sers@nictusa.com
02/03/2012 05:31 PM

To SERS@fec.gov, sersnotify
cc
bcc
Subject New comment on REG 2010-01 submitted by Gold, Laurence

Please find attached the contents for the new comment submitted on Fri Feb 03 17:31:23 EST 2012.
User uploaded 1 file(s) as attachment to the comment. Please find them attached to this email.
You may review the comment in FRAPS system. An approval action from FRAPS is required to send this comment event to the CMS. Thanks.

REG_2010_01_Gold_Laurence_02_03_2012_17_31_23_NPRM Letter.pdf

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

February 3, 2012

Robert M. Knop
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Notice of Proposed Rulemaking, "Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations," 76 Fed. Reg. 80803 (Dec. 27, 2011)

Dear Mr. Knop:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") respectfully submits these comments on the above-captioned notice of proposed rulemaking ("NPRM"). I request on its behalf to testify at the March 7, 2012 hearing to be conducted by the Federal Election Commission ("the FEC" or "the Commission").

The AFL-CIO is the national labor federation comprised of 57 national and international unions and their thousands of state and local affiliates, throughout the United States. Together these organizations are comprised of approximately 12 million individual members who work in virtually every occupation and industry in the private and public sectors. All of these individuals are members of both the union that represents them in collective bargaining and the AFL-CIO itself. See 11 C.F.R. §§ 100.134(h), 114.1(e)(4). Our comments are confined to the Commission's regulations insofar as they affect unions and their members.

In the wake of the most recent United States Supreme Court decision directly affecting FECA, *Citizens United v. Federal Election Commission,* 558 U.S. ____, 130 S. Ct. 876 (2010), numerous Commission rules now express restrictions that the Court has held are unconstitutional, and other rules prescribe related requirements, standards and procedures that rely upon unenforceable proscriptions and distinctions. Meanwhile, related regulations merit fresh examination as to their soundness in light of *Citizens United* and other legal and practical developments. Retaining invalid regulations ill serves participants in the electoral process

regardless of those participants' views concerning the legal correctness or wisdom of *Citizens United.* As the Commission has done in the wake of other Supreme Court decisions, even in the absence of responsive amendments to the Act itself, it should conform its regulations to the governing law. Doing so is necessary so that all who engage in political activity are informed and can be confident in the currency and accuracy of the Commission's formal rules, and so no advantage is enjoyed by groups that have the resources and ready legal counsel to discern what is real and what is not. That said, as a general principle the Commission should not presume that constitutionally questionable statutory provisions are invalid pending further judicial clarification, and the Act establishes the extent of the Commission's regulatory authority to impose requirements and procedures.

We address the NPRM in an order somewhat different from its presentation.

A. "Proposed 11 CFR 114.3 – Disbursements for Communications to the Restricted Class and Labor Organizations in by Corporations Connection with a Federal Election"

1. Division of 11 C.F.R §§ 114.3 and 114.4

The AFL-CIO supports retention of the current regulatory division between 11 C.F.R. § 114.3 for restricted-class communications and 11 C.F.R § 114.4 for general-public communications. Although *Citizens United* in important respects converges the scope of permissible union communications to each audience, important reporting and coordination distinctions remain, and the current regulatory division would continue to afford useful clarity for those whose activities are regulated.

2. Reporting Express-Advocacy Communications

a. We see no reason to substantively revise the Commission's regulations that implement the reporting requirement of 2 U.S.C. § 431(9)(B)(iii). This requirement is not implicated by *Citizens United.*

b. We support adoption of proposed 11 C.F.R § 114.10(a), (b) and (d). These regulations would succinctly communicate the core holding of *Citizens United* and the consequent (if unanticipated) application to unions of the current statutory and regulatory independent expenditure and electioneering communication reporting and disclaimer requirements. Because the Act requires such reporting by any "person" that undertakes those activities, see 2 U.S.C. § 434(c), (f) and (g), and the term "person" includes a "labor organization," see 2 U.S.C. § 431(11), no disclosure void arises as a result of the Court's invalidation of the statutory proscription against union financing of those communications. We do suggest, for additional clarity, that proposed revised 11 C.F.R. § 114.10(a) also refer to "other public communications as defined in 11 C.F.R. 110.26 in connection with an election."

