

party committee first made an independent expenditure with respect to that same nominee, even of small size and without the State or national committee's prior knowledge or consent. The Commission notes the commenters' concerns, but points out that just that result is the apparent aim of the statute. 2 U.S.C. 441a(d)(4)(A).

3. 11 CFR 109.35(c) Restrictions on Certain Transfers and Assignments

Congress provided in BCRA that a "committee of a political party" that makes coordinated party expenditures with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated party expenditures under 2 U.S.C. 441a(d) to, or receive a transfer of funds 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).

In the final rules, paragraph (c) of 11 CFR 109.35 generally tracks the statutory language in 2 U.S.C. 441a(d)(4)(C).

Finally, the Commission noted in the NPRM that it was not proposing specific rules to implement the statutory language in the transfer and assignment provision that a political party committee "intends to make" an independent expenditure with respect to a candidate. 2 U.S.C. 441a(d)(4)(C). The Commission received no comments on this issue and incorporates no specific language into section 109.35.

4. Impact of Political Party Committee Activity Carried Out Pursuant to Contribution Limits and Coordinated Party Expenditure Authority

2 U.S.C. 441a(d)(4) applies to coordinated party expenditures and to political party committee independent expenditures. Congress did not directly address political party committees' monetary and in-kind contributions to candidates that are subject to the contribution limits under 2 U.S.C. 441a(a) and 441a(h). See 2 U.S.C. 441a(d)(1) ("Notwithstanding any other provision of law with respect to * * * limitations on contributions, [political party committees] may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained [in this subsection]" [emphasis added]); 2 U.S.C. 441a(d)(4)(A) (addresses coordinated party expenditures made under section 441a(d) and does not directly address contributions). See also 11 CFR 109.30, 109.32.

Political party committees may make in-kind contributions to a candidate in the form of coordinated activity. See 2 U.S.C. 441a(a)(7)(B)(i) and 11 CFR 109.20, discussed above. The Commission notes that such coordination between a political party committee and a candidate may compromise the actual independence of any simultaneous or subsequent independent expenditures the political party committee may attempt with respect to that candidate. Similarly, coordinated party expenditures made by a political party committee with respect to a candidate prior to nomination, see 11 CFR 109.34, may be considered evidence that could compromise the actual independence of any simultaneous or subsequent independent expenditures the political party committee may attempt with respect to that candidate. See 11 CFR 109.35; *Buckley v. Valeo*, 424 U.S. at 47 (in striking down limits on independent expenditures, the Court described such expenditures as made "totally independently of the candidate and his campaign" [emphasis added]).

Finally, the title of section 109.35 in this Explanation and Justification has been altered from the NPRM to match the title in the rule.

11 CFR 109.36 Are There Additional Circumstances Under Which a Political Party Committee Is Prohibited From Making Independent Expenditures?

Prior to the enactment of BCRA, the Commission's rules prohibited a national committee of a political party from making independent expenditures in connection with the general election campaign of a candidate for President. See former 11 CFR 110.7(a)(5). In the NPRM, the proposed rule at 11 CFR 109.36 would have largely deleted this prohibition. The NPRM limited the remaining application of the prohibition to certain circumstances in which the national committee of a political party serves as the principal campaign committee or authorized committee of its Presidential candidate, as permitted under 2 U.S.C. 432(e)(3)(A)(i) and 441a(d)(2). See 11 CFR 102.12(c)(1) and 9002.1(c). Such a prohibition is consistent with 11 CFR 100.16(b) (redesignated from former section 109.1(e)) providing that no expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

The Commission received several comments on this section, each of which urged the Commission to retain the prohibition at former 11 CFR 110.7(a)(5) regarding national party

committee independent expenditures with respect to Presidential nominees. One commenter asserted that neither *Colorado I* nor BCRA require the deletion of the prohibition, and that in light of the significance of this issue, Congress would have expressly addressed it if Congress desired a change in the current regulation. The commenter noted that such a change in the rule is based upon a misinterpretation of BCRA, which should not be read as affirmatively authorizing political party committees to engage in any particular activity. Another commenter claimed that to allow in a broad fashion national party committees to make independent expenditures on behalf of their Presidential candidates is to invite abuse. The commenter stated that Presidential candidates and their parties are so inextricably intertwined as to preclude any meaningful possibility that one can operate "independently" of the other, and that the degree of coordination that exists between a national party committee and its Presidential candidate typically far exceeds even the level of coordination between a party committee and its congressional candidates.

The Commission acknowledges the concerns expressed in the comments but for the following reasons is including 11 CFR 109.36 in the final rules. First, the Commission does not believe it appropriate to retain in its rules a conclusive presumption of coordination after *Colorado I*. Even though *Colorado I* expressly involved only Congressional races, and arguably the likelihood of coordination may be greater between a national party committee and its Presidential nominee, the rule at section 109.36 is consistent with the Supreme Court's decision.

Second, the Commission concludes that Congress in BCRA effectively repealed the prohibition at 11 CFR 110.7(a)(5). See 2 U.S.C. 441a(d)(4). Under a new statutory provision, Congress prohibits political party committees from making both post-nomination independent expenditures and post-nomination coordinated expenditures in support of a candidate. See 2 U.S.C. 441a(d)(4)(A). A national party committee could thus make independent expenditures with respect to a candidate after nomination, if not prohibited under section 441a(d)(4)(A). See 11 CFR 109.35(a). Because this provision appears to apply equally to party committee expenditures on behalf of either Presidential or Congressional candidates, a national party committee may be able to make independent expenditures with respect to a