) of the FECA. *Id.* at 2315.

Section 441a(d) permits national, state, and local committees of political parties to make limited general election campaign expenditures on behalf of their candidates, which are in addition to the amount they may contribute directly to those candidates. 2 U.S.C. 441a(d). These section 441a(d) expenditures are commonly referred to as "coordinated expenditures." Prior to the *Colorado* case, it was presumed that party committees could not make expenditures independent of their candidates. Please note that not all coordinated expenditures constitute communications. In fact, party committees may use their coordinated expenditure limits to pay for other types of expenses incurred by candidates,

including staff costs, polling and other services.

Based on the *Colorado* Supreme Court decision, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee filed a Petition for Rulemaking urging the Commission to: (1) repeal or amend 11 CFR 110.7(b)(4) to the extent that it prohibited national committees of political parties from making independent expenditures for congressional candidates; (2) repeal or amend 11 CFR Part 109 with respect to which expenditures qualify as "independent"; and (3) issue new rules to provide meaningful guidance regarding independent expenditures by the national committees of political parties. Please note that although the Petition for Rulemaking urged changes only in the rules applicable to national committees of political parties, the Commission's rulemaking will also cover possible changes to the provisions governing state and local party committees.

In response to the *Colorado* decision, the Commission promulgated a Final Rule on August 7, 1996 which repealed paragraph (b)(4) of section 110.7. See 61 F.R. 40961 (Aug. 7, 1996). On the same date, the Commission also published a Notice of Availability seeking comment on the remainder of the Petitioners' requests. See 61 F.R. 41036 (Aug. 7, 1996). No statements supporting or opposing the petition were received by the close of the comment period.

The attached proposed rules are explained more fully below.

Section 100.7—Contribution

The Commission is proposing adding new language to the definition of contribution in 11 CFR 100.7(a) regarding coordinated communications and other things of value. Comments are sought on two different alternative versions of this new provision. Alternative 1-A would specify that the term "contribution" includes a payment for a communication or anything of value which is coordinated with a candidate, authorized committee or other political committee. Alternative 1-B is similar, except that it would include the concept that the communication or thing of value must be for the purpose of influencing a federal election. Coordination is discussed in greater detail below. Please note that under either alternative this

new provision would apply not only to contributions from party committees, but also to any other person, including individuals, corporations, labor organizations, and nonconnected committees, who coordinate with candidates or committees. Alternative 1-A of the proposed rule would also reference 11 CFR 114.2(c), which explains that some forms of coordination by a corporation or labor organization may not necessarily result in the making of a contribution.

Section 100.23—Coordination

The Commission's current regulations at 11 CFR 109.1(b)(4) indicate that an expenditure will be presumed to be coordinated rather than independent when it is "[b]ased on information about the candidate's plans, projects or needs provided to the expending person by the candidate or the candidate's agents, with a view toward having an expenditure made," or when it is "[m]ade by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent." 11 CFR 109.1(b)(4)(i). The present language is drawn from the statutory definitions of "independent expenditure" at 2 U.S.C. 431(17) and "contribution" at 2 U.S.C. 441a(a)(7)(B). The FECA defines independent expenditure to mean "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17); *See also* 11 CFR 109.1(a). Similarly, in *Colorado*, the Court referred to independent expenditures as those which are "developed * * * independently and not pursuant to any general or particular understanding with [the candidates and their agents]." 116 S. Ct. at 2315.

While the Commission does not propose to change its definition of independent expenditure in 11 CFR 109.1(a), the attached draft rules would more clearly tie the concept of what negates the independence of expenditures to a revised explanation of what constitutes coordination. Accordingly, the Commission seeks comments on replacing the current language in section 109.1(b)(4) with new language in section 100.23 that more

fully explains what is meant by "coordination with a candidate." Comments are sought on several different alternative versions of this provision. The proposed rule would add some new examples of coordination, although these would not constitute an exhaustive list. The examples include situations set out in section 441a(a)(7)(B) of the FECA where a person finances the reproduction, republication, display, distribution or other form of dissemination of the candidate's campaign materials, with several exceptions. The exceptions consist of situations where the campaign materials are used in communications that advocate the candidate's defeat, or that are incorporated into an exempt news story, commentary or editorial, or that are incorporated into a corporation's or labor organization's expression of its own views. *See* 11 CFR 100.7(b)(2), 114.3(c)(1) and Advisory Opinion 1996-48.