c. The Commission has no authority to require a union that disseminates the same express-advocacy communication to *both* its restructured class and the general public to treat the entire communication as *solely* an independent expenditure (or, for that matter, solely as a membership communication). That is because the Act explicitly exempts membership communications from the scope of the term "expenditure", and (albeit oddly within a definitional provision) prescribes special reporting of those communications that is distinct from, and

decidedly less burdensome than, the reporting requirements for independent expenditures. *Compare* 2 U.S.C. § 431(a)(9)(B)(iii) *with* 2 U.S.C. § 434(c) and (g).

We recommend that the Commission revise its regulations to require that disbursements for express-advocacy communications to both union restricted class members and the general public be allocated between the two audiences and distinctly reported as the Act variously requires. If the Commission's regulations directly treat allocation, then they should require only that the particular computation reflects a reasonable estimation of the respective numbers of the potential recipients of the communication. And, it should be subject to two exceptions that we believe reflect current enforcement policy with respect to groups, such as qualified nonprofit corporations under 11 C.F.R. § 114.10 that even prior to *Citizens United* lawfully could communicate express advocacy to both their restricted classes and the general public.

First, if an express-advocacy communication is publicly communicated in a manner that inherently entails no special targeting of the restricted class, then no allocation is required and the entire cost may be treated as an independent expenditure. Examples include broadcast, print, the Internet and outdoor advertising. In contrast, other media, such as telephone, direct mail and email, that are inherently specially targeted and feature, in the perception of the recipient, a direct, one-on-one (albeit possibly uniform) communication, ought to be subject to a reasonable allocation.

Second, the regulations should specify that restricted-class communications that entail *de minimis* dissemination to the public may be treated entirely as a restricted class communication for reporting purposes. This would maintain the useful and appropriate safe harbor-like distinction that the Commission has long recognized in its application of the now-defunct prohibition against union-financed express-advocacy communications beyond the restricted class. *See, e.g.,* Advisory Opinion ("AO") 1999-06.

This approach to reporting would be both workable and fair, and would comply with the Act's disclosure provisions that, insofar as the Court addressed them in *Citizens United,* were upheld. See 130 S. Ct. at 915-16.

3. Voter Registration and GOTV Drives

The Act nowhere proscribes unions from undertaking voter registration or GOTV activities. The statutory exemption from the terms "contribution" and "expenditure" for "nonpartisan registration and get-out-the-vote campaigns" that are aimed at a union's restricted class, see 2 U.S.C § 441b(b)(2)(B), does not mean that *partisan* such campaigns are *not* so exempt. To the contrary, 2 U.S.C. § 441b(b)(2)(A) permits a union to communicate with its restricted class "on any subject," and 11 C.F.R. § 114.3(c)(4) has long provided that union-paid voter registration and GOTV drives among the restricted class "may include communications containing express advocacy, such as urging individuals to register with a particular party or to vote for a particular party or to vote for a particular candidate or candidates." And, such activities, like all other membership communications, may be coordinated with candidates and political parties. See 11 C.F.R. §§ 114.2(c), 114.3(a).

Nonetheless, 11 C.F.R. § 114.3(c)(4) also states that union "[i]nformation and other assistance regarding registering or voting, including transportation and other services offered,

shall not be withheld or refused on the basis of support for or opposition to particular candidates, or a particular political party." This aspect of § 114.3(c)(4) has always existed in tension with the other aspects cited above. Yet the general rationale of *Citizens United* concerning electoral advocacy, and the Court's recognition long ago that construing the then-federal prohibition of union "expenditures" to restrict communications between a union and its members would create "the gravest doubt" as to the statute's constitutionality, *United States v. CIO*, 335 U.S. 106, 121 (1948), do not abide a regulatory restriction regarding how a union deploys its (often limited) resources in targeting its voter registration and GOTV activities within its restricted class. Accordingly, this and other restrictions should be deleted. And, this would be in keeping with the current explicit constitutional, statutory and regulatory recognitions that unions are free to communicate any electoral message to their restricted classes, however partisan or selective. (We hasten to note that unions are not in the business of "refusing" services and assistance to their members in electoral matters, but the Commission simply lacks authority here to compel particular conduct.)

