exemption from the independent expenditure prohibition. The *MCFL* Court described these three features as ''essential to [its] holding that [MCFL] may not constitutionally be bound by § 441b's restriction on independent spending.'' 479 U.S. at 263–64. The clear implication is that a corporation that does not have all three of these features can be subject to this restriction.

The U.S. Court of Appeals decision in *Day* v. *Holahan*, 34 F.3d 1356 (8th Cir. 1994), does not affect this conclusion. In that case, the Eighth Circuit decided that a Minnesota statute that closely tracked the Supreme Court's three essential features was unconstitutional as applied to a Minnesota nonprofit corporation. The Commission believes the Eighth Circuit's decision, which is controlling law in only one circuit, is contrary to the plain language used by the Supreme Court in *MCFL*, and therefore is of limited authority.

The Notice sought comments on two versions of section 114.10 that represent contrasting approaches for defining the *MCFL* exemption. The first version set out the essential features listed in the *MCFL* opinion as threshold requirements for an exemption from the independent expenditure prohibition. By following the long-standing presumption that all incorporated entities are subject to the independent expenditure prohibition in section 441b, and requiring corporations that claim to be exempt from that prohibition to demonstrate that they are entitled to an exemption, this version sought to fit the *MCFL* decision into the existing statutory framework.

The second version took the opposite approach. It presumed a broad class of corporations would be exempt from section 441b's independent expenditure prohibition, unless they have a characteristic that would bring them within the Commission's jurisdiction.

The Commission has decided to follow the first approach and incorporate the rules into the existing framework for section 441b. The Supreme Court did not conclude that all of section 441b is unconstitutional on its face. Rather, it held that one portion of section 441b, the prohibition on independent expenditures, is unconstitutional as applied to a narrow class of incorporated issue advocacy organizations. The Court explicitly reaffirmed the validity of section 441b's prohibition on corporate contributions. 479 U.S. at 259–60. Thus, the broad prohibition on the use of corporate treasury funds contained in section 441b still exists, and the Commission's responsibility for enforcing that provision remains in place.

The Commission is aware that most of the comments were in accord with the second version. These commenters argued that all organizations are entitled to unlimited First Amendment rights regardless of whether they are incorporated, and that any Commission action that has the effect of limiting those rights is unconstitutional. They felt that the first version would define the category of exempt corporations too narrowly, and would burden the speech activity of corporations that are entitled to an exemption.

However, there is a long history of regulating the political activity of corporations, and the Supreme Court has recognized the compelling governmental interest in regulating this activity on numerous occasions. ''The overriding concern behind the enactment of the [statutory predecessor to section 441b] was the problem of corruption of elected representatives through the creation of political debts. * * * The importance of the governmental interest in preventing this occurrence has never been doubted.'' *First National Bank of Boston v. Belotti*, 435 U.S. 765, 788, n.26 (1978). ''This careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference. . . . [I]t also reflects a permissible assessment of the dangers posed by those entities to the electoral process.'' *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 209 (1982).

The *MCFL* decision reaffirms, rather than casts doubt upon, the validity of Congressional regulation of corporate political activity. In its opinion, the *MCFL* Court said ''[w]e acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.'' *MCFL*, 479 U.S. at 263. The Court found the application of section 441b to MCFL unconstitutional not because this governmental interest was not compelling in general, but because MCFL was different from the majority of entities addressed by section 441b. Consequently, this governmental interest was not implicated by MCFL's activity. *Id.* The Court also acknowledged that MCFL-type corporations are the exception rather than the rule, saying that ''[i]t may be that the class of organizations affected by our holding today will be small.'' *Id.* at 264. Thus, the Commission's task is to incorporate this narrow exception to the independent expenditure prohibition into the regulations so that they protect the interests of organizations that are like MCFL without undermining the FECA's legitimate legislative purposes. The Commission has concluded that the first approach is better suited to this task.

2. Scope and Definitions

Paragraph (a) is a scope provision that explains, in general terms, the purposes of section 114.10. Paragraph (b) defines four terms for the purposes of this section.

a. The promotion of political ideas. The first term is the phrase ''the promotion of political ideas.'' The *MCFL* Court said one of MCFL's essential features was that ''it was formed for the express purpose of promoting political ideas, and cannot engage in business activities.'' 479 U.S. at 264. Paragraph (b)(1) clarifies what this phrase means for the purposes of section 114.10. Under paragraph (b)(1), the promotion of political ideas includes issue advocacy, election influencing activity, and research, training or educational activity that is expressly tied to the organization's political goals.

The Commission added the last phrase, which is based on language in the *Austin* decision, in response to several commenters who felt that the proposed definition was too narrow. These commenters said that many organizations engage in certain activities that are not pure advocacy but are directly related to their advocacy activities. They argued that organizations should be allowed to conduct these activities without losing their exemption from the independent expenditure prohibition. The Commission agrees, and has added the last phrase to the final rules to serve this purpose.

b. Express purpose. Paragraph (b)(2) defines the term ''express purpose,'' as that term is used in section 114.10. As indicated above, the Supreme Court said that MCFL was formed for the express purpose of promoting political ideas and cannot engage in business activities. *Id.* Paragraph (b)(2) states that a qualified nonprofit corporation's express purpose is evidenced by the purpose stated in the corporation's charter, articles of incorporation, or bylaws. It also may be evidenced by any purpose publicly stated by the corporation or its agents, and any activities in which the corporation actually engages.

Generally, if an organization's organic documents set out a purpose that cannot be characterized as issue advocacy, election influencing activity, or research, training or educational activity