

Proposed Rules

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, 110, 111, and 113

[Notice 2002-15]

Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules relating to disclaimers in political communications, fraudulent solicitations, civil penalties, and personal use of campaign funds under the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”). The proposed rules implement the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which specifies new requirements for disclaimers accompanying radio, television, and print campaign communications; expands the scope of FECA’s fraudulent misrepresentation prohibition; increases FECA’s civil penalties for violating the prohibition on contributions made in the name of another; and codifies the “irrespective” test for permissible use of campaign funds by candidates and Federal office holders. The Commission had planned to address BCRA-related rules for inaugural committees in this rulemaking; however, inaugural committees will now instead be addressed in a future rulemaking.

Please note that the draft rules that follow do not represent a final decision by the Commission on the issues presented by this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before September 27, 2002.

ADDRESSES: All comments should be addressed to Mr. John C. Vergelli, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Electronic mail comments should be sent to

BCRAmisc@fec.gov and must include the full name, electronic mail address, and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address, and postal service address of the commenter will not be considered. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its web site within ten business days of the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Mr. John C. Vergelli, Acting Assistant General Counsel, or Attorneys, Ms. Ruth Heilizer (personal use), Ms. Dawn Odrowski (fraudulent solicitations), Mr. Mark Allen (civil penalties), Mr. Richard Ewell (disclaimers), 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002), contains extensive detailed amendments to the Federal Election Campaign Act of 1971 (“FECA” or “the Act”), as amended, 2 U.S.C. 431 *et seq.* This Notice of Proposed Rulemaking (“NPRM”) is part of a continuing series of rulemakings the Commission is publishing over the next several months in order to meet the rulemaking deadlines set out in BCRA.

This NPRM addresses changes to: disclaimer requirements for campaign communications (2 U.S.C. 441d); fraudulent misrepresentation for purposes of soliciting contributions or donations (2 U.S.C. 441h); civil penalties for a specific knowing and willful violation of FECA (2 U.S.C. 437g); permissible uses of campaign funds by candidates and officeholders (2 U.S.C. 439a); and a technical amendment to the definition of “Act” to include BCRA amendments to FECA. The changes to the Act addressed in this NPRM are only a few of many changes made to the Act by BCRA. Other rulemakings have addressed or will address: (1) Non-Federal funds or “soft

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money” (promulgated on June 22, 2002, 67 FR 49064 (July 29, 2002)); (2) reorganization of “contribution” and “expenditure” definitions (promulgated on August 5, 2002, 67 FR 50582); (3) electioneering communications (Notice of Proposed Rulemaking, 67 FR 51131 (August 7, 2002)); (4) coordinated and independent expenditures;¹ (5) new or amended contribution limitations and prohibitions; (6) the so-called “millionaires’ amendment,” which increases contribution limits for Congressional candidates facing self-financed candidates on a sliding scale, based on the amount of personal funds the opponent contributes to his or her campaign; and (7) consolidated reporting. The consolidated reporting NPRM will contain the reporting rules proposed in each of the other NPRMs and will restructure 11 CFR part 104 to make the reporting rules more user-friendly. Section 402(c) of BCRA establishes a 270-day deadline for the Commission to promulgate the remaining rules. The 270-day deadline is December 22, 2002.

Disclaimers

I. Introduction

Under the Act, certain communications must include disclaimers identifying who paid for and, where applicable, who authorized the communication. In BCRA, Congress added new specificity to these requirements, expanded the disclaimer requirement to reach “any communication” made by political committees, and required that “electioneering communications” include disclaimers. See 2 U.S.C. 441d.

The Commission proposes to implement these statutory changes by deleting pre-BCRA 11 CFR 110.11 in its entirety, and adopting a new section 110.11. As explained in detail below, proposed section 110.11 would incorporate many substantive provisions from the pre-BCRA version of the section. By deleting pre-BCRA section 110.11 and adopting a new section 110.11, the Commission would be able to implement the changes necessitated by BCRA, and to reorganize 11 CFR 110.11 into a more easily understandable rule.

¹ This NPRM will also address electioneering communications coordinated with candidate and political party committees.

II. Applicability and Definitions

Proposed paragraph (a)(1) would set out the applicability of the section, and would define certain terms used in the section. Proposed paragraph (a)(1) would explain that the disclaimer requirements of this section would apply only to communications through any broadcast, cable, or satellite transmission, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising. This wording would generally follow 2 U.S.C. 441d(a), with one change from the statutory language. Whereas the statute refers only to “any broadcasting station,” the regulation would cover “any broadcast, cable, or satellite transmission.” This change is based on Congress’ intent, apparent in 2 U.S.C. 441d(d), to regulate communications in the mass media of radio and television, and the Commission’s judgment that it would be unsupportable to regulate a television communication that was broadcast, while not regulating the same communication merely because it was carried on cable or satellite.

The Commission seeks comment on whether the term *communication*, as used in this section, should have the same scope as the term *public communication*. See 2 U.S.C. 431(22) and 11 CFR 100.26. The two terms differ in some respects. A “public communication,” as defined in 2 U.S.C. 431(22), includes a telephone bank to the general public, whereas telephone banks are not mentioned in section 441d(a). A “public communication” includes a mass mailing, which is defined as more than 500 pieces of substantially similar mail. 2 U.S.C. 431(22), (23). Section 441d(a) refers to a “mailing,” without any adjective. (See below for a discussion of the proposed definition of “mailing” for purposes of the disclaimer requirements.)

The Commission notes, however, that the definitions of “public communication” (2 U.S.C. 431(22)) and “communication” (2 U.S.C. 441d(a)) have a fundamental similarity in that both use virtually identical phrases, “or any other type [form] of general public political advertising,” to summarize the respective definitions. (Section 431(22) uses the word “form,” while section 441d(a) uses the word “type;” the Commission discerns no substantive differences arising from the choice of synonyms.) Also, conforming the definitions would appear to promote consistent use of terminology throughout the regulations.

