Agenda Document 07-92

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

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SUBJECT: Draft Final Rule and Explanation and Justification on Electioneering Communications

Attached is a draft Final Rule and Explanation and Justification implementing the U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007). This draft is based upon the rules approved by the Commission on November 20, 2007.

We request that this draft be placed on the agenda for December 14, 2007.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part [104, 114]

[Notice 2007-x]

Electioneering Communications

AGENCY: Federal Election Commission.

ACTION: Final Rule and Transmittal of Rule to Congress.

SUMMARY: The Federal Election Commission is revising its rules governing electioneering communications. These revisions implement the Supreme Court's decision in FEC v. Wisconsin Right to Life, Inc., which held that the prohibition on the use of corporate and labor organization funds for electioneering communications is unconstitutional as applied to certain types of electioneering communications. Further information is provided in the supplementary information that follows.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: The Commission is revising 11 CFR parts 104 and 114 to implement the recent U.S. Supreme Court decision in FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (June 25, 2007).

I. Background

A. Statutory and Regulatory Provisions Governing Electioneering Communications

The Bipartisan Campaign Reform Act of 2002 ("BCRA")[1] amended the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"),[2] by adding a new category of political communications, "electioneering communications," to those already governed by the Act. See 2 U.S.C. 434(f)(3). Electioneering communications ("ECs") are broadcast, cable or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i). Individuals and entities that make ECs are subject to certain reporting obligations. See 2 U.S.C. 434(f)(1) and (2). Corporations and labor organizations are prohibited from using general treasury funds to finance ECs, directly or indirectly. See 2 U.S.C. 441b(b)(2). Finally, all ECs must include a disclaimer including the name of the individual or entity who paid for the EC and a statement as to whether or not the EC was authorized by a candidate. See 2 U.S.C. 441d(a).

The Act exempts certain communications from the definition of "electioneering communication" found in 2 U.S.C. 434(f)(3)(B)(i) to (iii), and specifically authorizes the Commission to promulgate regulations exempting other communications as long as the

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1 Pub. L. 107-155, 116 Stat. 81 (2002).

2 2 U.S.C. 431 et seq.

exempted communications do not promote, support, attack or oppose ("PASO") a candidate. See 2 U.S.C. 434(f)(3)(B)(iv), citing 2 U.S.C. 431(20)(A)(iii).

The Commission promulgated regulations to implement BCRA's EC provisions. Final Rules and Explanation and Justification for Regulations on Electioneering Communications, 67 FR 65190 (Oct. 23, 2002) ("EC E&J").[3] See also 11 CFR 100.29 (defining "electioneering communication"); 104.20 (implementing EC reporting requirements); 110.11(a) (requiring disclaimers in all ECs); 114.2 (prohibiting corporations and labor organizations from making ECs); 114.10 (allowing qualified non-profit corporations ("QNCs") to make ECs); 114.14 (restricting indirect corporate and labor organization funding of ECs). Commission regulations exempt five types of communications from the definition of "electioneering communication." See 11 CFR 100.29(c).[4]

B. U.S. Supreme Court Precedent Regarding Electioneering Communications

In McConnell v. FEC, 540 U.S. 93 (2003) ("McConnell"), the U.S. Supreme Court upheld all of BCRA's EC provisions against various constitutional challenges. Id. at 194, 201-02, 207-08. Specifically, the Supreme Court held that the prohibition on the use of general treasury funds by corporations and labor organizations to pay for ECs in 2 U.S.C. 441b(b)(2) was not facially overbroad. Id. at 204-06. In Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) ("WRTL I"), the U.S. Supreme Court explained

[3] The Commission revised its rule defining "electioneering communication" in 2005, in response to Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), aff'd, 414 F.3d 76 (D.C. Cir. 2005), reh'g en banc denied, No. 04-5352 (D.C. Cir. Oct. 21, 2005). See Final Rules and Explanation and Justification for Regulations on Electioneering Communications, 70 FR 75713 (Dec. 21, 2005).

[4] The exemptions in 11 CFR 100.29(c)(1) (non-broadcast communications), 100.29(c)(2) (news stories, commentaries or editorials), 100.29(c)(3) (expenditures and independent expenditures) and 100.29(c)(4) (candidate debates or forums) are based on the express language of the Act. See 2 U.S.C. 434(f)(3)(B)(i) to (iii). Section 100.29(c)(5) exempts communications paid for by State or local candidates that do not PASO any Federal candidate.

that McConnell's upholding of section 441b(b)(2) against a facial constitutional challenge did not preclude further as-applied challenges to the corporate and labor organization funding prohibitions. See WRTL I, 546 U.S. at 411-12.

