

accordance with paragraph (e)(1)(i)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first independent expenditure report required under paragraph (e)(2)(i) of this section.

(B) This certification may be made either as part of filing FEC Form 5 (independent expenditure form) or, if the corporation is not required to file electronically under 11 CFR 104.18, by submitting a letter in lieu of the form. The letter shall contain the name and address of the corporation and the signature and printed name of the individual filing the qualifying statement. The letter shall also certify that the corporation has the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section. A corporation that does not have all of the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section, but has been deemed entitled to qualified nonprofit corporation status by a court of competent jurisdiction in a case in which the same corporation was a party, may certify that application of the court's ruling to the corporation's activities in a subsequent year entitles the corporation to qualified nonprofit corporation status. Such certification shall be included in the letter submitted in lieu of the FEC form.

(ii) If a corporation makes electioneering communications under paragraph (d)(2) of this section that aggregate in excess of \$10,000 in a calendar year, the corporation shall certify, in accordance with paragraph (e)(1)(ii)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first electioneering communication statement required under paragraph (e)(2)(ii) of this section.

(B) This certification must be made as part of filing FEC Form 9 (electioneering communication form).

(2) *Reporting independent expenditures and electioneering communications.* (i) Qualified nonprofit corporations that make independent expenditures aggregating in excess of \$250 in a calendar year shall file reports as required by 11 CFR part 104.

(ii) Qualified nonprofit corporations that make electioneering communications aggregating in excess of \$10,000 in a calendar year shall file

statements as required by 11 CFR 104.14.

* * * * *

(g) *Non-authorization notice.* Qualified nonprofit corporations making independent expenditures or electioneering communications under this section shall comply with the requirements of 11 CFR 110.11.

(h) *Segregated bank account.* A qualified nonprofit corporation may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, from which it makes disbursements for electioneering communications.

(i) *Activities prohibited by the Internal Revenue Code.* Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a), including any qualified nonprofit corporation, to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501, *et seq.*

6. Section 114.14 is added to read as follows:

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation or labor organization, or received by a person, that constitute—

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements,

including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or otherwise provided an amount aggregating \$1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

Dated: October 11, 2002.

David M. Mason,

Chairman, Federal Election Commission.

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FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2002-21]

FCC Database on Electioneering Communications

AGENCY: Federal Election Commission.

ACTION: Interim final rules with requests for comments.

SUMMARY: The Federal Election Commission is promulgating interim final rules regarding electioneering communications, which are certain television and radio communications that refer to a clearly identified Federal candidate and that are targeted to the relevant electorate within 60 days before a general election or within 30 days

before a primary election for Federal office. These interim final rules implement a portion of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which adds to the Federal Election Campaign Act new provisions regarding "electioneering communications." BCRA defines electioneering communications to mean certain communications that can be received by 50,000 or more persons in the State or district that a candidate seeks to represent. The interim final rules: Identify the Web site of the Federal Communications Commission ("FCC") as the appropriate place to acquire information as to whether a communication will be capable of being received by 50,000 persons; allow those who make communications to rely on information on the FCC's Web site to determine whether their communications will be capable of being received by 50,000 or more persons in a given area; set out the formulae to be used to determine whether a communication can be received by 50,000 or more persons; and specify three ways that a person can demonstrate that a communication did not reach 50,000 persons in a particular Congressional district or State, if the FCC database is silent on the matter. Further information is provided in the Supplementary Information that follows.

DATES: These rules are effective on November 22, 2002. Comments must be received on or before January 21, 2003.

