

qualify for an exemption from the independent expenditure prohibition. In order to become a qualified nonprofit corporation, a corporation must adopt the essential characteristics set out in paragraph (c) of the final rules. In addition, the corporation must purge its accounts of corporate and labor organization donations and implement a policy to ensure that it does not accept these donations in the future. Once it adopts the essential characteristics, purges its accounts, and implements such a policy, the corporation will become a qualified nonprofit corporation.

7. Permitted Corporate Independent Expenditures

Paragraph (d) states that qualified nonprofit corporations can make independent expenditures, as defined in 11 CFR Part 109, without violating the prohibitions on corporate expenditures in 11 CFR Part 114. However, this paragraph also emphasizes that qualified nonprofit corporations remain subject to the other requirements and limitations in Part 114, in particular, the prohibition on corporate contributions, whether monetary or in-kind.

The Commission received no comments on this provision, and has retained it in the final rules.

8. Reporting Requirements

Paragraph (e) requires a corporation that makes independent expenditures to certify that it is a qualified nonprofit corporation under this section and report its independent expenditures. The procedures for certifying exempt status are set out in paragraph (e)(1). The requirements for reporting independent expenditures are set out in paragraph (e)(2).

Under paragraph (e)(1), the corporation must certify that it is eligible for an exemption from the independent expenditure prohibition. This certification must be submitted no later than the date upon which the corporation's first independent expenditure report is due under paragraph (e)(2), which will be described in detail below. However, the corporation is not required to submit this certification prior to making independent expenditures. The certification can be made as part of FEC Form 5, which the Commission will be modifying for use in this situation. Or, the corporation can submit a letter that contains the name, address, signature and printed name of the individual filing the report, and certifies that the corporation has the characteristics set out in paragraph (c).

One of the alternatives set out in the NPRM would have required qualified nonprofit corporations to submit much more detailed information in order to qualify for exempt status. The Commission decided not to include these requirements in the final rules in order to minimize the reporting burdens on qualified nonprofit corporations. Instead, the Commission has decided to require only that corporations certify that they have the characteristics of a qualified nonprofit corporation when they make independent expenditures. This will ensure that corporations claiming to be exempt are aware of the characteristics required to qualify for an exemption.

Paragraph (e)(2) states that qualified nonprofit corporations must comply with the independent expenditure reporting persons who make independent expenditures in excess of \$250 in a calendar year to report those expenditures using FEC Form 5. This report must include the name and mailing address of the person to whom the expenditures were made, the amount of the expenditure, an indication as to whether the expenditure was in support of or in opposition to a candidate, and a certification as to whether the corporation made the expenditure in cooperation or consultation with the candidate. The names of persons who contributed more than \$200 towards the expenditure must also be reported.

Thus, the final rules treat qualified nonprofit corporations as individuals for the purposes of the reporting requirements. This is one of the least burdensome reporting schemes contained in the FECA. The *MCFL* Court specifically endorsed this approach when it said that the disclosure provisions of 2 U.S.C. 434(c) will "provide precisely the information necessary to monitor [the corporation's] independent spending activity and its receipt of contributions." *MCFL*, 479 U.S. at 262. None of the commenters discussed the proposed independent expenditure reporting requirements.

In another part of its opinion, the *MCFL* Court also said that "should *MCFL*'s independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *MCFL*, 479 U.S. at 262. The proposed rules set out a test for determining a corporation's major purpose, and also contained proposed reporting requirements related to that test. These reporting requirements were set out in paragraph (e) of the proposed rules.

As will be discussed further below, the Commission has decided not to address this part of the Court's opinion in the final rules being promulgated today, preferring to do so at a later date as part of a separate rulemaking. Consequently, the reporting requirements related to the major purpose test have been deleted from paragraph (e) of the final rules. However, these rules may eventually be amended to require reporting of information related to the major purpose concept. Any such changes will be made as part of the separate rulemaking.

9. Solicitation Disclosure

Section 114.10(f) of the final rules states that when a qualified nonprofit corporation solicits donations, the solicitation must inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates. This rule, which has been modified slightly from the proposed rule, requires qualified nonprofit corporations to include a disclosure statement in their solicitations for donations.

One commenter called this an "unjustifiable roadblock" to the exercise of constitutional rights by small nonprofit corporations, and speculated that the people who run these organizations won't know about this requirement until after a complaint is filed against them.

However, this disclosure requirement directly serves the purposes of the *MCFL* exemption. In carving out this exemption, the Supreme Court said "[t]he rationale for regulation is not compelling with respect to independent expenditures by [*MCFL*]" because "[i]ndividuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *MCFL* at 260-61. "Given a contributor's awareness of the political activity of [*MCFL*], as well as the readily available remedy of refusing further donations, the interest [of] protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of *MCFL*." *Id.* at 262 (emphasis added).

The *MCFL* Court went on to endorse the disclosure requirement as a way to ensure that persons who make donations are aware of how those donations may be used. The Court said the need to make donors aware that their donations may be used to "urge support for or opposition to political candidates" can be met by "simply requiring that contributors be informed that their money may be used for such a purpose." *MCFL*, 479 U.S. at 261.