The new language in section 100.23(a)(1) would retain some portions of the language of current 11 CFR 109.1(b)(4), which is based on section 431(17) of the FECA, with regard to payments made in cooperation or consultation or concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of a candidate. Alternative 2-A would not provide separate definitions for each term contained in section 431(17). It incorporates both the statutory standard and language from the plurality opinion in *Colorado*. Alternatives 2-B, 2-C and 2-D would define the terms to provide guidance to the regulated community. However, the definitions in Alternative 2-B are broader and more inclusive than in Alternatives 2-C or 2-D. The definitions in Alternative 2-C would and to stress the mutuality of the plan of action connoted by the statutory terms which make up "coordination." Alternative 2-D generally follows Alternative 2-C, except for other changes described below.

Alternatives 2-A, 2-B, and 2-C also propose to add new language to the definition of coordination in proposed section 100.23(a) based on the plurality opinion in *Colorado*. The plurality indicated that independent expenditures are those which are "developed . . . independently and not pursuant to any general or particular understanding with [the candidates and their agents]." *Colorado* at 2315. These alternatives indicate that coordination occurs when there is a general or particular understanding or arrangement with a candidate. Alternative 2-D of proposed section 100.23(a) excludes this

new language in favor of the statutory language. Comments are sought concerning whether the new language should be added to the definition of "coordination" or whether the Supreme Court intended this phrase to be limited to its discussion of independent expenditures made by party committees.

In addition, comments are sought as to whether coordination between a person making an expenditure and a candidate or campaign committee only results from a specific agreement on a particular advertisement or communication, or other expenditure, or whether a more general understanding or arrangement is sufficient to constitute coordination.

In paragraph (a)(3), of new section 100.23, Alternative 3-A would continue the Commission's current approach of including payments based on information about the candidate's plans, projects or needs provided to the expending person by the candidate or the candidate's agents or authorized committee. However, Alternative 3-A of the revised rules would eliminate the current language regarding information provided "with a view toward having an expenditure made." This alternative takes the view that the term "with a view toward having an expenditure made" requires a subjective determination of the candidate's or committee's intentions, and the receipt of such information from the candidate is sufficient to establish coordination. In contrast, Alternatives 3-B and 3-C would retain the phrase "with a view toward having an expenditure made" to provide further guidance in defining the statutory term "for the purpose of influencing a federal election" in light of the examples given in proposed section 100.23(a) (1), (2), and (3). Alternative 3-C would define what is not meant by "coordination" so as to clarify the limits of the term to the regulated community. Comments are sought as to whether an exchange of information regarding the expending person's plans, projects or needs also results in "coordination."

All the alternatives would also eliminate the current language indicating when expenditures will be "presumed" to be coordinated. This "presumption" has not provided sufficient certainty to the regulated community.

Proposed new section 100.23 also explains more fully who is considered to be an agent of a candidate. Alternative 4-A of paragraph (b) of this draft rule would indicate that agents include persons who during the same election cycle in which the payment is made hold executive, policymaking, or

other significant advisory or fundraising positions with the candidate's authorized committee; or have participated in strategic or policymaking discussions with the candidate or campaign officials; or provide campaign-related services such as polling, media advice, direct mail, fundraising or campaign research. Alternative 4-B of paragraph (b) of this draft rule would add an additional provision that agents must have an express or implied grant of authority from the principal to act on its behalf either generally or with regard to particular matters. However, under both of these alternatives the rules would specifically exclude entities that are not actively involved in campaign decision-making, such as messenger and delivery services, and other passive vendors. In addition, under proposed paragraph (c), as under current 11 CFR 109.1, coordination would not result merely from providing the expending person with Commission guidelines on independent expenditures.

Additional issues related to coordination by party committees are discussed below. These include the related questions of whether there should be a different definition of "independent expenditure" and a different standard as to what constitutes "coordination" for party committees than for individuals and other political committees.

Section 109.1—Independent Expenditure Definition

The proposed regulations would make one modification to 11 CFR 109.1(a), which defines "person" for purposes of making independent expenditures. The definition of "person" already includes political committees. Nevertheless, the attached rules would add a reference to party committees to recognize that, consistent with *Colorado*, party committees may make independent expenditures.

In paragraph (b)(4) of section 109.1, Alternative 5-A would modify the definition of the phrase "made with the cooperation or with the prior consent of, or in consultation with, or at the request of suggestion of" by referring the reader to the definition of "coordination" in 11 CFR 100.23. Alternative 5-B would eliminate paragraph (b)(4) of this section.