Proposed paragraphs (a)(1)(i) through (iv) would enumerate the particular

types of such communications to which the disclaimer requirements would apply. Throughout proposed section 110.11, the word “type” would be used, rather than “form,” as in the pre-BCRA version of the regulation. This change would have no substantive effect and would be done only to conform the regulation to the language of the statute. See 2 U.S.C. 441d.

In BCRA, Congress provided that “any communication” for which a political committee makes a disbursement must include a disclaimer, expanding the scope of the disclaimer requirement for political committee communications. 2 U.S.C. 441d(a). Proposed paragraph (a)(1)(i) would read, “[a]ll such communications for which a political committee makes a disbursement,” with the qualifier “such” intended to clarify that only communications by a political committee through one or more of the media enumerated in the first sentence of proposed paragraph (a)(1) must have a disclaimer.

Proposed paragraph (a)(1)(ii) would require that “[a]ll such communications by any person that expressly advocate the election or defeat of a clearly identified candidate” must include a disclaimer. 2 U.S.C. 441d(a). The proposed rule would not substantively change the disclaimer requirement for express advocacy communications from the pre-BCRA version of the regulation.

Proposed paragraph (a)(1)(iii) would require “[a]ll such communications by any person” that solicit a contribution to include a disclaimer. 2 U.S.C. 441d(a). The proposed rule would not change the disclaimer requirement for solicitations from the pre-BCRA version of the rule.

Congress amended 2 U.S.C. 441d(a) to require that “electioneering communications” include disclaimers. The Commission proposes new paragraph (a)(1)(iv), which would require that “[a]ll electioneering communications” include a disclaimer.

Proposed paragraph (a)(2) would define two terms used in the section. In a separate rulemaking, the Commission has proposed a definition of the term “electioneering communication,” as that term is used in BCRA. Proposed 11 CFR 100.29(a), see “Electioneering Communications,” 67 FR 51131 (Aug. 7, 2002). Proposed paragraph (a)(2)(i) would state that *electioneering communication* has the same meaning as set forth at proposed 11 CFR 100.29.

In BCRA, Congress amended 2 U.S.C. 441d(a)(1) by removing the adjective “direct” from the pre-BCRA term “direct mailing.” The Commission proposes to define *mailing*, for purposes of this section, by redesignating the

definition of *direct mailing* in pre-BCRA 110.11(a)(3) to proposed paragraph (a)(2)(ii), deleting the adjective “direct,” and simplifying the syntax of the pre-BCRA definition. For purposes of the disclaimer requirements, *mailing* would mean more than 100 pieces of substantially similar mail. Thus, the definition of *mailing*, post-BCRA, would substantively correspond to the definition of *direct mailing*, pre-BCRA. Given that Congress defined “mass mailing” in BCRA as more than 500 pieces of mail, see 2 U.S.C. 431(23), and given that a “mailing” is presumably less than a “mass mailing,” the continued use of a threshold of 100 pieces of mail, which is, of course, fewer than 500 pieces, seems appropriately matched to the statutory language.

III. General Content Requirements

Proposed paragraph (b) would set out the general content requirements for disclaimers, depending on who paid for the communication and, where applicable, who authorized the communication. Pre-BCRA paragraphs (a)(1)(i) and (ii) of section 110.11, which apply to communications authorized and paid for by a candidate and communications authorized by a candidate but paid for by another person, respectively, would be redesignated as proposed paragraphs (b)(1) and (2), respectively, without substantive revision.

Proposed paragraph (b)(3) would apply to a communication, including any solicitation, that is not paid for or authorized by a candidate. The provisions of pre-BCRA 11 CFR 110.11(a)(1)(iii) would be replaced with proposed paragraph (b)(3), with one substantive change. In BCRA, Congress provided that a covered communication not authorized by a candidate, his or her authorized committees or agents must have a disclaimer that includes the “permanent street address, telephone number, or World Wide Web address” of the person who paid for the communication. 2 U.S.C. 441d(a)(3). Similar language would be added in proposed paragraph (b)(3).

The Commission proposes not to continue pre-BCRA 11 CFR 110.11(a)(1)(iv) in proposed section 110.11. This paragraph, pre-BCRA, applies to “solicitations directed to the general public on behalf of a political committee which is not an authorized committee of a candidate.” Pre-BCRA paragraph (a)(1)(iv) thus appears to be redundant with proposed paragraph (b)(3), see above, which would apply to communications, including solicitations, not authorized by a

candidate. Given this apparent redundancy, the pre-BCRA provision would not be included in the proposed section.

IV. Disclaimer Specifications

A. Specifications for All Disclaimers

In BCRA, Congress created a number of specific requirements for disclaimers to be included in communications covered by the statute. These statutory requirements vary, depending on whether the communication was printed or broadcast through radio or television, and on whether a candidate or another person paid for the communication. 2 U.S.C. 441d(c), (d). Proposed paragraph (c) would combine the disclaimer requirements in pre-BCRA 11 CFR 110.11(a)(5) with the new requirements Congress added in BCRA.

Proposed paragraph (c)(1) would set forth a general, “clear and conspicuous” requirement applicable to all disclaimers, regardless of the medium in which the communication is transmitted. Proposed paragraph (c)(1) would be a slightly revised version of the “clear and conspicuous” requirement in pre-BCRA 11 CFR 110.11(a)(5). The final sentence of proposed paragraph (c)(1) would provide that a disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. This would modify the corresponding pre-BCRA provision, which was focused on print communications only, by generalizing it to apply to radio and television communications, as well. The Commission seeks comment on this proposed paragraph.

B. Specific Requirements for Printed Communications

Several of the specific disclaimer requirements added by BCRA apply only to printed communications. 2 U.S.C. 441d(c)(1). Proposed paragraph (c)(2) would implement the new statutory specifications, and would incorporate three of the print-specific provisions of pre-BCRA section 110.11.