Subsequently, in FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) ("WRTL II"), the Supreme Court reviewed an as-applied challenge brought by a non-profit corporation seeking to use its own general treasury funds, which included donations it had received from other corporations, to pay for broadcast advertisements referring to Senator Feingold and Senator Kohl during the EC period before the 2004 general election, in which Senator Feingold, but not Senator Kohl, was on the ballot. The plaintiff argued that these communications were genuine issue advertisements run as part of a grassroots lobbying campaign on the issue of Senate filibusters of judicial nominations. WRTL II, 127 S. Ct. at 2660-61. The Supreme Court held that section 441b(b)(2) was unconstitutional as applied to the plaintiff's advertisements because the advertisements were not the "functional equivalent of express advocacy." Id. at 2670, 2673. A communication is the "functional equivalent of express advocacy" only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Id. at 2667. Thus, WRTL II limited the reach of the EC funding prohibitions to communications that were the "functional equivalent of express advocacy" as determined under this newly articulated test.

C. The Commission's Rulemaking After WRTL II

The Commission published a Notice of Proposed Rulemaking in August 2007 seeking public comment on alternative proposed rules implementing the WRTL II decision. See Notice of Proposed Rulemaking on Electioneering Communications, 72

FR 50261, 50262 (August 31, 2007) ("NPRM"). The Commission sought public comment generally regarding the effect of the WRTL II decision on the Commission's rules governing corporate and labor organization funding of ECs, the definition of "electioneering communication," and the rules governing reporting of ECs, as well as comment on the specific requirements of the proposed rules. The Commission also requested public comment regarding specific examples of communications that should be covered by the proposed rules and those that should not be. Id. at 50267-69. Finally, the Commission sought public comment regarding the impact, if any, of the WRTL II decision on other parts of the Commission's regulations, such as the definition of "express advocacy" in 11 CFR 100.22. Id. at 50263. The comment period ended on October 1, 2007. The Commission received twenty-seven written comments on the proposed rules. The Commission held a public hearing to discuss the proposed rules on October 17 and 18, 2007 at which fifteen witnesses testified. All written comments and hearing transcripts are available at http://www.fec.gov/law/law_rulemakings.shtml under the heading "Electioneering Communications (2007)." For purposes of this document, the terms "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

After consideration of the comments, the Commission has decided to implement the WRTL II decision by promulgating an exemption from the corporate and labor organization funding prohibitions in part 114 of the Commission's rules. Under the final rule, ECs that qualify for the WRTL II exemption may be funded with corporate and/or labor organization funds, including general treasury funds, but are subject to EC reporting and disclaimer requirements. The EC reporting requirements in 11 CFR 104.20 are also

being revised to accommodate both reporting by corporations and labor organizations for ECs permissible under the new exemption, and reporting the use of corporate and labor organization donations by individuals and unincorporated entities to pay for ECs permissible under the new exemption. The Commission has decided to leave open possible revisions to the definition of "express advocacy" in 11 CFR 100.22 and to address the issue at a later date.

II. Effective Date and Transmittal of Final Rules to Congress

The final rule is effective immediately upon publication under 5 U.S.C. 553(d)(1) and (d)(3). Typically, rules must be published not less than thirty days before their effective dates under the Administrative Procedure Act ("APA"). See 5 U.S.C. 553(d). However, a rule that "grants or recognizes an exemption or relieves a restriction" is exempted from this requirement under 5 U.S.C. 553(d)(1). This final rule grants an exemption and relieves the funding restrictions for certain communications that meet the definition of "electioneering communications." Therefore, this final rule meets this exception to the APA, is not required to be published thirty days prior to its effective date, and will therefore be effective immediately upon publication. In addition, 5 U.S.C. 553(d)(3) states that an agency may make a rule effective immediately "for good cause found and published with the rule." The U.S. Supreme Court's decision in WRTL II was issued on June 25, 2007, less than six months before the first EC periods began (thirty days before various state Presidential caucuses and primaries in January 2008). The Commission has worked diligently to promulgate the final rule in time to provide guidance to organizations as to the permissible funding and required reporting for communications broadcast within the EC periods, which began in early December 2007

for certain states. The final rule implementing the WRTL II decision should apply to all EC periods for the 2008 election cycle and it would be contrary to the public interest to delay the effective date of the final rule until some time after the first EC periods start. Therefore, the Commission has "good cause" under section 553(d)(3) to make the final rule effective immediately.

Under 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 before they take effect. The final rule that follows was transmitted to Congress on [DATE].

