2. Debate Structure and Selection of Candidates

The rules in section 110.13(b)(1) continue the previous policy of permitting staging organizations to decide which candidates to include in a debate, so long as the debate includes at least two candidates. Please note that a face-to-face appearance or confrontation by the candidates is an inherent element of a debate. Hence, a debate does not consist of a series of candidates appearances at separate times over the course of a longer event. *See* AO 1986–37. Nevertheless, the requirement of including two candidates would be satisfied, for example, if two candidates were invited and accepted, but one was unable to reach the debate site due to bad weather conditions, and the staging organization held the debate with only the other candidate present. Other situations will be addressed on a case-by-case basis. The Commission does not intend to penalize staging organizations for going forward with debates when circumstances beyond their control result in only one candidate being present and it is not feasible to reschedule. Please note that in some situations, the rules in 11 CFR 114.4 regarding candidate appearance may also be applicable.

Many comments, and much public testimony, was received on whether the Commission should establish reasonable, objective, nondiscriminatory criteria to be used by staging organizations in determining who must be invited to participate in candidate debates. In the alternative, it was suggested that the Commission could allow staging organizations to use their own pre-established sets of reasonable, objective, nondiscriminatory criteria, provided the criteria are subject to Commission review and are announced to the candidates in advance.

In response to the comments and testimony, new paragraph (c) has been added to section 110.13 to require all staging organizations to use pre-established objective criteria to determine which candidates are allowed to participate in debates. Given that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process. The choice of which objective criteria to use is largely left to the discretion of the staging organization. The suggestion that the criteria be ''reasonable'' is not needed because reasonableness is implied. Similarly, the revised rules are not intended to permit the use of discriminatory criteria such as race, creed, color, religion, sex or national origin.

Although the new rules do not require staging organizations to do so, those staging debates would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate. This will enable staging organizations to show how they decided which candidates to invite to the debate. Staging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants. The objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes there are too many candidates to conduct a meaningful debate.

Under the new rules, nomination by a particular political party, such as a major party, may not be the sole criterion used to bar a candidate from participating in a general election debate. But, in situations where, for example, candidates must satisfy three of five objective criteria, nomination by a major party may be one of the criteria. This is a change from the Explanation and Justification for the previous rules, which had expressly allowed staging organizations to restrict general election debates to major party candidates. *See* Explanation and Justification, 44 FR 76735 (December 27, 1979). In contrast, the new rules do not allow a staging organization to bar minor party candidates or independent candidates from participating simply because they have not been nominated by a major party.

The final rules which follow also continue the previous policy that sponsoring a primary debate for candidates of one political party does not require the staging organization to hold a debate for the candidates of any other party. *See* Explanation and Justification, 44 FR 76735 (December 27, 1979).

Section 114.1 Definitions

1. Contribution and Expenditure

The revised regulations in 11 CFR 114.1 (a)(1) and (a)(2) recognize that the *MCFL* decision necessitates certain distinctions between the terms ''contribution'' and ''expenditure.'' The previous rules had treated these terms as coextensive. The distinction arises because the Court read an express advocacy standard into the 2 U.S.C. 441b definition of expenditure. However, payments which are coordinated with candidates constitute expenditures and in-kind contributions to those candidates even if the communications do not contain express advocacy. *See* AO 1988–22.

One commenter urged the Commission to continue to interpret the term ''contribution or expenditure'' to cover the same disbursements. The comment argued that the *MCFL* decision applies equally to contributions and expenditures. The Commission disagrees with this interpretation of *MCFL*, given that the case only involved the issue of whether corporate expenditures were made. In *MCFL*, the parties did not raise, and the Supreme Court did not resolve, the factual question of whether corporate contributions had been made by MCFL, Inc. However, the *MCFL* Court reaffirmed the First Amendment distinction between independent expenditures and contributions, which was recognized in the *Buckley* opinion. In *Buckley*, the Supreme Court generally struck down the Act's limitations on independent campaign expenditures by individuals and organizations (*Buckley*, 424 U.S. at 39–51), but upheld the constitutionality of the Act's restrictions on contributions to candidates. *Id*. at 23–38. Subsequently, the Court stated in *NCPAC* that ''there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.'' *Federal Election Comission* v. *National Conservation PAC*, 470 U.S. 480, 497 (1985). Similarly, the Court indicated that ''a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.'' *Id.*, at 495–96. In light of this judicially-recognized distinction, the final version of section 114.1(a)(1) and (a)(2) is being modified to recognize that the terms ''contribution'' and ''expenditure'' are not coextensive.

The attached rules also include two technical amendments to section 114.1(a)(1). First, the reference to the National (sic) Savings and Loan Insurance Corporation has been deleted, because that entity no longer exists. Paragraph (a)(2)(ii) of section 114.1 is also being amended to remove the reference to ''nonpartisan'' voter drives.

2. Restricted Class

New paragraph (j) of section 114.1 contains a definition of ''restricted class'' for purposes of receiving