Section 110.7—Party Committee Coordinated Expenditures and Independent Expenditures

Section 110.7 of the Commission's regulations implements a statutory exception to the contribution limits set forth at 2 U.S.C. 441a. This exception

allows national, state and subordinate committees of political parties to make expenditures up to specifically prescribed amounts on behalf of the general election campaigns of federal candidates without counting such expenditures against the committees' contribution limits. See 2 U.S.C. 441a(d). These expenditures are commonly referred to as "coordinated" because the FECA permits party committees to make such expenditures after extensive consultation with the candidates and their campaign staffs. Prior to the *Colorado* decision, the Commission's regulations at 11 CFR 110.7(a)(5) and (b)(4) also barred national, state and local party committees from making independent expenditures. As noted above, at an earlier point in this rulemaking, the Commission repealed paragraph (b)(4) of this section, although paragraph (a)(5), barring national party committees from making independent expenditures in the general election campaigns of Presidential candidates, remains in effect. See 61 F.R. 40961 (Aug. 7, 1996).

In *Colorado*, the Supreme Court's plurality opinion delivered by Justice Breyer (joined by Justices O'Connor and Souter) held that, "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees. [Citation omitted]" *Colorado* at 2316. The plurality stated, "We therefore believe this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Id.* at 2317. The First Amendment rights of individuals and political committees to make independent expenditures were initially delineated by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*Buckley*), and *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (*NCPAC*), respectively. With respect to coordinated expenditures, the Supreme Court's *Colorado* decision did not modify or eliminate the existing statutory limits on coordinated expenditures. The plurality opinion did not reach the broader question of whether "the First Amendment forbids congressional efforts to limit coordinated expenditures as well as independent expenditures." *Colorado* at 2319. However, those limits are the subject of pending judicial proceedings.

In light of the *Colorado* decision, the Commission is seeking comments on

several proposed amendments to 11 CFR 110.7, including alternative language, regarding both coordinated and independent expenditures. First, the title of this section, and the references to "expenditures" found throughout, would be modified to clarify which portions of this section apply to expenditures which are coordinated with the candidate on whose behalf they are made, and which portions apply to independent expenditures. For the convenience of the reader, titles for each paragraph would also be added.

1. Independent Expenditures for Congressional Candidates

In light of the prior repeal of 11 CFR 110.7(b)(4), the attached proposed rules do not limit the total amount of money political party committees at all levels may devote to independent expenditures on behalf of their congressional candidates. However, funds used to make independent expenditures would continue to be subject to FECA requirements. Party committee expenditures on behalf of House and Senate candidates would not count towards the contribution limits when those expenditures are genuinely independent of the candidates in that election. Conversely, party committee expenditures on behalf of candidates which do not qualify as independent must be treated as either in-kind contributions subject to the limits of section 441a(a) or (h) of the Act (See 2 U.S.C. 441a(a)(7)(B)), or as coordinated expenditures subject to the limits of section 441a(d) of the Act, unless they qualify as exempt activities under 2 U.S.C. 431(8)(B)(v), (x) and (xii) and 431(9)(B)(iv), (viii) and (ix).

The *Colorado* opinion indicates that political party committees have the same rights to make independent expenditures as other persons covered by the FECA. *Colorado* at 2317. Consequently, under the proposed new rules, independent expenditures made by political party committees would be treated as subject to the same standards and conditions as independent expenditures made by other entities. This includes the same standards for avoiding coordination with candidates, as well as the same reporting requirements, disclaimers and contribution limits. Nevertheless, comments are requested as to whether different standards should apply to party committees.

The Petition for Rulemaking argued that party committees are in regular contact with their candidates, help develop candidate messages and campaign strategy, and routinely share

overlapping consultants, pollsters, fundraisers and other campaign agents. According to the petition, these consultations, discussions, and arrangements involve face-to-face meetings, telephone conversations, and exchanges of paper and electronic mail on a regular basis, sometimes daily, and take place at both the staff level and higher levels. If the party has such ties to a candidate, it would be difficult for the committees to achieve sufficient insulation from that candidate so as to avoid any general or particular understanding that would result in coordination, thereby destroying the independence of their expenditures. As Justice Kennedy stated, concurring in the result in *Colorado*, in most cases, the answer to the question of "whether a party's spending is made 'in cooperation, consultation, or concert with' its candidate * * * will be yes * * *." *Colorado* at 2322. Nevertheless, the Court found it was possible for the Colorado Republican Party to make independent expenditures in the specific circumstances presented in the *Colorado* case. These circumstances included the fact that the expenditures were made months before the primary election, three individuals were vying for the nomination, and no general election candidate had yet been selected. *Id.* at 2315. It was also significant that the only "politically relevant individuals" to read the script were the state party chairman, executive director and political director. *Id.* In Advisory Opinion 1984-30, the Commission concluded that contacts during the primary campaign would raise a rebuttable presumption that general election expenditures would be based on the information about the candidate's plans, projects or needs raised in the course of such contacts.