Even if the last sentence of 11 C.F.R. § 114.3(c)(4) were retained, we submit that the NPRM errs in suggesting that the Commission could require a union to "report" its spending on a registration or GOTV effort that fails to comply with that sentence; absent express advocacy, there is no requirement in the Act that a union or corporation report to the Commission its voter registration or GOTV activities among its restricted class. See 2 U.S.C. § 431(9)(B)(iii); 11 C.F.R. § 104.6.

Finally, some voter registration and GOTV campaigns neither contain express advocacy nor are nonpartisan, and instead fall within the substantial space between those poles. Accordingly, if undertaken by a union, they are neither "expenditures" nor reportable.

B. "Proposed 11 CFR 114.2(b): Prohibitions on Certain Expenditures" and "Proposed 11 CFR 114.4: Disbursements for Communications by Corporations and Labor Organizations Beyond the Restricted Class in Connection With a Federal Election"

1. "Expenditures" Under 11 C.F.R. § 114.2(b)

Plainly, 11 C.F.R §§ 114.2(b)(2)(ii) and (3) are no longer valid and should be removed. But, as the NPRM recognizes, 11 C.F.R. § 114.2(b)(2)(i) presents a more complicated question: whether "expenditures" that the NPRM variously terms "non-communicative" and "non-expressive" are still subject to prohibition if they are not coordinated with a candidate or political party.

This regulation proscribes union spending for matters described in 11 C.F.R. Part 100, Subpart D, which defines the statutory term "expenditure" at 2 U.S.C. § 431(a). *Citizens United* did not disturb that provision of the Act, which includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office," as well as any "written contract, promise, or agreement to make an expenditure." Insofar as Subpart D includes spending that constitutes an *in-kind contribution* to a candidate, political party or other political committee, Subpart D is also unaffected by *Citizens United* because, under the Act's somewhat confusing duality, see 2

U.S.C. §§ 431(8) and (9), those "expenditures" are also "contributions" and unions are prohibited from spending for the latter.

In contrast, Subpart D's description of what kind of spending is *only* an "expenditure" identifies only "independent expenditures" at 11 C.F.R. § 100.13, which by definition are uncoordinated express-advocacy communications, *see generally id.*; 2 U.S.C. § 431(17), which unions may constitutionally undertake. *Citizens United*, *supra*.

The NPRM asserts, however, and without reference to Subpart D, that there are other kinds of "expenditures" and provides examples of some that would be "permissible" under the NPRM's "Alternative A" here. See 76 Fed. Reg. at 80806. Although we must assume that the NPRM means that these examples illustrate the phrase "any purchase," etc., in 2 U.S.C. § 431(8), several of these examples appear to be in-kind contributions that a union cannot make – namely, "transportation of volunteers to campaign events" and "the provision of food to campaign volunteers" if "campaign" means a candidate's or political party's campaign.[1]

Voter registration and GOTV activities are different, because they may be undertaken independently of candidates and political parties. And, in its revision of its regulations, the Commission should make clear that unions are not prohibited from undertaking these activities among the general public so long as they are uncoordinated.

The NPRM notes that these activities may "include both communicative and non-communicative elements." See 76 Fed. Reg. at 80806. In fact, they may consist of speech alone (advocacy to register or vote, without material assistance); material assistance alone (driving a voter to a registrar or the polls; babysitting a potential voter's child while the potential voter registers or votes); or a combination of speech and material assistance.

Like other union-financed electoral speech, voter registration and GOTV speech alone, if uncoordinated, cannot be prohibited with respect to express advocacy, *see generally Citizens United*; and, since *Buckley v. Valeo*, 424 U.S. 1 (1976), such speech has not been subject to restriction (other than for libel, under exacting standards) with respect to any other kinds of candidate and party references.

