

for a Change" or "Vote Pro-Choice," without more. The language was intended to apply to a situation, for example, where one insert in a mailing lists voting records or positions on specific issues and clearly indicates which of the named candidates shares the speaker's views. If another insert urges the reader to vote in favor of candidates who share its views, this is considered to be advocating the election of those clearly identified candidates. Similarly, the *MCFL* case involved a flyer which urged voters to vote for "pro-life" candidates, and included a list of "pro-life candidates." Thus, in this example, several "pro-life" candidates were clearly identified to the reader.

In light of comments, the wording of new section 100.22(a) has been reworked to refer to "one or more clearly identified candidate(s)" to more clearly state what was intended. In addition, section 100.17 has been modified to provide some additional examples of when candidates are considered to be "clearly identified."

Section 100.22 Expressly Advocating

The definition of express advocacy previously located in 11 CFR 109.1(b)(2) has been replaced with a revised definition in new section 100.22. The placement of the definition of express advocacy in Part 100—Scope and Definitions is intended to ensure that the reader will be able to locate it more easily. Also, while express advocacy is an important component of any independent expenditure, it is also the legal standard used in determining whether other types of activities are expenditures by corporations or labor organizations under 11 CFR Part 114. Please note that the terms "communication containing express advocacy" and "communication expressly advocating the election or defeat of one or more clearly identified candidates" have the same meaning.

The NPRM presented the possibility of creating a separate definition of "express advocacy" for inclusion in Part 114 that would apply only to corporations and labor organizations governed by that Part. The NPRM indicated that the purpose of promulgating a separate definition would be to focus more specifically on implementing the *MCFL* Court's dictate that "express advocacy" is the standard when determining what is an expenditure under 2 U.S.C. § 441b. The Notice suggested that a separate definition could center on whether a communication urged action with respect to a federal election rather than on whether the communication also

related to a clearly identified candidate. Thus, this approach would have taken a different view of "express advocacy" for organizations subject to the prohibitions of section 441b.

There was little support for separate definitions from the comments and testimony. The difficulty the commenters and witnesses had in trying to determine what the courts meant by "express advocacy," and what they thought the Commission had in mind, amply demonstrate that it would be extremely confusing to work with separate definitions for corporations and labor organizations on one hand, and candidates, committees and individuals on the other. Consequently, separate definitions of express advocacy have not been included in the final rules.

1. Alternative Definitions Presented in the NPRM

The NPRM sought comments on two alternative sets of revisions to the definition of express advocacy. Alternatives A-1 and A-2 were similar in several respects. They both continued to list the specific phrases set forth in the *Buckley* opinion as examples of express advocacy. Both alternatives recognized that all statements and expressions included in a communication must be evaluated in terms of pertinent external factors such as the context and timing of the communication. In addition, both proposed definitions clearly indicated that communications consisting of several pieces of paper will be read together.

The alternative definitions in the NPRM differed in several respects. Under Alternative A-1, express advocacy included suggestions to take actions to affect the result of an election, such as to contribute or to participate in campaign activity. In contrast, Alternative A-2 indicated that express advocacy constitutes an exhortation to support or oppose a clearly identified candidate, and that there must be no other reasonable interpretation of the exhortation other than encouraging the candidate's election or defeat, rather than another type of action on a specific issue. Nevertheless, Alternative A-2 also specifically stated that "with respect to an election" includes references such as "Smith '92" or "Jones is the One."

There was no consensus among the commenters and witnesses regarding either alternative definition of express advocacy. While there was more support for Alternative A-2 than A-1, specific portions of both alternatives troubled a number of commenters and witnesses. Some objected that

Alternative A-1 was too narrow in that it did not cover all express, implied, or reasonably understood references to an upcoming election. Others argued Alternative A-1 was too broad, and preferred Alternative A-2. However, there was also considerable sentiment expressed that Alternative A-2 was also too broad, and should be further limited to avoid running afoul of the First Amendment considerations that are involved.

To illustrate the difficulty involved in applying an "express advocacy" standard, the Commission included Agenda Document #92-86-A in the rulemaking record. This document contained seven hypothetical advertisements, each of which is assumed to be published within two weeks of an election. Several written comments and witnesses mentioned these examples in analyzing the proposals contained in this Notice, but there was no consensus as to which examples, if any, contained express advocacy.

In commenting on the proposed rules, the Internal Revenue Service indicated that 26 U.S.C. § 501(c)(3) prohibits certain nonprofit organizations from participating or intervening in political campaigns on behalf of or in opposition to candidates for elective public office. The IRS stated that prohibited political activity under the Internal Revenue Code is much broader in scope than the express advocacy standard under the FECA. The Commission expresses no opinion as to any tax ramifications of activities conducted by nonprofit corporations, since these questions are outside its jurisdiction.

The definition of express advocacy included in new section 100.22 includes elements from each definition, as well as the language in the *Buckley*, *MCFL* and *Furgatch* opinions emphasizing the necessity for communications to be susceptible to no other reasonable interpretation but as encouraging actions to elect or defeat a specific candidate. Please note that exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy. The expressions enumerated in *Buckley* included "support," a term that encompasses a variety of activities beyond voting.

2. Examples of Phrases That Expressly Advocate

The previous definition of express advocacy in 11 CFR 109.1(b)(2) included a list of expressions set forth in *Buckley*. Both alternatives in the NPRM would have largely retained this list of phrases that constitute express