Given the specificity of the statutory requirements added by BCRA, proposed paragraphs (c)(2)(i), (ii), and (iii) would precisely track 2 U.S.C. 441d(c)(1), (2), and (3), respectively. Proposed paragraph (c)(2)(i) would require that the disclaimer on printed communications be of sufficient type size to be clearly readable by the recipient. 2 U.S.C. 441d(c)(1). The Commission seeks comment on whether the term, “sufficient type size,” should be further addressed, either in a specific definition, or by providing a “safe

harbor” for disclaimers of at least a specified size. For example, the disclaimer type size could be related, as a percentage or fraction, to the communication’s core message text. If the core message text in the communication appears in an 18-point font, the regulation could require that the disclaimer text must appear in a type font, for example, at least two-thirds the size of 18-point font, or 12-point font, or could deem it sufficient if it was of such size. Alternatively, the disclaimer type size could be related, as a percentage or fraction, to the largest type size that appears in the communication. For example, if the banner text or headline text on a newspaper advertisement is two inches tall by twelve inches wide, the disclaimer text must be 60% of the banner text or headline text, or 1.2 inches tall by 7.2 inches wide, or would be deemed sufficient if of at least that size. Or, alternatively, there could be a safe harbor for a disclaimer with a type size that is at least as large as the smallest type size in the communication. Or, there could be a safe harbor for a disclaimer with a type size that is at least as large as the smallest type size in the body of the text of the message.

Proposed paragraph (c)(2)(ii) would specify that the disclaimer included in printed communications must be contained within a printed box set apart from the other contents of the communication. 2 U.S.C. 441d(c)(2). Proposed paragraph (c)(2)(iii) would specify that the text of the disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. 2 U.S.C. 441d(c)(3). The Commission seeks comment on whether “reasonable degree of color contrast” should be further defined, and specifically whether the color contrast requirement should be related to the color contrast of the core message text.

Proposed paragraphs (c)(2)(iv) and (v) would incorporate pre-BCRA provisions specific to print communications. Proposed paragraph (c)(2)(iv), to which the provisions of pre-BCRA paragraph (a)(5)(i) would be redesignated without substantive revision, would state that a disclaimer need not appear on the front cover of a communication, except for communications that only contain a front face, such as billboards. Proposed paragraph (c)(2)(v), to which the provisions of pre-BCRA paragraph (a)(5)(ii) would be redesignated without substantive change, would state that a communication that would require a disclaimer if distributed separately, and that is included in a package of

materials, must contain the required disclaimer.

C. Specific Requirements for Radio and Television Communications That are Authorized by Candidates

In BCRA, Congress added new requirements for disclaimers in radio and television communications paid for by candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(1). Proposed paragraph (c)(3) would implement these specific statutory requirements.

Proposed paragraph (c)(3)(i) would require that a communication that is paid for or authorized by a candidate and transmitted through radio must include an audio statement spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(A). The statement would have to identify the candidate, and state that the candidate has approved the communication. *Id.*

Proposed paragraph (c)(3)(ii) would require that a communication that is paid for or authorized by a candidate and transmitted through television have an oral disclaimer spoken by the candidate himself or herself. 2 U.S.C. 441d(d)(1)(B). The provision would require the candidate to identify himself or herself, and state that he or she has approved the communication. In addition, proposed paragraph (c)(3)(ii) would require that a full-screen view or a picture of the candidate appear while the statement is conveyed. The proposed paragraph would also require the statement to appear in writing at the conclusion of the communication in a clearly readable manner, with a reasonable degree of color contrast between the statement and the background for a period of at least four (4) seconds. See 2 U.S.C. 441d(d)(2)(B)(ii).

The pre-BCRA regulations provide that a written disclaimer appearing on the screen of a television communication “shall be considered clear and conspicuous if [it] appear[s] in letters equal to or greater than four (4) percent of the vertical picture height for not less than four (4) seconds.” 11 CFR 110.11(a)(5)(iii). The proposed regulations would not continue this “safe harbor” provision because Congress has added specific statutory requirements that render it incomplete. Specifically, the statute now requires that the written disclaimer in television communications appear “with a reasonable degree of color contrast between the background and written statement.” 2 U.S.C. 441d(d)(1)(B); proposed 11 CFR 110.11(c)(3)(ii), above. Neither the statute nor these proposed regulations define “reasonable degree of

“color contrast” in the same manner that pre-BCRA paragraph (a)(5)(iii) defines the required vertical height of the written disclaimer. To continue the “safe harbor” approach of pre-BCRA paragraph (a)(5)(iii), the regulations would have to describe “reasonable degree of color contrast” in the same empirical manner. The Commission notes that this may be possible; for example, the regulation might be able to employ the standard “color spaces” used by professional printers and graphic artists (e.g., CMYK) to describe color contrast empirically. The disadvantage of this approach would be that it might add significant complexity to the regulation. The Commission seeks comment on whether a “safe harbor” approach to color contrast should be pursued, and, if so, how to define it.

Proposed paragraph (c)(3)(iii) would set out two examples of spoken disclaimers that, if used by a candidate, would satisfy the requirements of proposed paragraphs (c)(3)(i) and (ii). The proposed examples would not be mandatory and would not be an exhaustive list of acceptable disclaimers. Proposed paragraph (c)(3)(iii) would be intended to provide a clear “safe harbor” for candidates attempting to comply with the regulation. The Commission seeks comment on the use of these or other examples.

D. Specific Requirements for Radio and Television Communications Paid for by Other Persons and Not Authorized by Candidates

Congress set forth a scripted audio statement required for disclaimers in communications transmitted through radio or television and paid for by persons other than candidates or persons authorized by candidates. 2 U.S.C. 441d(d)(2). The Commission proposes new paragraph (c)(4), which would, tracking the statute, require the name of the political committee or other person responsible for the communication and any connected organization to be included in the communication. “Connected organization” is defined in 11 CFR 100.6. The scripted statement would be: “XXX is responsible for the content of this advertising.” 2 U.S.C. 441d(d)(2). Furthermore, in the case of a television transmission the proposed rule would require that the statement be conveyed by a full-screen view of a representative of the political committee making the statement, or in a voice-over by such representative. The Commission seeks comment on whether the regulation should specify who may represent the payor for this purpose. The regulation

could, for example, require that the representative be an officer or the treasurer, or it could allow a paid spokesperson, such as a celebrity or actor. In the case of a television transmission, the disclaimer statement would also have to appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement for a period of at least four (4) seconds. 2 U.S.C. 441d(d)(2).