Uncoordinated material assistance alone by unions to prospective voters also may not be prohibited either for several reasons, and the Commission's regulations should so reflect this. First, the Act simply does not prohibit such assistance. The Commission's regulations here date from 1977, and they are based on a snippet of legislative history, a floor speech by Representative Hansen, that relied solely upon a distinction between internal and general-public communications that no longer exists, and not upon an expansive definition of "expenditure" as

[1] We take the NPRM's references to "volunteers" to mean that term as it is commonly used in the Commission's regulations, to mean the provision of uncompensated individual services for a campaign, *see, e.g.*, 11 C.F.R.§ 100.74, as distinct from merely showing up to witness a campaign event such a candidate's speech. It would seem that a union's assistance to volunteer activity that is undertaken under a campaign's supervision or otherwise in direct contact with a campaign would be an in-kind contribution to that campaign, but assistance to uncoordinated volunteer activity would not be.

such. See FEC, "Explanation and Justification of Regulations," H. Doc. No. 95-44. 95th Cong., 1st Sess. 103-06 (1977); 122 Cong. Rec. 43380-88 (Nov. 30, 1971).

Second, absent coordination, there is no constitutionally cognizable corruption rationale to restrict union-financed voter registration or GOTV. Third, given their integral relationship to the electoral process, voter registration and GOTV comprise associational conduct that is protected by the First Amendment even absent a "speech" element.

Finally, two additional points should be borne in mind. First, voter registration is subject to extensive regulation by both federal law, including but not limited to the National Voter Registration Act and the Help America Vote Act, and the laws of every state. Absent a directive to do so by the Act, the Commission should steer clear of devising special requirements and distinctions with respect to voter registration that cannot possibly accommodate all of those other laws. Instead, the Commission should enforce its general regulatory provisions with respect to voter registration insofar as they affect that activity, such as the reporting requirements for independent expenditures undertaken as part of a voter registration drive.

Second, as a matter of policy the Commission should craft its rules in order to promote civic engagement and political participation. That means giving wide berth to voter registration and GOTV activity except where the Act imposes constraints on them. This rulemaking affords an opportunity for the Commission to remove barriers to efforts to expand the electorate and promote the exercise of the right to vote.

2. Treatment of 11 C.F.R. §§ 114.4(a) and (b)

We agree with the proposed revision of 11 C.F.R. § 114.4(a) and the proposal not to revise § 114.4(b) at least at this time. In order to conform with the general division of individuals between the "restricted class" and the "general public," we suggest insertion of the phrase "others among" before "the general public" in proposed § 114.4(a).

3. Enumeration of Various Communications in 11 C.F.R. § 114.4(c)

The NPRM proposes to revise regulatory descriptions and restrictions of various kinds of communications and related activities, and subject them all to a prohibition against coordination. The current subsections of 11 C.F.R. § 114.4(c) reflect earlier attempts by the Commission to make distinctions among different types of communications against the legal backdrop, now removed, of the "expenditure" prohibition. *See, e.g.*, FEC, Final Rule, "Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates," 60 Fed. Reg. 64259, 64269-70 (1995) ("FEC Second 1995 Final Rule"). We recommend that the first sentence of proposed 11 C.F.R. § 114(c)(1) not be adopted insofar as it is superfluous to proposed 11 C.F.R. § 114.10. We also recommend that the remainder of proposed § 114.4(c)(1) and proposed revised §§ 114.4(c)(2)-(6) not be adopted and that, instead, current 11 C.F.R. § 114.4(c)(2)-(6) be deleted. There is no reason to enumerate specific examples of permissible communications, and 11 C.F.R. Part 9 sets forth the Commission's exacting coordination standards, which *Citizens United* did not disturb. Even the proposed foreshortened version of the

current regulatory language implicitly suggests that other examples of a union's public electoral communication might enjoy less or different protection, which is not so.

C. "Proposed 11 C.F.R. 114.9 – Use of Corporate and Labor Organization Facilities"

The NPRM asks whether or not the Commission should revise its regulations concerning the use of facilities in connection with federal elections. We suggest that the Commission defer consideration of this subject to a future rulemaking.