Nevertheless, the Commission seeks comments as to whether and how a party committee could make expenditures which are genuinely independent of a candidate when the party committee has already made, or is in the process of making, coordinated expenditures or in-kind contributions for that candidate. For example, would it be feasible for a party committee to create a separate subdivision or other unit for the exclusive purpose of making independent expenditures, and to sufficiently insulate this unit from its regular staff and its daily campaign activities? Would this separate unit have to be established before the beginning of the election cycle, or before the first campaign-related discussions any party officials or staff have with the candidate's campaign staff? In the

alternative, would it be sufficient for the party committee to create this organization at any time before the party's nominee is chosen? Does a party committee's ability to make independent expenditures end when it nominates a candidate? Once a party committee has coordinated with a particular candidate in a given election, would it ever be possible to cease coordinating and begin making independent expenditures with respect to that particular candidate and election?

Similarly, if party committees are affiliated, the question arises as to whether coordination by one party committee automatically destroys the ability of other affiliated party committees to make independent expenditures. In this regard, comments are sought as to whether there may be a significant distinction between the relationship between national, state and local committees on the one hand, and the relationship between the national committee and its House and Senate campaign committees? Another question concerns candidates who are nominated at state party conventions. If the candidate who is nominated faces little or no opposition at the convention, does this mean the party organization staging the convention has sufficiently coordinated with the nominee so as to preclude subsequent independent expenditures by the state or local party committee in connection with the general election campaign?

2. Independent Expenditures for Presidential Campaigns

In *Colorado*, the Supreme Court indicated that its decision involved only congressional races, and did not "address issues that might grow out of the public funding of Presidential campaigns." *Id.* at 2314. Previously, in *NCPAC*, the Supreme Court addressed the constitutionality of one public-funding provision, section 9012(f) of the Presidential Election Campaign Fund Act. 26 U.S.C. 9001 *et seq.* This provision barred political committees from expending more than \$1000 to further the election of publicly-funded Presidential candidates in the general election. The Supreme Court found 26 U.S.C. 9012(f) to violate the First Amendment to the extent that it limited independent expenditures by nonconnected political committees. *NCPAC* at 497. The Court emphasized the "fundamental constitutional difference between money spent to advertise one's views independently of a candidate's campaign and money contributed to the candidate to be spent on his campaign. * * * [T]he absence

of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id.* at 497-98. However, this case did not involve political party committees.

For a number of reasons, the proposed rules in paragraph (a)(4) of section 110.7 would continue the current ban on national party committees making independent expenditures on behalf of the general election campaigns of Presidential candidates. One reason for retaining these regulations is that they may still be necessary to implement the provisions of 2 U.S.C. 441a(d), which were not invalidated by the Supreme Court. The rules recognize that it may be difficult, perhaps impossible, for a national party committee to be wholly independent of its presidential candidate if the chair of the national party was selected by the Presidential candidate or has worked closely with his or her campaign staff over a period of time. Accordingly, the Commission seeks comments regarding the extent of coordination between party committees and Presidential candidates, in practice. Sections 432(e)(3)(A)(i) and 441a(d)(2) of the FECA allow the national committee of a political party to serve as the principal campaign committee or authorized committee of its Presidential candidate. See 11 CFR 102.12(c)(1) and 9002.1(c). In such a case, it does not seem possible for party committees to operate independently of the candidate and the candidate's agents.

Comments are also sought on several other issues addressed in proposed paragraph (a)(4) of section 110.7. First, should the ban on independent expenditures be extended to include those made in connection with Presidential primaries? Secondly, should this provision explicitly bar congressional campaign committees, as well as state and local party committees, from making these independent expenditures? The Commission is considering whether coordination between a national party committee and its Presidential candidate destroys the ability of affiliated state or local party committees to make independent expenditures on behalf of that candidate. In the alternative, are such independent expenditures precluded only when the state or local party committee, itself, coordinates with the Presidential candidate's committee? Another approach would be to establish a rebuttable presumption that any party committee communications mentioning Presidential candidates are coordinated

with those candidates in both the primary and the general election.