V. Coordinated Party Expenditures and Independent Expenditures by Political Party Committees

Proposed paragraph (d) of section 110.11 would cover disclaimers for communications that constitute coordinated party expenditures and independent expenditures by political party committees. The relevant pre-BCRA provisions of 11 CFR 110.11(a)(2) would be redesignated as proposed paragraph (d)(1), without substantive change. There would be a minor grammatical change.

Proposed paragraph (d)(2) would cover communications that constitute independent expenditures by political party committees. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996). It would clarify that the disclaimer provisions apply to such communications, and that a “non-authorization notice” would be required, as with any other independent expenditure communication. See pre-BCRA 11 CFR 109.3.

VI. Exempt Activities

The Commission proposes to redesignate the provisions of pre-BCRA 11 CFR 110.11(a)(4), pertaining to communications that qualify as “exempt activities,” as proposed paragraph (e) of section 110.11. Proposed paragraph (e) would include two minor revisions to its pre-BCRA predecessor. In the first sentence, the word “expenditure” would be replaced with the word “communication” to conform this proposed paragraph to the wording of proposed paragraph (a). This proposed revision would not constitute a substantive change. Also, there would be a non-substantive revision to the cross-reference to the definitions of “exempt activities,” which would be updated to reflect changes to part 100 made in a recent reorganization rulemaking. “Reorganization of Regulations on ‘Contribution’ and ‘Expenditure,’” 67 FR 50582 (Aug. 5, 2002). Overall, the relocation and the minor revisions would not be intended

to change the substantive operation of these provisions.

VII. Exceptions

Exceptions to the disclaimer requirements would be set out in proposed paragraph (f). The exceptions in pre-BCRA paragraphs (a)(6)(i), (ii), and (iii) would be redesignated as proposed paragraphs (f)(1)(i), (ii), and (iii), respectively, without any other revision.

The Commission proposes incorporating the provisions of pre-BCRA 11 CFR 110.11(a)(7), regarding certain communications by a separate segregated fund or its connected organization, in proposed paragraph (f)(2), because this provision is essentially an exception. In addition, in proposed paragraph (f)(2), the word “form” would be changed to “type.” This change would have no substantive effect, and would be done only to conform to the language of the statute. *See* 2 U.S.C. 441d(a).

VIII. Comparable Rate for Campaign Purposes

Proposed paragraph (g) of section 110.11 would continue the pre-BCRA rule pertaining to comparable rates for print advertising. That is, the contents of pre-BCRA 11 CFR 110.11(b) would be redesignated as proposed paragraph (g). Other than the addition of a heading for the paragraph, there would be no revisions to the pre-BCRA rule. Proposed paragraph (g) would, as does its pre-BCRA predecessor, track 2 U.S.C. 441d(b).

Prohibitions on Fraudulent Solicitations

In BCRA, Congress adds a subsection to the fraudulent misrepresentation statute at 2 U.S.C. 441h. The new provision, 2 U.S.C. 441h(b), prohibits a person from fraudulently misrepresenting that the person is acting for or on behalf of a Federal candidate or political party, or an employee or agent of either, for the purpose of soliciting contributions or donations. It also prohibits persons from participating in, or conspiring to participate in, plans, schemes, or designs to make such fraudulent misrepresentations in soliciting contributions and donations. BCRA also non-substantively amends the existing fraudulent misrepresentation statute by redesignating it as subsection (a) of 2 U.S.C. 441h. The Commission proposes to implement the new statutory provision, together with the pre-BCRA fraudulent misrepresentation regulation found at 11 CFR 110.9(b), by combining them in a new section 11 CFR 110.16.

The pre-BCRA misrepresentation statute, now codified at 2 U.S.C. 441h(a), is aimed at fraudulent misrepresentation of campaign authority. For additional background, see *Legislative History of Federal Election Campaign Act Amendments of 1974* at 521. The statute prohibited a candidate, his or her employee or agent, or an organization under the candidate's control, from purporting to speak, write, or act for another candidate or party on a matter that damages the other candidate or party. Section 441h(a) encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and fraudulently attributes them to the opponent.

Because the language and purpose of the pre-BCRA misrepresentation statute encompasses only misrepresentations by a candidate or the candidate's employee or agent, the Commission has historically been unable to take action in enforcement matters where persons unassociated with a candidate or candidate committee have solicited funds by purporting to act on behalf of a specific candidate or party. Candidates have complained that contributions which contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor. Consequently, the Commission has frequently included in its annual legislative recommendations to Congress a recommendation that 2 U.S.C. 441h be amended to specifically prohibit any person from fraudulently misrepresenting a candidate or political party in solicitations. See *Federal Election Commission Annual Reports* for 2000 at 39, for 1999 at 47–48, for 1998 at 52, and 1997 at 47. BCRA's prohibition on fraudulent solicitations of contributions and donations implements those legislative recommendations. 2 U.S.C. 441h(b); see 148 Cong. Rec. S3122 (daily ed. March 29, 2001) (statement of Sen. Nelson).

Proposed 11 CFR 110.16(a) would amend the pre-BCRA fraudulent misrepresentation regulation at 11 CFR 110.9(b) by adding the title "in general," following BCRA, which added a similar heading to section (a) of 2 U.S.C. 441h. Technical amendments would also make the language of proposed paragraph (a) gender-neutral. Finally, proposed paragraph (a)(2) would be amended to include the word "schemes" to more closely track the statutory language.

Proposed 11 CFR 110.16(b) would track the statutory language in BCRA. Proposed paragraph (b)(1) would prohibit a person from fraudulently

misrepresenting that the person speaks, writes, or otherwise acts for or on behalf of a candidate, political party, or an employee or agent of either, in soliciting contributions or donations. Proposed paragraph (b)(2) would prohibit a person from willfully and knowingly participating in, or conspiring to participate in, any plan, scheme, or design to violate proposed paragraph (b)(1).

