

section 441b of the FECA. The *Austin* decision prompted the Commission to issue a second notice seeking further comments on what changes to its regulations were warranted. Request for Further Comment, 55 FR 40397 (Oct. 3, 1990), comment period extended 55 FR 45809 (Oct. 31, 1990). This notice also welcomed comments on the express advocacy questions raised by the *Faucher* and *NOW* decisions.

Eight commenters responded to the second notice, including some who reiterated their earlier positions. Most, but not all, of the commenters urged the Commission to adopt an express advocacy test for expenditures under section 441b. One comment favored the development of definitions which precisely set out what activity will be deemed within the scope of the FECA under such a standard, while another comment supported the use of a case by case approach. There was also some support for revising the regulations to reflect the approach to express advocacy taken into the *Furgatch* opinion. The Commission also received specific suggestions for delineating the class of nonprofit corporations falling within *MCFL*'s exception from the independent expenditure prohibition. Two comments advocated a broad scope for the exemption, while a third comment emphasized the narrowness of the group of organizations possessing the three essential features delineated in *MCFL* and *Austin*.

Subsequently, the Court of Appeals for the First Circuit upheld the district court's decision in *Faucher*. *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991). *cert. denied sub nom. Federal Election Commission v. Keefer et al.*, 502 U.S. 820 (1991). The Commission sought certiorari in *Faucher*, arguing that the express advocacy standard should not be made applicable to the 441b prohibition on corporate expenditures. On October 7, 1991, the Supreme Court denied the petition for certiorari, and thus declined to consider narrowing or otherwise modifying the statements it made in *MCFL* regarding the scope of section 441b. Accordingly, the Commission moved for the dismissal of its appeal in *NOW* and resumed consideration of several substantial changes to its regulations necessitated by the *MCFL* decision.

The Commission published a Notice of Proposed Rulemaking on July 29, 1992 seeking public comment on draft rules codifying the reduced scope of the prohibition on corporate expenditures. 57 FR 33548 (July 29, 1992). The proposed language set forth the general rule that corporations and labor

organizations are prohibited from making expenditures for communications to the general public expressly advocating the election or defeat of a clearly identified candidate. The draft regulations also sought to establish criteria for determining whether nonprofit corporations qualify for the exemption from section 441b's prohibition on independent expenditures.

The Commission received 35 separate comments on the NPRM from 32 commenters between July 29, 1992 and November 22, 1993. The Commission also received 149 form comments during that period. The Commission held a public hearing on October 15 and 16, 1992, at which 15 of these commenters testified on the issues presented in the *MCFL* decision and the proposed rules. The comments and testimony are discussed in more detail below.

As indicated above, this rulemaking process has involved a broader range of issues regarding the scope of permissible and prohibited corporate and labor organization expenditures than is reflected in the final rules being promulgated today. The rulemaking with regard to the other issues is continuing, and the Commission expects to issue additional new rules revising 11 CFR Parts 110 and 114 at a later date. These subsequent changes will replace the partisan/nonpartisan standards in sections 110.13, 114.1, 114.2, 114.3, 114.4 and 114.12(b) with language prohibiting corporations and labor organizations from making expenditures for communications to the general public expressly advocating the election or defeat of clearly identified candidates. Specifically, these provisions govern candidate debates, candidate appearances, distributing registration and voting information, voter guides, voting records, conducting voter registration and get-out-the-vote drives and use of meeting rooms. At the same time, the Commission intends to address issues which have arisen regarding activities undertaken by incorporated colleges and universities, the use of logos, trademarks and letterheads, endorsements of candidates, activities which facilitate the making of contributions, and coordination between candidates and corporations or labor organizations which results in in-kind contributions. These issues, not previously addressed in the rules, involve activities that are also impacted by the express advocacy standard and the case law in this area.

Section 438(d) of Title 2, United States Code requires that any rules or regulations prescribed by the

Commission to carry out the provisions of Title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on June 30, 1995.

Explanation and Justification

Generally, the new and amended rules contain the following changes. First, the definitions of "express advocacy" and "clearly identified" at 11 CFR 109.1 (b)(2) and (b)(3) have been moved to new 11 CFR 100.22 and revised 11 CFR 100.17, respectively. They have been reworded to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates, in accordance with the judicial interpretations found in *Buckley*, *MCFL*, *Furgatch*, *NOW* and *Faucher*.

Second, new section 114.10 has been added to implement the *MCFL* Court's conclusion that nonprofit corporations possessing certain essential features may not be bound by the restrictions on independent expenditures contained in section 441b. This new section expressly permits certain corporations to use general treasury funds for independent expenditures, and sets out the reporting obligations for these corporations.

Part 100—Scope and Definitions (2 U.S.C. 431)

Section 100.17 Clearly Identified (2 U.S.C. 431(18))

The definitions of "clearly identified" in 11 CFR 106.1(d) and "clearly identified candidate" in 11 CFR 109.1(b)(3) have been removed and replaced by a revised definition in section 100.17. It is not necessary for this definition to appear in multiple locations throughout these regulations.

The NPRM sought comments on two alternative approaches regarding the requirement that the candidates be "clearly identified." Alternative A-1 indicated that this would include candidates of a clearly identified political party and a clearly identified group of candidates, such as the "pro-life" candidates in the *MCFL* case. Alternative A-2 did not specifically mention clearly identified groups of candidates or candidates of clearly identified political parties.

Several commenters and witnesses argued that under Alternative A-1, it could be too difficult to determine the candidates in the group. Examples cited were buttons that read "Elect Women