Another issue concerns the role of public funding. Comments are sought on whether the ban on party committee independent expenditures for Presidential candidates should only apply to those party committees whose nominees accept public funding. Alternative 6-B of section 110.7(a) would implement this approach. In contrast, Alternative 6-A would cover all Presidential candidates. Comments are also sought on revising 11 CFR 110.7 and 9008.3(a)(4) to condition the grant of public funding for national nominating conventions on the party committee's and convention committee's agreement not to make independent expenditures for either the primary or general election campaigns of its Presidential and Vice Presidential candidates. Such a requirement, while not appearing in the attached draft rules, would be predicated on the assumption that nominating conventions are extensively coordinated with these candidates, thereby precluding the possibility of simultaneous or subsequent independent expenditures. However, this may not be true if the nomination is still being contested by the time of the convention.

3. Other Changes to Section 110.7

The Commission seeks comments on adding language to paragraph (c) of section 110.7 to set forth the Commission's current policy regarding the assignment of coordinated expenditure limits. The revised rule would state that whenever a party committee authorizes another party committee to use part or all of its coordinated expenditure limitation, the authorization must be in writing, must specify a dollar amount, and must be made before the committee so authorized actually makes the coordinated expenditure. See Campaign Guide for Political Party Committees (1996). This would apply to both the national committee and state committees. Consequently, it would replace the language in current paragraph (a)(4), that permits national committees of political parties to assign their spending limits but does not specify how this should be accomplished. Comments are requested as to whether copies of such written authorizations should be attached to the committees' disclosure reports.

New paragraph (d) of section 110.7 would indicate that the explanation of "coordinated" in 11 CFR 100.23 and 109.1(b)(4) would apply in determining whether expenditures are coordinated

for purposes of the coordinated expenditure limits of 11 CFR 110.7. Please note that under the proposed rules, the Commission's standards for determining whether a communication by a party committee is a coordinated expenditure under 2 U.S.C. 441a(d) would continue to depend on whether it contains an electioneering message and mentions a clearly identified candidate.

Section 104.4(a)—Reporting Independent Expenditures

Paragraph (a) of this section sets out the reporting obligations of political committees making independent expenditures. The draft rules which follow would add a specific reference to party committees to make clear that national, state and subordinate committees of political parties would be subject to the same reporting requirements as other political committees. Consequently, other regulations which establish reporting requirements would apply in the same manner and to the same extent that they apply to other political committees making independent expenditures. *E.g.* 11 CFR 104.3(b)(3)(vii)(A) through (C) and 104.5(g).

Section 110.1(n) and 110.2(k)—Contributions to Committees Making Independent Expenditures

The Commission requests comments on proposed new paragraph (n) of section 110.1 and new paragraph (k) of section 110.2, which would replace current paragraphs (d)(2) of these sections regarding the application of the contribution limits to contributions to committees that make independent expenditures. These sections need to be updated because current paragraphs (d)(2) of each section recognize that non-party committees may make independent expenditures, but do not contemplate party committees doing so. Individuals may donate up to \$20,000 to national party committees. Consequently, under the proposed new language, the \$20,000 contribution limit would continue to apply when the recipient national party committee uses the contribution to make independent expenditures.

Section 110.11(a)—Party Committee Disclaimers

The Commission seeks comments on two changes to paragraph (a)(2) of section 110.11 regarding disclaimers for party committee communications. First, new language would be added to paragraph (a)(2)(i) to state that the required disclaimer for communications which constitute coordinated

expenditures must indicate who authorized the communication. Accordingly, the present language in paragraph (a)(2)(ii) would be deleted. Currently, 11 CFR 110.11(a)(2)(ii) states that coordinated expenditures need not include an authorization statement if the communication is made before the party's candidate is nominated. However, in the event that the Commission decides to continue to treat party committee communications mentioning Presidential candidates as inherently coordinated, comments are sought as to whether paragraph (a)(2)(ii) should remain as it is now and not require party committees to state which Presidential candidates authorized these pre-primary communications.

Second, new paragraph (a)(2)(ii) would indicate that when party committees make independent expenditure communications, the disclaimer must state that the party committee paid for the communication, and that the communication is not authorized by any candidate or authorized committee. Given that independent expenditures contain express advocacy, they are subject to the disclaimer requirements of 2 U.S.C. § 441d.