The Commission emphasizes that section 441h and proposed 11 CFR 110.16 are different from common law fraud. First, section 441h is part of a Federal statute designed to address campaign finance abuses, not common law fraud. Congress enacted FECA to protect the public interest. Unlike common law fraudulent misrepresentation, section 441h gives rise to no tort action; it is part of an enforcement scheme enacted to promote the integrity of the financing of Federal elections, and to prevent corruption or the appearance of corruption. See generally *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

Thus, the Supreme Court has recognized that statutes that address schemes to defraud do not require proof of the common law requirements of "justifiable reliance" and "damages." *Neder v. United States*, 527 U.S. 1, 24–25 (1999) ("The common law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in federal fraud statutes." * * * "By prohibiting the 'scheme to defraud' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted"), citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989).

Second, section 441h(a) states that the fraudulent misrepresentation must be "on a matter which is damaging to [the misrepresented] candidate or political party." If this includes proof of damage as required by common law fraudulent misrepresentation, then the phrase "on a matter damaging" is superfluous. Courts construe statutes so "as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); see also *Federal Election Commission v. Arlen Specter '96*, 150 F. Supp.2d 797, 806 (2001), quoting *Bennett v. Spear*, 520 U.S. 154, 173 (1997). "Damaging" means "causing or able to cause damage." Webster's Collegiate Dictionary (10th ed. 1993).

Increase in Civil Penalties

The Commission seeks comments on proposed changes to its rules on civil

penalties under FECA. The proposed rules are based on BCRA, which increases the civil penalties that may be negotiated by the Commission or imposed by a court for violations of the Act.

The Act imposes civil penalties on anyone violating any portion of the Act or certain related portions of the Federal tax code. The Act's civil penalties, found at 2 U.S.C. 437g(a)(5), (6), and (12), are organized into two tiers of monetary penalties; one tier of penalties for violations of the Act, and a second tier of penalties for "knowing and willful" violations of the Act.

BCRA amends sections 437g(a)(5)(B) and 437g(a)(6)(C) by separating out and increasing the penalties for a subset of knowing and willful violations, namely, contributions that are made in the name of another. See 2 U.S.C. 441f. Such contributions are often made through a conduit to circumvent the contribution limits. The amendment to 2 U.S.C. 437g(a)(5)(B) increases the civil penalties for such violations to "not less than 300 percent of the amount involved in the violation" and "not more than the greater of \$50,000 or 1,000 percent of the amount involved in the violation."

Section 437g(a)(6)(C) of FECA, authorizing a court to impose civil penalties on a person who knowingly and willfully violates the Act, has been similarly amended by BCRA. Accordingly, the Commission is proposing to amend current 11 CFR 111.24 to implement these amendments to FECA.

The proposed rule would divide current 11 CFR 111.24(a) into proposed paragraphs (a)(1), and (a)(2)(i) and (ii). Proposed paragraph (a)(1) would contain the unchanged language of the current regulation for civil penalties for violations of the Act or the relevant tax code provisions. Proposed paragraph (a)(2) would address "knowing and willful" violations and would be further divided into proposed paragraphs (a)(2)(i) and (ii). Proposed paragraph (a)(2)(i) would contain the unchanged language of the current regulation for civil penalties for knowing and willful violations of the Act or relevant tax code provisions. Proposed 11 CFR 111.24(a)(2)(ii) would contain proposed language implementing BCRA's amendments to FECA increasing civil penalties for knowing and willful violations involving contributions made in the name of another. The proposed language would explain that in the case of a knowing and willful violation of the prohibition on contributions in the name of another, the civil penalty would not be less than an amount that

is equal to 300 percent of the amount of the violation, and the civil penalty would not be more than \$50,000 or an amount equal to 1,000 percent of the amount of the violation, whichever is greater.

Personal Use

In BCRA, Congress deleted 2 U.S.C. 439a in its entirety, and replaced it with a new section 439a. One of BCRA's principal sponsors explained:

[BCRA] amends 2 U.S.C. section 439a to specify which candidate expenditures from campaign funds would be considered an unlawful conversion of a contribution or donation to personal use. The language continues to allow candidates to use excess campaign funds for transfers to a national, State or local committee of a political party. It is the intent of the authors that—as is the case under current law—such transfers be permitted without limitation. Furthermore, while the provision is intended to codify the FEC's current regulations on the use of campaign funds for personal expenses, we do not intend to codify any advisory opinion or other current interpretation of those regulations.

148 Cong. Rec. S2143 (daily ed. March 20, 2002) (statement of Sen. Feingold).

The Commission notes that certain language from the pre-BCRA version of section 439a has not been included in the post-BCRA version of section 439a. First, the phrase “in excess of any amount necessary to defray” campaign expenses has been deleted from the statute. The Commission's personal use regulations are framed in terms of “excess campaign funds.” See 11 CFR 113.1(e) (“Excess campaign funds means amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures”); 11 CFR 113.2 (excess campaign funds and funds donated may be used to defray any ordinary and necessary expenses incurred in connection with the recipient's duties as a holder of Federal office). The Commission proposes that regulations 11 CFR 113.1(e) and 11 CFR 113.2 remain unchanged because it does not appear that Congress intended to eliminate the discretion of candidates and Federal officeholders to use these excess campaign funds “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.” 2 U.S.C. 439a(a)(2).²

² In its 1995 Explanation and Justification of its rules concerning personal uses of campaign funds, the Commission stated that it “reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of campaign funds.” 60 Fed. Register 7867 (February 9, 1995).

Also, the post-BCRA version of 2 U.S.C. 439a does not include the language “any other lawful purpose” in the statutory enumeration of permissible uses of excess campaign funds, as did the pre-BCRA version of the statute. 11 CFR 113.2(d) provides that “excess campaign funds” may be “used for any other lawful purpose,” in addition to specific uses permitted in paragraphs (a), (b), and (c) of that section. The Commission proposes that 11 CFR 113.2(d) remain intact, as it believes that Congress's continuing intent is to allow only lawful uses of campaign funds and donations. The Commission seeks comment on these proposals.

