

all contributions they receive. 2 U.S.C. 434(b)(2). Since the recipient does not actually receive a cash payment from an in-kind contribution, the recipient must report the value of an in-kind contribution as both a contribution received and an expenditure made so that the receipt of the contribution will be reported without overstating the cash-on-hand in the committee's treasury. See 11 CFR 104.13.

2. Overview of BCRA's Changes to the FECA and Commission Regulations

In BCRA, Congress revised the FECA's definition of "independent expenditure" in 2 U.S.C. 431(17). The revision added a reference to political party committees and their agents and reworked other aspects of the former definition. Corresponding revisions are being made to the regulations in 11 CFR 100.16.

Congress repealed the Commission's pre-BCRA regulations regarding "coordinated general public political communications" at former 11 CFR 100.23, and directed the Commission to adopt new regulations on "coordinated communications" in their place. Public Law 107-155, sec. 214(b), (c) (March 27, 2002). A new section 11 CFR 109.21 implements this Congressional mandate.

In addition, the new and revised rules implement several new restrictions found in BCRA on the timing of independent and coordinated expenditures made by committees of political parties. 2 U.S.C. 441a(d)(4). Those regulations are located in new 11 CFR part 109, subpart D. Similarly, Congress established new restrictions on transfers between committees of a political party. 2 U.S.C. 441a(d)(4). Those changes, as well as amendments to the rules on the assignment of coordinated party expenditure authority in pre-BCRA 11 CFR 110.7, are reflected in new 11 CFR part 109, subpart D.

Finally, Congress established new reporting obligations for independent expenditures. 2 U.S.C. 434(a)(5) and (g). These reporting obligations have been addressed in a separate rulemaking. See Final Rules and Explanation and Justification for Bipartisan Campaign Reform Act of 2002 Reporting, published elsewhere in this issue of the *Federal Register*. The comments received regarding the reporting of independent expenditures have been addressed separately in the Explanation and Justification for the amended reporting rules.

11 CFR 100.16 Definition of Independent Expenditure

In light of several Congressional changes to the statutory definition of

"independent expenditure" at 2 U.S.C. 431(17), the Commission is making several corresponding changes to the definition of the same term in 11 CFR 100.16. Most significantly, the statutory definition of "independent expenditure" is modified to exclude expenditures coordinated with a political party committee or its agents (in addition to the pre-BCRA exclusion of coordination with candidates). 2 U.S.C. 431(17).

Paragraph (a) of section 100.16 contains the revised pre-BCRA section 100.16. The first sentence of paragraph (a) is being changed by adding a reference to political party committees and their agents, thereby tracking BCRA's changes in 2 U.S.C. 431(17).

In BCRA, Congress deleted the term "consultation" from the list of activities that compromise the independence of expenditures. See 2 U.S.C. 431(17)(B). Notwithstanding that change, in the NPRM the Commission proposed the retention of the term "consultation" because it remains, post-BCRA, in other related provisions of the Act. Most importantly, the term "consultation" was used in a closely related provision added by BCRA itself. See 2 U.S.C. 441a(a)(7)(B)(ii) as amended by Public Law 107-155, sec. 214(a) (expenditures made in "cooperation, *consultation*, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party"); see also 2 U.S.C. 441a(a)(7)(B)(i) (expenditures that are made in "cooperation, consultation, or concert with, or at the request or suggestion of" candidates, political committees, and agents thereof are contributions) (emphasis added).

Similarly, while Congress referred to expenditures "not made in concert or cooperation with * * * a political party committee or its agents" in 2 U.S.C. 431(17) (emphasis added), it did not refer to agents of a party committee in 2 U.S.C. 441a(a)(7)(B)(ii) when describing coordination with a party committee. The Commission proposed in the NPRM including agents of political party committees as persons who might take actions that would cause a communication to be coordinated with that party committee.

The Commission received one joint comment from two commenters¹ on each of the two proposals above, urging the Commission to include in the final rules both terms as proposed. The final rules retain the term "consultation" in

paragraph (a) as an element in the regulatory definition of "independent expenditure," for the reasons outlined in the NPRM. The Commission is similarly including agents of a political party within the scope of its independent expenditure definition. 11 CFR 100.16(a).

In BCRA, Congress repealed the pre-BCRA regulatory definition of "coordinated general public political communication." See former 11 CFR 100.23 (January 1, 2001), repealed by Public Law 107-155, section 214(b) (March 27, 2002). Therefore, in one additional change to paragraph (a) of section 100.16, the Commission is deleting the term "coordinated general public political communication," and replacing it with references to a "coordinated communication" from section 109.21 and a "party coordinated communication" from 11 CFR 109.37.

The Commission is also moving pre-BCRA 11 CFR 109.1(e), which clarifies the basic definition of "independent expenditure," to paragraph (b) of section 100.16, without other changes. This rule provides that expenditures made by a candidate's authorized committee on behalf of that candidate never qualify as independent expenditures.

The Commission is adding a new paragraph (c) to provide examples of activities that would disqualify a communication from being treated as an independent expenditure. This provision does not in any way change the scope of the definition of coordinated communication in 11 CFR 109.21; it is merely intended to provide additional guidance.

11 CFR 100.23 [Removed and Reserved]

Prior to the enactment of BCRA, the Commission initiated a series of rulemakings in response to the Supreme Court's ruling on the appropriate application of the so-called "coordinated party expenditure" provisions of FECA. See *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) ("*Colorado I*"). For example, the Commission addressed the issue of coordination when it promulgated former 11 CFR 100.23 (January 1, 2001) in December 2000. See Explanation and Justification of General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FR 76,138 (Dec. 6, 2000). Former section 100.23 defined a new term, "coordinated general public political communication," drawing from judicial guidance in *Federal Election*

¹ For the purposes of this Explanation and Justification, all persons who expressed their views on the rules proposed in the NPRM are referred to as "commenters" without regard to whether those views were expressed to the Commission in writing or through testimony at the hearing.