III. Explanation and Justification

A. Scope of the WRTL II Electioneering Communications Exemption

The NPRM included two alternative proposals implementing the WRTL II decision in the rules governing ECs. Alternative 1 incorporated the new exemption into the rules prohibiting the use of corporate and labor organization funds for ECs in 11 CFR part 114. See NPRM at 50262. This alternative required corporations and labor organizations to comply with the reporting and disclaimer requirements for all ECs that qualify for the exemption. Alternative 2 incorporated the new exemption into the definition of "electioneering communication" in 11 CFR 100.29. This alternative removed all reporting and disclaimer requirements for these communications, whether run by corporations and labor organizations, or individuals and unincorporated entities not subject to the funding prohibitions in part 114. See NPRM at 50262-63.

The commenters were divided in their support for each alternative. Commenters supporting Alternative 1 pointed out that the plaintiffs in WRTL II did not challenge the

EC reporting and disclaimer requirements, the Court did not address the issue of whether the EC reporting requirements were constitutional as applied to genuine issue advertisements, and the EC reporting requirements had been upheld against a facial challenge in McConnell. These commenters also contended that disclosure requirements are held to a less rigorous constitutional standard than funding prohibitions, and that a broader exemption would violate the Commission's statutory authority. In contrast, commenters supporting Alternative 2 argued that WRTL II held that the communications at issue were protected from any regulation (including disclosure), that the constitutionality of disclosure requirements is linked to the constitutionality of the funding restrictions on the communication, and that the costs of compliance with reporting obligations would chill speech by small nonprofit organizations. Some commenters stated their policy preference would be to adopt Alternative 2 and remove reporting requirements for communications qualifying for the WRTL II exemption, but argued that the Commission's authority was confined to creating an exemption from the funding restrictions on ECs unless the EC reporting and disclaimer provisions are successfully challenged in court.

After consideration of the comments, the Commission has decided to adopt a revised version of Alternative 1 and create an exemption solely from the prohibition on the use of corporate and labor organization funds to finance ECs. Accordingly, the revisions to 11 CFR 114.2 and new section 114.15 do not create (1) an exemption from the overall definition of "electioneering communication" in section 100.29, (2) an exemption from the EC reporting requirements in section 104.20, or (3) an exemption from the EC disclaimer requirements in section 110.11. Corporations and labor

organizations are permitted to use general treasury funds for ECs that are permissible under section 114.15, but are also required to file EC disclosure reports once they spend more than $10,000 in a calendar year on such communications. See revised 11 CFR 104.20.

The plaintiff in WRTL II challenged only BCRA's corporate and labor organization funding restrictions in section 441b(b)(2) and did not contest either the separate statutory definition of "electioneering communication" in section 434(f)(3), the separate reporting requirement in section 434(f)(1), or the separate disclaimer requirement in section 441d. See WRTL II, 127 S. Ct. at 2658-59; see also Verified Complaint for Declaratory and Injunctive Relief, ¶ 36 (July 28, 2004) in Wisconsin Right to Life, Inc. v. FEC (No. 04-1260), available at http://fecds005.fec.gov/law/litigation_related.shtml#wrtl_dc ("WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements."). Nor did any of the four separate opinions issued by the Justices in WRTL II discuss the EC reporting or disclaimer requirements. Accordingly, the Commission agrees with the commenters who argued that WRTL II's holding that the Act's EC funding restrictions are unconstitutional as applied to certain advertisements does not extend to the EC reporting or disclaimer requirements.

Because WRTL II did not address the issue, McConnell continues to be the controlling constitutional holding regarding the EC reporting and disclaimer requirements. McConnell held that the overall definition of "electioneering communication" in section 434(f)(3) is facially valid. McConnell, 540 U.S. at 193-94.

Moreover, eight Justices in McConnell voted to uphold the EC reporting requirements (including three Justices who separately voted to strike down the EC funding prohibitions). Id., 540 U.S. at 196 (Stevens, J.) and 321 (Kennedy, J.). The EC disclaimer requirements were similarly upheld as constitutional by a vote of 8-1. McConnell, 540 U.S. at 230 (Rehnquist, C.J., joined by all Justices except Thomas, J.). Thus, because McConnell has upheld the definition of ECs, as well as the reporting and disclaimer requirements, as facially valid, and because WRTL II did not address these provisions, the Commission has no mandate to revise the underlying definition of "electioneering communication" or remove the reporting and disclaimer requirements. WRTL II requires that the Commission implement an as-applied exemption to the EC funding requirements and nothing more. By adopting a revised version of Alternative 1, the Commission is acting in accordance with WRTL II.