The pre-BCRA version of 2 U.S.C. 439a contained a general prohibition against the personal use of campaign funds, but did not specify any particular impermissible uses. The Commission's pre-BCRA personal use regulations define certain uses of campaign funds or donations as per se prohibited personal uses. 11 CFR 113.1(g)(1)(i). In BCRA, Congress amended 2 U.S.C. 439a to include a non-exhaustive list of prohibited personal uses of campaign funds. 2 U.S.C. 439a(b). As one of BCRA's principal sponsors explained, new section 439a “[c]lodifies FEC regulations relating to the personal use of campaign funds by candidates. Contributions will be considered converted to personal use if they are used for an expense that would exist irrespective of the campaign or duties as an officeholder, including home mortgage or rent, clothing, vacation expenses, tuition payments, non-campaign-related automobile expenses, and a variety of other items.” 148 Cong. Rec. S1993–1994 (daily ed. March 18, 2002) (statement of Sen. Feingold).

The Commission notes that several of new 2 U.S.C. 439a's personal use provisions are summarized versions of pre-BCRA personal use regulations. For example, the statute now prohibits the use of campaign contributions and donations for “a clothing purchase” (2 U.S.C. 439a(b)(2)(B)); whereas the corresponding regulation at 11 CFR 113.1(g)(1)(i)(C) prohibits the personal use of “[c]lothing, other than items of *de minimis* value that are used in the campaign, such as campaign “T-shirts” or caps with campaign slogans.” Also, new section 439a does not incorporate the current 11 CFR 113.1(g)(1)(i) *per se* personal use rules in their entirety. Compare 2 U.S.C. 439a(b)(A) through (I) with 11 CFR 113.1(g)(1)(i). Nonetheless, the Commission interprets new subsection (b) of 2 U.S.C. 439a to provide an even firmer statutory foundation for the *per se* rules at 11 CFR

113.1(g)(1)(i) than the pre-BCRA version of section 439a.

The Commission proposes three changes to its *per se* rules. Pre-BCRA, the Commission considered on a case-by-case basis whether excess campaign funds may be used to pay for vehicle expenses. 11 CFR 113.1(g)(1)(ii)(D). New section 439a, however, includes “a non-campaign-related automobile expense” in its list of prohibited uses of excess campaign funds. 2 U.S.C. 439a(b)(2)(C). Therefore, the Commission proposes to remove the “vehicle expenses” regulation from the “case by case” category of rules and add it to the “*per se* prohibited” category of rules. The new *per se* “vehicle expenses” rule would be proposed 11 CFR 113.1(g)(1)(i)(J).

In addition, new section 439a includes “a vacation or other non-campaign-related trip” in the list of prohibited uses of excess campaign funds. 2 U.S.C. 439a(b)(2)(E). The Commission accordingly proposes to include an implementing “vacations and other non-campaign-related trips” provision as 11 CFR 113.1(g)(1)(i)(K). The Commission also proposes to modify current 11 CFR 113.1g(1)(ii)(C), which applies to “travel expenses” and is located in the “case by case” category of rules, to indicate that “vacations and other non-campaign-related trips” are *per se* prohibited.

Proposed 11 CFR 113.1(g)(1)(i)(K) tracks the statutory language of new 2 U.S.C. 439a. However, candidates who are Federal officeholders may take trips that are not campaign-related, such as factfinding trips, which may nonetheless be part of their duties as Federal officeholders. The Commission seeks comment on whether Congress intended to ban completely the use of campaign funds for such trips. Compare 11 CFR 113.1(g)(5), which states in part that the use of campaign funds for “political or officially connected expenses * * * [are] not personal use to the extent that the expense is * * * an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office,” with 2 U.S.C. 439a(b)(2)(E). Additionally, the Commission seeks comment on whether non-vacation, non-campaign-related travel should be evaluated on a case-by-case basis, under proposed 11 CFR 113.1(g)(1)(ii)(C).

The Commission proposes one other change to the *per se* rules. Proposed 11 CFR 113.1(g)(1)(i)(I) would prohibit candidates from using campaign funds to pay themselves salaries or otherwise compensate themselves in any way for income lost as a result of campaigning for Federal office. Neither pre-BCRA

section 439a nor new section 439a directly address this issue, but the Commission believes that the proposed addition of candidate salaries to the list of impermissible personal uses is consistent with the non-exhaustive list Congress included in amended section 439a(b)(2). The Commission notes that it failed to reach a four-vote majority on this issue when it considered the personal use rules in 1995 (60 FR 7867 (February 9, 1995)), but it has since addressed this issue in Advisory Opinion 1999-1. Comments are sought as to whether this interpretation is appropriate.

The Commission notes that Congress codified the regulatory “irrespective” test. 2 U.S.C. 439a(b)(2); see 11 CFR 113.1(g). The Commission originally formulated this test, which states that “personal use” means the use of excess campaign funds for any expense “that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder,” because it could not anticipate and promulgate regulations covering all possible examples of prohibited personal use of excess campaign funds. Explanation and Justification for 11 CFR 113.1, 60 FR 7867 (February 9, 1995). Therefore, for uses not specifically identified as impermissible, the Commission stated that it would determine whether uses were for “expenses that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.” *Id.* BCRA’s description of the “irrespective” test is virtually identical to the Commission’s description. *Compare* 2 U.S.C. 439a(b) with 11 CFR 113.1(g). The Commission will, therefore, continue, post-BCRA, to apply the “irrespective” test as before.

The Commission proposes a recordkeeping requirement for campaign funds used for expenses that may be partially personal in nature, including vehicle expenses, as set forth in proposed 11 CFR 113.1(g)(1)(i)(J), and legal expenses, meal expenses, travel expenses, and charitable expenses, as listed in 11 CFR 113.1(g)(1)(ii) and (g)(2). See proposed 11 CFR 113.1(g)(8). This proposed regulation is based on the analysis in Advisory Opinion 2001-3, which advised that a member of Congress who proposed to pay for a vehicle with campaign funds and use it for a combination of campaign, official, and personal uses, should keep a log detailing each use of the car. In such cases of “mixed use,” the proposed rule would require that a candidate or Federal officeholder keep a log or other record to document the dates and expenses related to personal use. The log or other record would have to be

updated whenever an expense is incurred, either for campaign or officeholder uses or for personal uses. It would have to be maintained and preserved for three years and signed by the treasurer of the candidate’s or Federal officeholder’s committee.