The Commission welcomes comments on proposed new 11 CFR 100.23, the proposed amendments to 11 CFR 100.7(a), 104.4(a), 109.1(b), 110.1, 110.2, 110.7, and 110.11(a) as well as the issues raised in this notice.

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

These proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The basis for this certification is that the rules would conform to a recent Supreme Court decision by permitting, but not requiring, small entities to make independent expenditures. Therefore, no significant economic impact would result.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 109

Elections, Reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, it is proposed to amend Subchapter A, Chapter I of title 11 of the *Code of Federal Regulations* as follows:

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

1. The authority citation for Part 100 would continue to read as follows:

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

2. Section 100.7 would be amended by adding new paragraph (a)(5) to read as follows:

§ 100.7 Contribution (2 U.S.C. 431(8)).

(a) * * *

Alternative 1-A

(5) Any payment made for a communication or anything of value that is made in coordination with a candidate, or a candidate's authorized committee or agent, or in coordination with a political committee or its agent, except as otherwise provided in 11 CFR 114.2(c).

Alternative 1-B

(5) Any payment made for a communication or anything of value that is made for the purpose of influencing any election for Federal office and that is made in coordination with a candidate, or a candidate's authorized committee or agent, or in coordination with a political committee or its agent, except as otherwise provided.

(End of Alternatives for § 100.7)

* * * * *

3. Part 100 would be amended by adding new section 100.23 to read as follows:

§ 100.23 Coordination (2 U.S.C. 431(17)).

(a) Payments made in "coordination" with a candidate include:

Alternative 2-A

(1) Payments made by any person in cooperation, consultation or concert with, at the request or suggestion or direction of, or pursuant to any general or particular understanding or arrangement with a candidate or a candidate's authorized committee or agent;

Alternative 2-B

(1) Payments made by any person in cooperation, consultation or concert with, at the request or suggestion or direction of, or pursuant to any general or particular understanding or

arrangement with a candidate or a candidate's authorized committee or agent, as defined below:

(i) *In cooperation or concert with* means acting, working or operating together, or conferring or discussing or jointly deciding or planning for one or more persons to take action(s);

(ii) *In consultation with* means providing information to one or more persons and obtaining their reactions, suggestions or responses;

(iii) *At the request, suggestion or direction of* means asking, ordering, requiring, indicating, telling, or otherwise expressly or impliedly expressing the hope or desire that one or more persons take action(s);

(iv) *Pursuant to any general or particular understanding or arrangement* means an express or implied agreement or intention for one or more persons to take action necessary to achieve a common goal;

Alternative 2-C

(1) Payments made by any person in cooperation, consultation or concert with, at the request or suggestion or direction of, or pursuant to any general or particular understanding or arrangement with a candidate or a candidate's authorized committee or agent as defined below. See the definition of person in 11 CFR 109.1(b)(1).

(i) *In cooperation with* means the act of persons working or operating together in the formation of a plan;

(ii) *In consultation with* means a meeting of persons to discuss, decide, or plan something;

(iii) *In concert with* means an agreement of two or more persons in a design or plan;

(iv) *At the request, suggestion or direction of* means asking, ordering, requiring, indicating, telling, or otherwise expressly or impliedly expressing the hope or desire that one or more persons take action(s);

(v) *Pursuant to any general or particular understanding or arrangement* means an express or implied agreement or intention for one or more persons to take action necessary to achieve a common goal;

Alternative 2-D

(1) Payments made by any person in cooperation, consultation or concert with, at the request or suggestion or direction of a candidate or a candidate's authorized committee or agent as defined below. See the definition of person in 11 CFR 109.1(b)(1).

(i) *In cooperation with* means the act of persons working or operating together in the formation of a plan;

(ii) *In consultation with* means a meeting of persons to discuss, decide, or plan something;

(iii) *In concert with* means an agreement of two or more persons in a design or plan;

(iv) *At the request, suggestion or direction of* means asking, ordering, requiring, indicating, telling, or otherwise expressly or impliedly expressing the hope or desire that one or more persons take action(s);

(End of Alternatives for Paragraph (a)(1))

(2) Payments made by any person to finance the dissemination, distribution, display, republication or reproduction, in whole or in part, of any broadcast or any written, graphic or other form of campaign materials prepared by the candidate or any agent or authorized committee of the candidate, but not including the use of those materials in communications that advocate the candidate's defeat or are incorporated into a news story, commentary or editorial exempted under 11 CFR 100.7(b)(2) or are incorporated into a corporation's or labor organization's expression of its own views under 11 CFR 114.3(c)(1); and

Alternative 3-A

(3) Payments made based on information about the candidate's plans, projects or needs provided to the expending person by the candidate, or the candidate's authorized committee or agents.