As originally conceived, 11 C.F.R. § 114.9 served the Act's proscriptions against contributions and expenditures by restricting the deployment of institutional facilities in support of or opposition to candidates by individuals with authorized access to them, such as union officials, employees and members that use union facilities. These rules tolerate some "occasional, isolated or incidental" use by such individuals of those facilities in their capacities as volunteers for a campaign. Insofar as § 114.9 carries out the statutory prohibition against certain "contributions," *Citizens United* does not disturb the rationale and utility of these rules. And, the rule remains pertinent in delineating the circumstances that absolve a union of responsibility for *reporting* an individual's activity as an independent *expenditure.* And, as a practical matter, then, the rule as written continues to serve its purpose of tacitly recognizing the practical reality that individuals often engage in some personal political activity while working, that much of it is *de minimis* in time and cost, and that there ought to be some thresholds before various FECA requirements are triggered.

Having said that, § 114.9 bears revisiting to ensure that it strikes appropriate balances. However, because neither *Citizens United* nor any other applicable judicial decision has rendered any of this rule either unconstitutional or superfluous, and because we perceive no urgent reason to revise it now, we recommend that the Commission not further treat with § 114.9 at this time.

D. "Proposed Revision of 11 C.F.R. 114.10 – Corporations and Labor Organizations Making Independent Expenditures and Electioneering Communications"

1. Conversion to General Provisions Concerning Permissible Communications

The AFL-CIO largely concurs, subject to one significant exception, with the NPRM's proposal to convert 11 C.F.R. § 114.10 from a special set of rules for qualified nonprofit corporations to a concise general itemization of permissible communications and the application of the Act's longstanding reporting and disclaimer requirements to them. We have already stated that we support proposed 11 C.F.R. § 114.10(a) (with one additional clause), (b) and (d). There is utility to a straightforward regulatory statement as to what is permissible and how that activity is now subject to other preexisting requirements. Although the absence of such a statement would produce the same legal result so long as no contradictory rules were in place, given the overall complexity of the Act and its regulations, and the confusion that has followed in the wake of *Citizens United*, affirmative regulatory language can serve important public informational purposes.

2. Disclosures in Solicitations

Every subsection in proposed revised 11 C.F.R. § 114.10 except one would explicitly state that unions and corporations are subject to the current statutory requirements with respect to the disclosure and disclaimer obligations of persons that engage in independent expenditures and electioneering communications. The exception is a proposed solicitation disclaimer requirement, to be included as 11 C.F.R. § 114.10(c), that is *not* found in the Act and that the Commission should not include in its final revised regulation. This would require that any "solicit[ation of] donations that may be used for political purposes…inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates."

This proposal would dramatically expand the scope of a vestige of the Commission's to-be-deleted rules that were adopted in order to implement the Supreme Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which held that the Act's prohibition against corporate independent expenditures could not be constitutionally enforced against what the Commission came to term "qualified nonprofit corporations" ("QNCs"). As explained by the Commission, current 11 C.F.R. § 114.10(f) (which proposed § 114.10(c) would substantively track *verbatim*) was adopted to ensure that donors to QNCs were aware that they were established specifically for "the promotion of political ideas." FEC, Final Rule, "Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures," 60 Fed. Reg. 35292, 35297, 35303 (1995) ("FEC 1995 Final Rule"). But that essential characteristic simply does not apply to unions, which, as the Act's definition of "labor organization" makes clear, are formed "for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 2 U.S.C. § 441b(b)(1). *See also* 29 U.S.C. § 152(5); 11 C.F.R. §§ 100.134(b), 114.1(d).