ADDRESSES: All comments should be addressed to Ms. Mai T. Dinh, Acting Assistant General Counsel, and must be submitted in either electronic or written form. Electronic mail comments should be sent to FCCdatabase@fec.gov and must include the full name, electronic mail address, and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address, and the postal service address of the commenter will not be considered. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its Web site within ten business days of the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Acting Assistant General

Counsel, or Mr. Anthony T. Buckley, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (Mar. 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* Among these amendments are provisions in Title 2 of BCRA that address electioneering communications. The Commission published a Notice of Proposed Rulemaking ("NPRM") on which these interim final rules are based in the **Federal Register** on August 7, 2002. 67 FR 51,131 (Aug. 7, 2002). Written comments were due by August 21, 2002 for those who wished to testify or by August 29, 2002 for all other commenters. The names of commenters and their comments are available at <http://www.fec.gov/register.htm> under "Electioneering Communications." The Commission held a public hearing on the NPRM on August 28 and 29, 2002, at which it heard testimony from 12 witnesses. Transcripts of the hearing are available at <http://www.fec.gov/register.htm> under "Electioneering Communications."¹

The Electioneering Communications NPRM had several components, including the definition of "electioneering communication"; the prohibitions on corporations and labor organizations from making disbursements for electioneering communications, with limited exceptions; the reporting requirements; and the database that will be developed and maintained by the Federal Communications Commission ("FCC") to determine whether a communication reaches 50,000 persons in the relevant Congressional district or State.

Throughout this rulemaking, the Commission and the FCC have recognized that the creation of the FCC database will be a difficult and complicated undertaking, given the statutory deadline for promulgation of rules implementing BCRA.² For the Commission, the difficulties reside not in the development of the database, but in determining the various ways that

communications can be distributed and the options for measuring how many persons can receive them. Therefore, the Commission is separating the final rules addressing the FCC database from the final rules on Electioneering Communications so that it may continue to receive and consider comments and information on the FCC database.

Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The interim final rules on the FCC database on electioneering communications were transmitted to Congress on October 11, 2002.

Explanation and Justification

Introduction

BCRA at 2 U.S.C. 434(f)(3) defines a new term, "electioneering communications." This term includes broadcast, cable, or satellite communications: (1) That refer to a clearly identified Federal candidate; (2) that are transmitted within certain time periods before a primary or general election; and (3) that are "targeted to the relevant electorate," that is, the relevant Congressional district or State. A communication is "targeted to the relevant electorate" if it can be received by 50,000 or more persons in the Congressional district or State.³

Pursuant to section 201(b) of BCRA,⁴ the FCC "shall compile and maintain any information (that this Commission) may require to carry out [the electioneering communications disclosure requirements of BCRA,] and shall make such information available to the public on the (FCC's) Web site." These requirements are necessary to promote compliance with the disclosure and funding requirements in the new law regarding electioneering communications. Those who wish to make communications that meet the content, timing, and medium requirements of the electioneering communication definition must be able to easily determine whether the radio or television stations, cable systems, or satellite systems on which they wish to publicly distribute their communications will reach 50,000 or more persons in the State (U.S. Senate

¹ Oral testimony at the Commission's public hearing and written comments are both considered "comments" in this document.

² Section 402(c)(1) of BCRA establishes a general deadline of 270 days for the Commission to promulgate regulations to carry out BCRA. The President of the United States signed BCRA into law on March 27, 2002, so the 270-day deadline is December 22, 2002. The interim final rules do not apply to any runoff elections required by the results of the November 5, 2002 general election. 2 U.S.C. 431 note.

³ See the Electioneering Communications Final Rules, which are promulgated in conjunction with these interim final rules, for the implementation of the definition of "electioneering communication."

⁴ This section of BCRA has not been codified.

candidates or presidential primary candidates) or Congressional district (U.S. House of Representatives candidates) in which the candidate mentioned in the communication is running.

11 CFR 100.29(b)(6)—Information Available on the FCC Web Site

In the NPRM, the Commission described some of the search capabilities that will be necessary and some features that would be helpful on the FCC's Web site, as well as some contemplated for the Commission's own Web site. The Commission also posed a number of questions related to the techniques for determining whether a communication will reach 50,000 or more persons in a Congressional district or State. The NPRM invited comments on what additional information, Web site features, or search options should be made available. Finally, the NPRM stated that the final rule would list the types of information that the FCC determines it will provide on its Web site.