Alternative 3-B

(3) Payments made based on information about the candidate's plans, projects or needs provided to the expending person by the candidate, or the candidate's authorized committee or agents with a view toward having an expenditure made.

Alternative 3-C

(3) Payments made based on information about the candidate's plans, projects or needs provided to the expending person by the candidate, or the candidate's authorized committee or agents with a view toward having an expenditure made, but not including mere contacts with persons who are not empowered to commit their organizations, or which do not result in coordinated action with persons empowered to commit their organization, or which do not meet the definition of coordination as defined in (a)(1) of this section.

(End of Alternatives for Paragraph (a)(3))

(b) A candidate's agents include persons who during the same election cycle in which the payment is made—

Alternative 4-A

(1) Hold or have held executive, policymaking, or other significant advisory or fundraising positions with the candidate's authorized committee;

(2) Have participated in strategic or policymaking communications with the candidate or campaign officials; or

(3) Are providing or have provided campaign-related services such as polling, media advice, direct mail, fundraising or campaign research, unless such persons do not make decisions, or participate in decision-making, regarding the candidate's plans, projects or needs.

Alternative 4-B

(1) Have an express or implied grant of authority from the principal to act on its behalf either generally or only with regard to particular matters; and

(2) (i) Hold or have held executive, policymaking, or other significant advisory or fundraising positions with the candidate's authorized committee;

(ii) Have participated in strategic or policymaking communications with the candidate or campaign officials; or

(iii) Are providing or have provided campaign-related services such as polling, media advice, direct mail, fundraising or campaign research, unless such persons do not make decisions, or participate in decision-making, regarding the candidate's plans, projects or needs.

(End of Alternatives for Paragraph (b))

(c) Payments made in coordination with a candidate do not include payments by any person whose only contact with the candidate, candidate's authorized committee or agents is to receive Commission guidelines on independent expenditures.

PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

4. The authority citation for part 104 would continue to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

5. Section 104.4 would be amended by revising paragraph (a) to read as follows:

§ 104.4 Independent expenditures by political committees (2 U.S.C. 434(c)).

(a) Every political committee, including a party committee, which makes independent expenditures shall

report all such expenditures on Schedule E in accordance with 11 CFR 104.3(b)(3)(vii). Every person (other than a political committee) shall report independent expenditures in accordance with 11 CFR part 109.

* * * * *

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

6. The authority citation for part 109 would continue to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441d.

7. Section 109.1 would be amended by revising paragraphs (b)(1) and (b)(4) to read as follows:

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

* * * * *

(b) * * *

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

* * * * *

Alternative 5-A

(4) *Made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate* means coordination with the candidate prior to the publication, distribution, display or broadcast of the communication, as defined in 11 CFR 100.23.

Alternative 5-B

(No Corresponding Provision)

* * * * *

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

8. The authority citation for part 110 would continue to read as follows:

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

9. In section 110.1, paragraph (d)(2) would be removed, paragraph (d)(1) would be redesignated as paragraph (d), and a new paragraph (n) would be added to read as follows:

§ 110.1 Contributions by persons other than multicandidate political committees (2 U.S.C. 441a(a)(1)).

* * * * *

(n) Contributions to committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to political committees making independent expenditures under 11 CFR part 109.

10. In section 110.2, paragraph (d)(2) would be removed, paragraph (d)(1) would be redesignated as paragraph (d), and a new paragraph (k) would be added to read as follows:

§ 110.2 Contributions by multicandidate political committees (2 U.S.C. 441a(a)(2)).

* * * * *

(k) Contributions to multicandidate political committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to multicandidate political committees making independent expenditures under 11 CFR Part 109.

11. Section 110.7 would be revised to read as follows:

§ 110.7 Party committee coordinated expenditures and independent expenditures (2 U.S.C. 441a(d)).

(a) *Presidential elections.* (1) The national committee of a political party may make coordinated expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The coordinated expenditures shall not exceed an amount equal to 2 cents multiplied by the voting age population of the United States.