The Commission disagrees with the comments that contended that Alternative 2 is more consistent with the Congressional intent because they believed BCRA did not contemplate reporting by corporations and labor organizations. While it is true that under BCRA, corporations and labor organizations were prohibited from funding any ECs, the statute requires every "person" (which by definition includes corporations and labor organizations) funding ECs over the reporting threshold to report. 2 U.S.C. 431(11). Moreover, incorporating the WRTL II exemption into the regulatory definition would remove certain ECs that are currently subject to reporting and disclaimer requirements when run by individuals, QNCs, or unincorporated entities from public disclosure entirely. While Congress provided for certain possible effects of judicial review of the definition of "electioneering communication" (see 2 U.S.C. 434(f)(3)(A)(ii)), Congress

did not expressly address the consequences for the reporting provisions in the event of a successful as applied challenge to the funding restrictions. Thus, the Commission cannot conclude that Congress has spoken directly to this issue.

Finally, while understanding that some nonprofit organizations and their donors have privacy interests and that some donors request to remain anonymous, the Commission disagrees with the commenters who argue the only constitutional way to protect those interests is to adopt Alternative 2, thereby allowing all ECs that qualify for the WRTL II exemption to be run without any disclaimers or reporting. First, under revised section 104.20 described below, the reporting requirements for corporations and labor organizations funding ECs that qualify for the WRTL II exemption are narrowly tailored to address many of the commenters' concerns regarding individual donor privacy. See Section D below. Second, as some commenters noted, there are other ways of protecting donor privacy. When upholding the EC reporting requirements, McConnell recognized that these privacy interests are adequately protected on a case-by-case basis for certain organizations that espouse positions such that their donors or members might be subject to reprisal or harassment. See McConnell, 540 U.S. at 198-99 (citing Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 98-99 (1982)). Organizations with significant and serious threats of reprisal or harassment may seek as-applied exemptions to the disclosure requirements under Socialist Workers through advisory opinions and court filings. See, e.g., Advisory Opinion 2003-02 (Socialist Workers Party). Therefore, the Commission believes that the carefully designed reporting requirements detailed below do not create unreasonable burdens on the privacy rights of donors to nonprofit organizations.

The Commission notes that the final rule does not affect the coordinated communications rules in section 109.21, because ECs that are permissible under section 114.15 would still meet the "electioneering communication" content standard in 11 CFR 109.21(c)(1).[5] Thus, an EC that may be paid for with corporation or labor organization funds under the new exemption in section 114.15 may nevertheless be a prohibited corporate or labor organization in-kind contribution to a candidate or political party if that EC is coordinated with a candidate or party under the coordinated communications rules. In addition, the revisions to section 114.14 clarify that individuals and unincorporated entities may receive and spend corporate or labor organization funds for ECs that are permissible under new section 114.15. However, individuals and unincorporated entities are still subject to the general prohibition on using such funds to pay for any EC that is not permissible under section 114.15.

B. Revised 11 CFR 114.2 - General Prohibition on Corporations and Labor Organizations Making Electioneering Communications

Section 114.2(b)(2)(iii) implements the funding restrictions of 2 U.S.C. 441b(b)(2) by prohibiting corporations and labor organizations from "[m]aking payments for an electioneering communication to those outside the restricted class." However, as explained in the NPRM, placing a detailed exemption based on the WRTL II decision within section 114.2(b) could be confusing and difficult for the reader to locate. See id. Therefore, in the NPRM, the Commission proposed to place the exemption in new

[5] The coordinated communication rules set forth a three-prong test: a payment prong, a content prong and a conduct prong. See 11 CFR 109.21(a). If a communication meets one of the standards under the content or conduct prong, it is deemed to have met that prong. Any communication that meets all three prongs is considered an in kind contribution to the candidate or political party with which the coordination occurs. See 11 CFR 109.21(b). Portions of the coordination regulations at 11 CFR 109.21 were held invalid in Shays v. FEC, 508 F. Supp.2d 10 (2007). However, the Commission is appealing the ruling and the current regulations remain in full force and effect pending the outcome of the proceeding.

section 114.15. None of the commenters opposed the placement of the exemption in new section 114.15.