The Media Bureau of the Federal Communications Commission provided comments on these issues, as did ten other commenters. The FCC acknowledges that BCRA requires it to create, maintain and make available to the public on its Web site a database of information necessary to determine if a communication can be received by 50,000 or more persons in any Congressional district or State. The FCC emphasized that "this undertaking could be extraordinarily complex and will require the expenditure of substantial resources in terms of time, money, and personnel." The FCC cautioned that, at a minimum, this database will involve the integration of information regarding the population and the geography of Congressional districts and State boundaries, and that it could also require the FCC to examine "more detailed information relating to the specific programming services transmitted or carried by each broadcast station, cable system, and satellite system in the country."

The FCC also stated that the "creation and maintenance of a database that complies with * * * BCRA will be, no matter what the details, a large and difficult undertaking." The FCC provided numerical data that underscore the magnitude of its task, noting that, as of June 30, 2002, there are 8450 FM radio stations, 4811 AM radio stations, and 1712 full-power analog television stations operating in the United States, and that as of August 27, 2002, there are 516 digital television stations, 10,500 cable systems, and

several satellite providers. Because of the nature of this task, the FCC asked this Commission to craft rules that will simplify the task to the extent possible. The FCC sought flexibility and discretion to implement the database based upon its expertise and available data, so that it will be able to provide the public with the information as quickly and accurately as possible.

One commenter argued that the proposal in the NPRM regarding what information should be available on the FCC Web site was not sufficient. This commenter suggested that the Commission also require the FCC "to compile and maintain a database, available on the World Wide Web, of certain information that has to be collected anyway under section 504 of the BCRA." Section 504 of BCRA, amends the Communications Act of 1934 to require broadcast licensees to maintain certain records regarding requests to purchase broadcast time for the purpose of communicating a message of a political nature. *See* 47 U.S.C. 315(e).

Eight commenters either stated specifically that they supported the database concept as described in the NPRM, or by their comments, appeared to support it. One commenter urged the Commission to defer to the FCC's determination of the specifics of how the database should operate.

In order to provide the FCC with the most flexibility possible, the Commission has decided not to include in the final rule any additional requirements as to the types of information to be made available on the FCC's Web site. Instead, the interim final rule lists only what is required by BCRA: the FCC's Web site will provide information that will permit those who wish to make communications to determine easily whether the radio or television stations, cable systems, or satellite systems through which they wish to publicly distribute their communications will reach 50,000 or more persons in a particular State or Congressional district, and, therefore, whether they are required to file statements of electioneering communications with the Federal Election Commission. Due to the stated challenge the FCC is facing in creating this Web site database, and because section 504 of BCRA includes information unrelated to electioneering communications, the Commission does not believe it is appropriate to require the FCC to include such information in its database.

The Commission also received comments on the statement in the proposed rule at § 100.29(b)(5) that

reliance on the FCC information will be a complete defense to a charge that a communication was capable of being received by 50,000 or more persons, and that as a result, the communication met the definition of an "electioneering communication." All of the commenters who addressed this topic agreed that reliance on the information provided on the FCC Web site should be sufficient, and many of them believed it should be a complete defense to any liability arising under BCRA. One commenter argued that the Commission should permit challenges to the information provided on the FCC Web site. Another commenter argued that, if the database cannot state whether a communication transmitted over a particular outlet reaches 50,000 or more persons, then it should be presumed to not reach 50,000 or more persons. Another commenter argued that the Commission should announce that it will not entertain complaints of violations until the technological issues are resolved and the targeting information is available as proposed.

Under the interim final rules at 11 CFR 100.29(b)(6)(i), if the FCC database indicates that a communication cannot be received by 50,000 or more persons in a particular Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication with respect to that particular district or State, as long as such information is posted on the FCC's Web site on or before the date the communication is publicly distributed.

The proposed rule in the NPRM would have stated that a defense involving the information on the FCC Web site would be available if the person making the communication relied on the information prior to the public distribution of the communication. The interim final rule removes the reliance requirement. The information on the FCC Web site is intended to state objective facts regarding the reach of broadcast systems and networks, and cable and satellite systems. These facts are true regardless of whether the person making the communication knew of them or intended to make an electioneering communication.