Inasmuch as the *MCFL* analysis does not apply to a union, there is simply no predicate for the imposition of the same regulatory disclosure requirement on a union, since the Act itself imposes no such requirement. Instead, the Act requires only that a "person" that solicits a "contribution" include certain self-identifications. See 2 U.S.C. § 441d(a). But a "contribution" is a term of art under the Act, and a solicitation of a "contribution" the Act does not compel any statements concerning the potential *use* of the funds solicited. The proposed regulation would not define the term "donation"; as defined by the Commission for purposes of implementing the candidate and political party provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the term is defined almost exactly like the statutory term "expenditure" with the critical exception that a "donation" need not have anything to do with an election, see 11 C.F.R. § 300.2(e); and that breadth certainly appears to be intended for the term in current 11 C.F.R. § 114.10(f). Although unions rarely solicit "donations" of any kind in the sense of seeking gifts of funds that are unrelated to membership or transactional activity, the term is now defined and used plainly could reach even union solicitations of dues payments from members. But any such application would intrude upon a complex and longstanding federal labor law regulatory framework that includes the Railway Labor Act of 1926, the National Labor Relations Act of 1935, the Labor Management Relations Act of 1947, the Labor-Management Reporting and Disclosure Act of 1959, and both federal and state collective bargaining laws that define the relationships among unions, their members and non-members that unions represent. Only Congress has the authority to modify further the sensitive and highly regulated matter of how

individuals become union members and how dues and fees are solicited and collected. Indeed, the Commission has previously explicitly disclaimed such authority. See FEC Second 1995 Final Rule at 64265-66.

Additionally, it is unclear what it would mean to "solicit." That term is very broadly defined in the candidate/party context under BCRA, see 11 C.F.R. § 300.2(m), and in the context of solicitations of contributions to separate segregated funds the Commission has also given it an elastic meaning that encompasses even indirect language that could encourage someone to contribute without actually suggesting a contribution. *See, e.g.*, AO 1979-13. Such an approach under proposed 11 C.F.R. § 114.10(c) could turn even routine union statements during organizing campaigns and myriad other contexts into "solicitations" that would trigger the proposed disclaimer. Self-evidently, that cannot be an appropriate requirement and would run far afield from the Commission's statutory authority and the intent and scope of the Act itself.

Moreover, the proposed regulation also turns on another undefined term, "political purposes." Even as it now appears in the current QNC solicitation regulation, this phrase is undefined, and the Commission did not elaborate on its meaning when it adopted that rule. See FEC 1995 Final Rule at 35303-04. With all due respect to the Commission, it should not repeat the insertion into its regulations of such a vague and undefined term that fails to correspond with any of the precise categories of political behavior that the Act *does* identify and regulate, such as independent expenditures and electioneering communications.

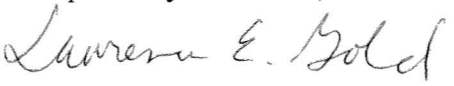
Finally, the proposed solicitation rule would apply not to a handful of highly unusual Section 501(c)(4) organizations but to every single labor organization, meaning literally tens of thousands of local, statewide and national organizations, many and perhaps most of which will not use their funds for "political purposes" however that term is defined. This massive expansion of current 11 CFR § 114.10(f) would not comport with the expectation of the *MCFL* Court, which presciently observed that "[i]t may be that the class of organizations affected by our holding today will be small," 479 U.S. at 264, an expectation that the Commission shared in issuing that regulation. See FEC 1995 Final Rule at 35297.

3. Segregated Bank Accounts

Proposed 11 CFR § 114.10(e) would authorize, but not require, the establishment of a distinct bank account for electioneering communications as described in 2 U.S.C. §§ 434(f)(2)(E) and (F). We do not object to this provision, for it accurately informs those regulated about provisions in the Act and would be located in a subsection of the regulations that summarizes the rights and obligations of regulated entities. The NPRM also asks, however, whether the Commission should adopt a regulation that would "require" the creation of a segregated bank account for independent expenditures and electioneering communications. Plainly, the correct answer is "no" because the Act explicitly makes such an account permissive rather than mandatory, and even as to such a voluntary account the Act contemplates its establishment only for electioneering communications, not independent expenditures. Moreover, any such requirement would be highly burdensome for most unions, which have neither the wherewithal nor the inclination to undertake such special banking measures in order to engage in *de minimis* communications; and, with or without such an account, these organizations will be subject to the Act's reporting and disclaimer requirements concerning those communications anyway.

Thank you for your consideration of these comments.

Respectfully submitted,



Laurence E. Gold
Associate General Counsel