Technical Amendment to the Definition of “Act”

Current 11 CFR 100.18 defines “Act” to mean the Federal Election Campaign Act as amended by the 1974, 1976, and 1980 amendments. The proposed rules would amend this definition to include the amendments to FECA within the Bipartisan Campaign Reform Act.

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

The Commission certifies that the attached proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis of this certification is that national, State, and local party committees of the two major political parties to which the proposed fraudulent solicitation, disclaimers, and civil penalties rules would apply are not small entities under 5 U.S.C. 601. In addition, the rules for personal use would only affect individuals, not entities, and the rules for the prohibition on fraudulent solicitation do not carry an economic impact. Furthermore, the small entities to which the rules would apply would not be unduly burdened by the proposed new requirements for disclaimers since the proposed requirements only add specificity to the current disclaimer requirements. The proposed increase in civil penalties would not unduly burden small entities since a small entity would pay a civil penalty only if the entity engaged in a specific knowing and willful violation of the Act.

List of Subjects

11 CFR Part 100

Elections

11 CFR Part 110

Campaign funds, and political committees and parties.

11 CFR Part 111

Campaign funds, and political committee and parties.

11 CFR Part 113

Campaign funds, and political candidates.

For the reasons set out in the preamble, the Commission proposes to amend 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 be revised to read as follows:

Authority: 2 U.S.C. 431, 434, 438(a)(8).

2. Section 100.18 would be revised to read as follows:

§ 100.18 Act (2 U.S.C. 431(19)).

Act means the Federal Election Campaign Act of 1971 (Pub. L. 92-225), as amended in 1974 (Pub. L. 93-443), 1976 (Pub. L. 94-283), 1980 (Pub. L. 96-187), and 2002 (Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155).

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

3. The authority citation for part 110 would be revised 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, 441h, and 441k.

4. Section 110.11 would be revised to read as follows:

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

(a) *Applicability and definitions.*

(1) *Applicability.* This section applies only to communications through any broadcast, cable, or satellite transmission, newspaper, magazine, outdoor advertising facility, mailing or any other type of general public political advertising. The following types of such communications must include disclaimers, as specified in this section:

(i) All such communications for which a political committee makes a disbursement.

(ii) All such communications by any person that expressly advocate the election or defeat of a clearly identified candidate.

(iii) All such communications by any person that solicits any contribution.

(iv) All electioneering communications by any person.

(2) *Definitions.*

(i) *Electioneering communication* has the same meaning as set forth at 11 CFR 100.29.

(ii) *As used in this section only,* mailing means more than one hundred substantially similar pieces of mail.

(b) *General content requirements.* A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or its agent, the disclaimer must clearly

state that the communication has been paid for by the authorized political committee;

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

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

(c) Disclaimer specifications.

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

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

(i) The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication.

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

(iii) The disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement.

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

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

(3) *Specific requirements for radio and television communications authorized by candidates.* In addition to the general requirements of paragraph

(c)(1) of this section, a communication that is authorized or paid for by a candidate (see paragraph (b)(1)(i) or (b)(1)(ii) of this section) that is transmitted through radio or television must comply with the following:

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

(ii) A communication transmitted through television must include a statement that identifies the candidate and states that he or she has approved the communication. The statement shall be conveyed by an unobscured, full-screen view of the candidate making the statement, or the candidate in a voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate. The statement shall also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the disclaimer statement, for a period of at least four (4) seconds.

(iii) The following are examples of acceptable disclaimers for a communication covered by paragraph (c)(3) of this section, but they are not the only allowable disclaimers.

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

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

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate.* In addition to the general requirements of paragraph (c)(1) of this section, a communication not authorized by a candidate (see paragraphs (b)(1)(iii) or (b)(2) of this section) that is transmitted through radio or television must comply with the following:

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

(ii) A communication transmitted through television must include the audio statement required by paragraph (c)(4)(i) of this section. The statement must be conveyed by an unobscured

full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over. The disclaimer statement must appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least four (4) seconds.

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

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

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

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

(e) *Exempt activities.* For purposes of paragraph (a) of this section only, the term communication includes a communication by a candidate or party committee that qualifies as an exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149. Such communications, unless excepted under paragraph (f)(1) of this section, must clearly state who paid for the communication, but do not have to include an authorization statement.

(f) Exceptions.

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

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

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

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

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

(g) *Comparable rate for campaign purposes.*

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

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

5. Section 110.16 would be added to read as follows:

§ 110.16 Prohibitions on Fraudulent Misrepresentations.

(a) *In General.* No person who is a candidate for Federal office or an employee or agent of such a candidate shall—

(1) Fraudulently misrepresent the person or any committee or organization under the person's control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof in a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (a)(1) of this section.

(b) *Fraudulent Solicitation of Funds.* No person shall—

(1) Fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or

(2) Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (b)(1) of this section.

PART 111—COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))

6. The authority citation for part 111 would continue to read as follows:

Authority: 2 U.S.C. 437g, 437d(a), and 438(a)(8); 28 U.S.C. 2461 nt.

7. In § 111.24, paragraph (a) would be revised to read as follows:

§ 111.24 Civil penalties (2 U.S.C. 437g(a)(5), (6), (12), 28 U.S.C. 2461 nt.)

(a) Except as provided in 11 CFR part 111, subpart B and in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall be as follows:

(1) Except as provided in paragraph (a)(2) of this section, in the case of a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of \$5,500 or an amount equal to any contribution or expenditure involved in the violation.

(2) Knowing and willful violations.

(i) In the case of a knowing and willful violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of \$11,000 or an amount equal to 200% of any contribution or expenditure involved in the violation.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, in the case of a knowing and willful violation of 2 U.S.C. 441f, the civil penalty shall not be less than 300% of the amount of any contribution involved in the violation and shall not exceed the greater of \$50,000 or 1,000% of the amount of any contribution involved in the violation.

PART 113—EXCESS CAMPAIGN FUNDS AND FUNDS DONATED TO SUPPORT FEDERAL OFFICE HOLDERS ACTIVITIES (2 U.S.C. 439a)

8. The authority citation for part 113 would continue to read as follows:

Authority: 2 U.S.C. 439a.