However, the Commission is concerned that the FCC database may not be able to provide information for every possible system or network, or may not be operational in time for any special elections in 2003 when such information might be necessary. In those situations, paragraphs (b)(6)(ii)(A) through (C) set out three ways a person

can establish a defense to a charge that a communication reached 50,000 or more persons in a particular district or State.

The first method is if the person reasonably relied on written documentation obtained from the entity publicly distributing the communication, stating that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

The second method is if the communication is not publicly distributed on a broadcast station, radio station or cable system located, in whole or in part, in any Metropolitan Area (MA). For many years, the Commission has used the Office of Management and Budget's (OMB) definition of MA in other portions of the Commission's regulations governing national convention host committee financing. *See* 11 CFR 9008.52(c)(2) ("For purposes of this section, any business (including any branch of a national or regional chain, a franchise, or a licensed dealer) or labor organization or other organization with offices or facilities located within the Metropolitan Area (MA) of the convention city shall be considered local.") *See also* Explanation and Justification, 59 FR 33,610 (June 29, 1994). Because MAs contain at least 50,000 inhabitants under OMB's definition, a communication aired or transmitted by an entity outside of any such areas in the specified district or State will not be presumed to reach 50,000 persons.

The third method is if the person making the communication reasonably believes that the communication cannot be received by 50,000 or more persons in the relevant Congressional district or State. Such belief must be reasonably based on information in possession of the maker of the communication prior to or at the time the communication is made. For example, if a person engaged a media buyer to secure broadcast time, and that media buyer reasonably informed that person that the communication would not reach 50,000 persons in the relevant Congressional district or State, then that would result in a reasonable belief as to the reach of the communication.

To assure persons that the information on the FCC Web site is reliable, the Commission encourages the FCC to establish a date by which all information on the Web site will be considered correct and unchangeable for a coming election cycle, and to post that date on its Web site.

11 CFR 100.29(b)(7)—Determining Whether a Communication Can Be Received by 50,000 or More Persons

In the NPRM, the Commission also sought comments on how the term "persons" should be interpreted for purposes of determining the required potential audience for electioneering communications. *See* 2 U.S.C. 434(f)(3)(C). The term "person" is defined in 2 U.S.C. 431(11) and in current Commission regulations at 11 CFR 100.10 to mean an individual, partnership, association, corporation, labor organization and any other organization or group of persons. The NPRM suggested that persons other than individuals should be excluded because partnerships and other legal entities are, by definition, not part of the "relevant electorate." Therefore, limiting "persons" to individuals or natural persons was proposed.

All nine commenters who addressed this issue favored construing "persons" to mean natural persons or individuals. Several commenters thought the term should be further limited to include only persons who are, as described by the commenters, either voting-age citizens, registered voters, eligible voters, or those entitled to vote.

In reviewing what this provision is intended to accomplish, the Commission has determined that attempting to define "person" by itself is not the best approach. Rather, the Commission has determined that the more appropriate course is to define the term "can be received by 50,000 or more persons," because this phrase is a more accurate reflection of the concept Congress sought to address in BCRA. This approach enables the Commission, with the assistance of the FCC, to employ varying factors to determine whether a communication has the necessary audience for it to be considered an electioneering communication. Due to the nature of the technologies involved, precision is not always feasible in measuring how many persons in a particular Congressional district or State can receive a television or radio communication. Nor is it required by BCRA, which only employs a more or less than 50,000 persons standard.

In adopting this approach, the Commission is, in effect, assessing the number of individuals without attempting to determine how many of them may be registered voters or eligible voters. The Commission is concerned that to attempt to further define the universe of individuals is not required by BCRA and could seriously and

unnecessarily complicate the effort to provide information in a timely manner.

