

Commission v. The Christian Coalition, 52 F.Supp.2d 45, 85 (D.D.C. 1999) (“*Christian Coalition*”), to determine whether expenditures for communications by unauthorized committees, advocacy groups, and individuals were coordinated with candidates or qualified as independent expenditures. Consistent with *Christian Coalition*, *id.* at 92, the Commission’s regulations stated that such coordination could be found when candidates or their representatives influenced the creation or distribution of the communications by making requests or suggestions regarding, or exercising control or decision making authority over, or engaging in “substantial discussion or negotiation” regarding, various aspects of the communications. Former 11 CFR 100.23(c)(2) (January 1, 2001). The regulations explained that “substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.” Former 11 CFR 100.23(c)(2)(iii) (January 1, 2001). The Commission provided an exception, however, for a candidate’s or political party’s response to an inquiry regarding the candidate’s or party’s position on legislative or public policy issues. See former 11 CFR 100.23(d) (January 1, 2001).

As explained above, Congress repealed 11 CFR 100.23 in BCRA and directed the Commission to promulgate new regulations to address coordinated communications. Those new regulations are discussed below in the Explanation and Justification for 11 CFR part 109. Accordingly, the Commission is now removing former section 100.23 from Title 11, Chapter 1, of the Code of Federal Regulations.

11 CFR 102.6(a)(1)(ii) Transfers

As a result of the enactment of 2 U.S.C. 441a(d)(4) and other provisions from BCRA affecting transfers between political party committees, the Commission revises 11 CFR 102.6(a)(1)(ii) to clarify the interaction of this section with those provisions of BCRA. Before BCRA, the Commission permitted unlimited transfers between or among national party committees, State party committees and/or any subordinate committees. See pre-BCRA 11 CFR 102.6(a)(1)(ii).

First, in BCRA, Congress provided that a national committee of a political party, including a national Congressional campaign committee of a political party, may not solicit, receive, or direct to another person a

contribution, donation, or transfer of funds or other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. 441i(a); see Explanation and Justification for 11 CFR 300.10(a), 67 FR 49,122 (July 29, 2002).

Second, in BCRA’s “Levin Amendment,” Congress placed restrictions on how State, district, and local party committees raise “Levin funds” and prohibited certain transfers between political party committees. See 2 U.S.C. 441i(b)(2)(C)(i); Explanation and Justification for 11 CFR 300.31, 67 FR 49,124 (July 29, 2002).

Third, also in the Levin Amendment, Congress provided that a State, district, or local committee of a political party that spends Federal funds and Levin funds for the newly defined term, Federal election activity, must raise those funds solely by itself. These committees may not receive or use transferred funds for this purpose. 2 U.S.C. 441i(b)(2)(B)(iv); see Explanation and Justification for 11 CFR 300.34(a) and (b), 67 FR 49,127 (July 29, 2002).

Fourth, Congress provided in BCRA that a committee of a political party that makes coordinated party expenditures under 2 U.S.C. 441a(d) in connection with the general election campaign of a candidate shall not, during that election cycle, transfer any funds to, assign authority to make coordinated party expenditures under this subsection to, or receive a transfer from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate. 2 U.S.C. 441a(d)(4)(C); see Explanation and Justification for 11 CFR 109.35(c), below.

The Commission adds a new opening clause in paragraph (a)(1)(ii) of section 102.6 incorporating these restrictions by reference into the rules regarding the transfer of funds and the use of transferred funds.

The Commission received no comments on this section, and the final rule is unchanged from the proposed rule.

Part 109—Coordinated and Independent Expenditures (2 U.S.C. 431(17), 441a(a) and (d), and Pub. L. 107–155 Sec. 214(c))

The Commission is reorganizing 11 CFR part 109 into four subparts in an effort to simplify and clarify its regulations while implementing the Congressional mandates in BCRA regarding payments for coordinated communications and coordinated expenditures by political party committees. Subpart A explains the

scope of part 109 and defines the key term “agent.” Subpart B, which addresses the reporting and recordkeeping requirements for independent expenditures, has 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**. Subpart C addresses coordination between a candidate or a political party and a person making a communication. Subpart D sets forth provisions applicable only to political party committees, including those pertaining to independent expenditures and support of candidates through coordinated party expenditures. See 2 U.S.C. 441a(d). The special authority for coordinated expenditures by political party committees, previously set forth in pre-BCRA 11 CFR 110.7, is being relocated to 11 CFR 109.32 and other sections in subpart D.

11 CFR Part 109, Subpart A—Scope and Definitions

11 CFR 109.1 When Will This Part Apply?

New section 109.1 introduces the scope of part 109. Section 109.1 explains that the regulations in part 109 set forth the general reporting requirements for both “independent expenditures” and “coordinated communications.” Note that the definition of “agent” found in pre-BCRA section 109.1 is being revised and moved to section 109.3. No comments were received regarding this section.

11 CFR 109.3 Definitions

The Commission proposed new 11 CFR 109.3 to define the term “agent,” which is used throughout 11 CFR part 109. This definition of agent is based on the same concept that the Commission used in framing the definition of “agent” in the revised “soft money” rules. See Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49,081 (July 29, 2002). The definition of “agent” proposed in the NPRM focused on whether a purported agent has “actual authority, either express or implied,” to engage in one or more specified activities on behalf of specified principals.

In the NPRM, the Commission listed those specific sets of activities, which vary slightly depending on whether the agent engages in those activities on behalf of a national, State, district, or local committee of a party committee, or on behalf of a Federal candidate or