(3) Any coordinated expenditure under paragraph (a) of this section shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2.

Alternative 6-A

(4) Political party committees may not make independent expenditures (See 11 CFR Part 109) in connection with an election campaign of a candidate for nomination or election to the office of President of the United States.

Alternative 6-B

(4) Political party committees affiliated with a publicly funded Presidential candidate may not make independent expenditures (See 11 CFR

Part 109) in connection with an election campaign of a candidate for nomination or election to the office of President of the United States.

(End of Alternatives for Paragraph (a)(4))

(5) Any coordinated expenditures made by the national, state and subordinate committees of a political party pursuant to paragraph (a) of this section on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b) *Other federal elections.* (1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make coordinated expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The coordinated expenditures shall not exceed—

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State; or

(B) Twenty thousand dollars; and

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, \$10,000.

(3) Any coordinated expenditure under paragraph (b) of this section shall be in addition to any contribution by a committee to the candidate permissible under 11 CFR 110.1 or 110.2.

(c) *Assignment of coordinated expenditure limits; compliance.* The national committee and State committees of a political party may make the coordinated expenditures specified in this section by designating another party committee as its agent, provided that before the coordinated expenditure is made, the national or State committee specifies in writing the amount the designated party committee may spend. For limitation purposes, "State committee" includes subordinate State committees. State committees and subordinate State committees combined shall not exceed the limits in paragraph (b)(2) of this section. To ensure compliance with the limitations, the State committee shall administer the limitation in one of the following ways:

(1) The State central committee shall be responsible for insuring that the coordinated expenditures of the entire party organization are within the limitations, including receiving reports

from any subordinate committees making coordinated expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission which permits control over expenditures.

(d) *Definition of coordinated expenditure.* The provisions of 11 CFR 100.23 and 109.1(b)(4) will apply for purposes of determining whether an expenditure is coordinated under this section.

12. Section 110.11 would be amended by revising paragraph (a)(2) to read as follows:

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

(a) * * *

(2) *Independent and 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, and shall identify the candidate(s) or authorized committee(s) who authorized the communication.

(ii) For a communication made by a party committee which constitutes an independent expenditure, the disclaimer required by paragraph (a)(1) of this section shall state that the party committee paid for the communication and that the communication is not authorized by any candidate or candidate's committee.

* * * * *

Dated: April 30, 1997.

John Warren McGarry,
Chairman, Federal Election Commission.
[FR Doc. 97-11590 Filed 5-2-97; 8:45 am]
BILLING CODE 6715-01-P

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 111 and 163

RIN 1515-AB77

Recordkeeping Requirements; Correction

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking, correction.

SUMMARY: This document makes corrections to the document published in the **Federal Register** on April 23, 1997, which set forth proposed amendments to the Customs Regulations relating to recordkeeping.

FOR FURTHER INFORMATION CONTACT: Stan Hodziewich, Regulatory Audit Division, Washington, D.C. at (202-927-0999) or Howard Spencer, Regulatory Audit Division, Atlanta Branch at (770-994-2273, Ext.158).

SUPPLEMENTARY INFORMATION:

Background

On April 23, 1997, Customs published in the **Federal Register** (62 FR 19704) a Notice of Proposed Rulemaking which covered recordkeeping requirements and reflected legislative changes to the Customs laws regarding recordkeeping, examination of books and witnesses, regulatory audit procedures and judicial enforcement. These statutory amendments are contained in the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. This document corrects some errors published in the NPRM.

Several errors involved the discussion under the **SUPPLEMENTARY INFORMATION** portion of the document. As part of the background discussion under the heading "Recordkeeping Requirements", in the center column of page 19705, in the first full paragraph which refers to section 163.4 and discusses drawback documentation retention requirements, the document misstates the period of time that drawback records may be necessary to be retained. Customs did not include the three-year period after exportation that the claimant could wait before filing the drawback claim in setting forth the number of years necessary to retain drawback documentation. Thus, the second sentence of the first full paragraph in the center column on page 19705 is incorrect. A drawback claimant has the ability to file a claim up to almost eight years from the date of importation: the export on which the claim is made may occur up to five years from the date of importation and the claim can be filed within three years from the date of exportation. The recordkeeping requirement runs from the date of payment, including a payment made under the accelerated payment program. If the claimant takes advantage of the full eight-year period and Customs pays the claim under the accelerated payment program, the supporting record must be kept three years from the payment date: a period