The Commission has identified several methodologies that are included in the interim final rules in 11 CFR 100.29(b)(7)(i)(A) through (H) to determine whether a communication meets BCRA's audience standard in a particular Congressional district or State. While these methodologies cannot achieve complete precision, the Commission believes they could aid in reliably and objectively determining whether a communication can be received by 50,000 or more persons in a Congressional district or State, as required by BCRA.

The Commission has ascertained that there are a number of different situations that will involve various calculations and configurations to make this determination. Some communications are broadcast by television stations, radio stations, or networks. These broadcast signals may also be redistributed by cable or satellite systems. Other communications appear on a single cable system, which may involve more than one cable franchise. Still other communications appear on cable networks (CNN, FOX News, USA, for example) that are publicly distributed via cable and satellite. Because Congressional districts are the most problematic, the discussion of the methodologies herein will address them specifically. Points made in this discussion can be extrapolated to apply statewide for Senate and presidential primary elections.

For over-the-air television broadcasters, broadcast contours appear to be the best way to gauge viewership. Thus, if a Congressional district lies entirely within a Grade B broadcast contour, the potential viewership of that station would be the population of that district.

A broadcast contour is the geographic line within which the broadcast signal is at a particular strength. For example, the line demarcating the Grade B contour represents the area where fifty percent of the population can receive the signal, and fifty percent cannot. The Commission understands that the FCC is capable of comparing the geographic sweep of broadcast contours, state boundaries and Congressional districts. Contours are a construction, not a geographic certainty; use of contours will both under- and over-count an audience. Nevertheless, based on the technology, contours are the most reliable, readily available measure of audiences that "can receive" a broadcast signal and, according to the FCC, are regularly relied upon in that agency and in the telecommunications industry.

Using population figures is consistent with the Commission's previously stated proposal, and was supported by a number of commenters, who agreed that "persons" should mean natural persons. Subscribers of cable or satellite television within the broadcast contour are not counted in the interim final rules at 11 CFR 100.29(b)(7)(i)(E), as that would result in the double-counting of certain persons. If a communication is simultaneously broadcast on a network, where multiple stations broadcasting the same material each reach a portion of the Congressional district, the populations within those portions must be combined to determine whether a communication reaches 50,000 or more persons. This method is found in the interim final rules at 11 CFR 100.29(b)(7)(i)(F)(1).

For a broadcast station with Grade B broadcast contours that do not cover an entire Congressional district, one way to determine the relevant viewership is to first ascertain the population within that portion of the district within the broadcast contour. With respect to the remaining portion of the district, a calculation must be made of the viewership of cable and satellite television that retransmit the broadcast station, and that result is added to the first number to determine whether the 50,000-person threshold is met. This method is found in the interim final rules at 11 CFR 100.29(b)(7)(i)(F)(2).

When determining viewership of a cable system or satellite system, the number of subscribers to each system provides a baseline. However, it is unlikely that the number of subscribers exactly equals viewership—inevitably, in many households where one person is the subscriber, there will be several people who are viewers. Accordingly, the interim rules in 11 CFR 100.29(b)(7)(ii) use a multiplier to account for this fact. One multiplier that could be used is the current average U.S. household size, which at present is 2.62 persons. See Jason Fields and Lynne M. Casper, *America's Families and Living Arrangements: March 2000*, Current Population Reports, P20-537, U.S. Census Bureau, Washington, DC, 2001. All cable and satellite systems carrying the broadcast channel and operating within the district or State must be considered.

Thus, in the hypothetical described above, if the Congressional district is served by a cable system, and it is determined that 10,000 of the cable system's subscribers reside outside of the broadcast contour but within the Congressional district, then 26,200 (2.62 × 10,000) persons are added to the population within the contour to

determine if the communication can be received by 50,000 or more persons.

With respect to communications publicly distributed solely on cable or satellite systems, the same sort of calculations described above must be made under the interim final rules at 11 CFR 100.29(b)(7)(i)(G) and (H). With respect to cable television networks, the Commission notes that not all cable systems carry all cable networks. Nevertheless, for the sake of simplicity, the interim final rules assume that every cable and satellite system carries every cable network, and calculations are based on this assumption. This creates a rebuttable presumption as to the reach of a particular cable network, which may be overcome by demonstrating that the cable system in question did not carry that network at the time a communication was transmitted. This rebuttable presumption is set forth in the interim final rules at 11 CFR 100.29(b)(7)(iii).