9. In section 113.1, paragraph (g) would be revised to read as follows:

§ 113.1 Definitions (2 U.S.C. 439a).

When used in this part—

* * * * *

(g) *Personal use.* *Personal use* means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.

(1) (i) Personal use includes but is not limited to the use of funds in a campaign account for:

(A) Household food items or supplies; (B) Funeral, cremation or burial expenses;

(C) Clothing, other than items of *de minimis* value that are used in the campaign, such as campaign "T-shirts" or caps with campaign slogans;

(D) Tuition payments, other than those associated with training campaign staff;

(E) Mortgage, rent or utility payments—

(1) For any part of any personal residence of the candidate or a member of the candidate's family; or

(2) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage;

(F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity;

(G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises;

(H) Salary payments to a member of the candidate's family, unless the family member is providing *bona fide* services to the campaign. If a family member provides *bona fide* services to the campaign, any salary payment in excess of the fair market value of the services provided is personal use;

(I) Salary payments to a candidate or any other compensation for income lost as a result of the campaign for federal office;

(J) Vehicle expenses, unless they are a *de minimis* amount. If a committee uses campaign funds to pay expenses associated with a vehicle that is used for both personal activities beyond a *de minimis* amount and campaign or officeholder related activities, the portion of the vehicle expenses associated with the personal activities is personal use, unless the person(s) using the vehicle for personal activities reimburse(s) the campaign account within thirty days for the expenses associated with the personal activities; and

(K) A vacation or other non-campaign related trip.

(ii) The Commission will determine, on a case by case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are

personal use. Examples of such other uses include:

- (A) Legal expenses;
- (B) Meal expenses; and
- (C) Travel expenses, except for a vacation or other non-campaign-related trip under paragraph (g)(1)(i)(K) of this section, including subsistence expenses incurred during travel. If a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder related activities, the incremental expenses that result from the personal activities are personal use, unless the person(s) benefiting from this use reimburse(s) the campaign account within thirty days for the amount of the incremental expenses.

(2) *Charitable donations.* Donations of campaign funds or assets to an organization described in section 170(c) of Title 26 of the United States Code are not personal use, unless the candidate receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to his or her personal benefit.

(3) *Transfers of campaign assets.* The transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value. Any depreciation that takes place before the transfer must be allocated between the committee and the purchaser based on the useful life of the asset.

(4) *Gifts.* Gifts of nominal value and donations of a nominal amount made on a special occasion such as a holiday, graduation, marriage, retirement, or death are not personal use, unless made to a member of the candidate's family.

(5) *Political or officially connected expenses.* The use of campaign funds for an expense that would be a political expense under the rules of the United States House of Representatives or an officially connected expense under the rules of the United States Senate is not personal use to the extent that the expense is an expenditure under subpart D of part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office. Any use of funds that would be personal use under 11 CFR 113.1(g)(1) will not be considered an expenditure under subpart D of part 100 or an ordinary and necessary expense incurred in connection with the duties of a holder of Federal office.

(6) *Third party payments.* Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a

contribution under subpart B of part 100 to the candidate unless the payment would have been made irrespective of the candidacy. Examples of payments considered to be irrespective of the candidacy include, but are not limited to, situations where—

(i) The payment is a donation to a legal expense trust fund established in accordance with the rules of the United States Senate or the United States House of Representatives;

(ii) The payment is made from funds that are the candidate's personal funds as defined in 11 CFR 110.10(b), including an account jointly held by the candidate and a member of the candidate's family;

(iii) Payments for that expense were made by the person making the payment before the candidate became a candidate. Payments that are compensation shall be considered contributions unless—

(A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;

(B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and

(C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

(7) *Members of the candidate's family.* For the purposes of paragraph (g) of this section, the candidate's family includes:

(i) The spouse of the candidate;

(ii) Any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate or the candidate's spouse;

(iii) The spouse of any child, step-child, parent, grandparent, sibling, half-sibling or step-sibling of the candidate; and

(iv) A person who has a committed relationship with the candidate, such as sharing a household and having mutual responsibility for each other's personal welfare or living expenses.

(8) For those uses of campaign funds described in proposed paragraphs (g)(1)(i) and (g)(1)(ii) of this section that involve both personal use and campaign use, a contemporaneous log or other record must be kept to document the dates and expenses related to the personal use of the campaign funds. The log must be updated whenever campaign funds are used for personal expenses, as described in paragraph (g)(1) of this section, rather than for campaign expenses. The log or other record must also be maintained and preserved for 3 years after the report

disclosing the disbursement is filed, pursuant to 11 CFR 102.9 and 104.14(b).

Dated: August 22, 2002.

Karl J. Sandstrom,
Vice-Chairman, Federal Election Commission.

[FR Doc. 02-21893 Filed 8-28-02; 8:45 am]

BILLING CODE 6715-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002-CE-31-AD]

RIN 2120-AA64

Airworthiness Directives; Cirrus Design Corporation Models SR20 and SR22 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to supersede Airworthiness Directive (AD) 2002-05-05, which currently applies to certain Cirrus Design Corporation (Cirrus) Models SR20 and SR22 airplanes. AD 2002-05-05 currently requires you to incorporate temporary operating limitations into the Limitation Section of the airplane flight manual (AFM) for certain affected airplanes and install a cable clamp external to the cone adapter on the Cirrus Aircraft Parachute System (CAPS) activation cable for all affected airplanes. AD 2002-05-05 resulted from a report from the manufacturer that certain CAPS may not activate in an emergency situation. This proposed AD is the result of the manufacturer redesigning the CAPS activation system. This proposed AD would require you to modify the CAPS activation system. The actions specified by this proposed AD are intended to eliminate the chance of failure of the CAPS activation system in an emergency situation. Failure of this system could result in occupant injury and/or loss of life and loss of aircraft.

DATES: The Federal Aviation Administration (FAA) must receive any comments on this proposed rule on or before November 1, 2002.

ADDRESSES: Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002-CE-31-AD, 901 Locust, Room 506, Kansas City, Missouri 64106. You may view any comments at this location between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.