With respect to communications publicly distributed via AM or FM radio stations, each of these media have their own terminology for the reach of over-the-air signals, which are reflected in the interim final rules at 11 CFR 100.29(b)(7)(i)(A) through (D). The analysis involved with these communications is similar to that for over-the-air only television broadcast stations. Information regarding the term used for FM stations, "primary service contour," can be found on the FCC's Web site at: <http://www.fcc.gov/mb/audio/fmclasses.html>. With respect to AM stations, the FCC's rules at 47 CFR part 73 describe the various classes of radio stations and the types of service areas (primary and/or secondary) that are applicable to them. The Commission's rules at 11 CFR 100.29(b)(7)(i)(C) and (D) use the phrase "outward service area" to address the fact that some stations may have a reach further than a primary service area.

Several commenters addressed whether the regulations should require aggregation of recipients of the same communication from multiple outlets and, if so, whether the regulations should aggregate substantially similar communications for this purpose. Theoretically, one communication could be publicly distributed via several small outlets, each of which reaches fewer than 50,000 persons in the relevant area, but in the aggregate reach 50,000 or more persons in the relevant area. The commenters agreed that the size of radio and television audiences might eliminate this concern as a practical matter. The commenters generally favored a potential audience measure that considers the viewers or

listeners of each station separately and does not aggregate those figures, except in one instance. For example, the commenters argued that if the identical television advertisement is separately broadcast on three broadcast stations, each of which reaches slightly fewer than 50,000 distinct individuals in the relevant area, no electioneering communication should result. (This example assumes the broadcast stations are not also distributed on a cable or satellite system serving the relevant area.)

Similarly, some of the commenters argued that if a cable system has 45,000 viewers in the relevant area and if it distributes an ad on several of the channels under its control—a news channel, a sports channel, and a lifestyle channel, for example—no electioneering communication could result as none of these distributions would be available to 50,000 or more persons in the relevant area. The only instance in which audience aggregation was supported by the commenters was if a television communication is simultaneously distributed by a network programming provider on multiple broadcast stations, then the combined potential audiences of all the broadcast stations along with any individuals who can receive the stations on a cable or satellite system should be analyzed to determine if 50,000 or more individuals in the relevant area can receive the communication. If so, then an electioneering communication would result, assuming the timing and content requirements are also met. The interim final rules take this approach.

These interim final rules represent an initial effort by the Commission to provide clear guidance to the Federal Communications Commission and to those who would make electioneering communications, as to how to determine whether a communication can be received by 50,000 or more persons. The Commission seeks comments on whether this approach is appropriate. Additionally, the Commission seeks comments on whether it should defer to the Federal Communications Commission to determine whether a communication can be received by 50,000 or more persons within a Congressional district or State. The Commission also seeks comments on whether the various formulae it has adopted for making these calculations are reasonable. The Commission is especially interested in comments addressing any alternative means of accomplishing the same task.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that these interim final rules do not have a significant economic impact on a substantial number of small entities. The basis of this certification is that these rules do not require any small entity to take any action or incur any cost.

List of Subjects in 11 CFR Part 100

Elections.

For the reasons set out in the preamble, subchapter A of chapter I of title 11 of the Code of Federal Regulations is amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.29 is amended by adding paragraphs (b)(6) and (b)(7) to read as follows:

§ 100.29 Electioneering communication (2 U.S.C. 437(f)).

* * * * *

(b) * * *

(6) (i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, <http://www.fcc.gov>. A link to that site is available on the Federal Election Commission's Web site, <http://www.fec.gov>. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7) (i) *Can be received by 50,000 or more persons* means—

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the

Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour—

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that—

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

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Dated: October 11, 2002.

David M. Mason,

Chairman, Federal Election Commission.

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