The final rule follows the approach proposed in the NPRM by setting forth the WRTL II exemption in new section 114.15, and amending section 114.2(b) to include a cross-reference to this new section. Revised section 114.2(b) states that corporations and labor organizations are prohibited from making ECs "unless permissible under 11 CFR 114.10 or 114.15." See revised 11 CFR 114.2(b)(3) (adding the new WRTL II exemption reference to the existing reference to the QNC exemption in section 114.10).[6] The language of the final rule is slightly changed from the proposed rule to conform the cross-reference in section 114.2(b)(3) to similar revisions in other sections of part 114. See, e.g., revised 11 CFR 104.20(c)(7) and 114.14(a)(1) discussed below.

C. New 11 CFR 114.15 – Permissible Use of Corporate and Labor Organization Funds for Certain Electioneering Communications

The exemption proposed in the NPRM was substantively the same under both Alternative 1 and 2. See NPRM at 50264. Under Alternative 1, proposed section 114.15(a) set forth the general standard for determining whether the use of corporate and labor organization funds for an EC is permissible under WRTL II. Proposed section 114.15(b) included safe harbor provisions for two common types of ECs: grassroots lobbying communications and commercial and business advertisements. The NPRM explained that the safe harbors were intended to provide additional guidance as to which ECs would qualify for the general exemption and that an EC that did not qualify for the safe harbor could still come within the general exemption. See id. Finally, proposed

[6] To increase clarity and readability, the final rule also revises the title of section 114.2 to include ECs explicitly, and to renumber paragraph (b)(2)(iii) as paragraph (b)(3) with conforming changes as necessary in the text of that paragraph.

section 114.15(c) addressed reporting obligations for corporations and labor organizations that choose to use general treasury funds to pay for ECs permissible under section 114.15. See id.

Some commenters favored the proposed rule's approach of including both a general exemption and one or more safe harbors. A few commenters suggested that the final rule should include not only safe harbors, but also "capture nets or red flags" that would indicate when an EC would generally be considered to be the functional equivalent of express advocacy and therefore not qualify for the general exemption. Other commenters were concerned that the safe harbors would become the de facto rule and groups would feel chilled from making ECs that do not qualify for one of the safe harbors without additional guidance in the general rule. Some commenters thought that the safe harbor provisions were too narrow to be useful. Some commenters also suggested that the Commission include a list of those factors that the Commission would consider in determining whether an EC qualifies for the exemption.

After consideration of the comments, the Commission has decided to modify the NPRM's proposed approach by adopting a rule that both incorporates a safe harbor for certain types of EC and sets forth a multi-step analysis for determining whether ECs that do not qualify for the safe harbor nevertheless qualify for the general exemption. First, the final rule includes a revised articulation of the general exemption in new section 114.15(a). Second, the Commission is broadening the safe harbor to provide more detailed guidance as to which ECs qualify for the exemption under the safe harbor. See 11 CFR 114.15(b). Third, the final rule contains a provision explaining the Commission's rules of interpretation for determining if an EC that does not qualify for

the safe harbor in section 114.15(b) is nonetheless permissible under the general exemption in section 114.15(a). See 11 CFR 114.15(c). The final rule also includes three additional paragraphs. First, new paragraph (d) explains what contextual information the Commission may consider in its analysis of ECs under the general exemption and safe harbor. Second, new paragraph (e) indicates that a list of examples of ECs analyzed under the general exemption and safe harbor will be placed on the Commission's web site. Lastly, new paragraph (f) states that corporations and labor organizations funding ECs that are permissible under section 114.15(a) are subject to certain reporting requirements under 11 CFR 104.20.

1. 11 CFR 114.15(a) – Articulation of the WRTL II Exemption

In the NPRM, proposed section 114.15(a) provided that corporations and labor organizations may make an EC (as defined in 11 CFR 100.29) without violating the prohibition in section 114.2(b)(3), "if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." See NPRM at 50264. Many commenters agreed with this proposed implementation of the WRTL II test as a general exemption. However, some commenters urged the Commission to use the exact words used in the WRTL II decision and phrase the general exemption so that corporations or labor organizations may make an EC "unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." These commenters argued that the NPRM's formulation of the standard shifted the burden of proving whether an EC qualifies for the exemption from the Commission to the speaker making the EC.

While the Commission disagrees with those commenters who argued that the effect of the NPRM's language was to shift the burden of proof, it appears that the formulation proposed in the NPRM could be misunderstood. Therefore, in the final rule, paragraph (a) tracks the WRTL II decision's language: "Corporations or labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." See 11 CFR 114.15(a).

2. 11 CFR 114.15(b) – Safe Harbor Provision

As proposed in the NPRM, the final rule supplements the general exemption in section 114.15(a) with a safe harbor provision in section 114.15(b). Satisfying the safe harbor provision demonstrates that the EC is susceptible of a reasonable interpretation other than as an appeal to vote for or against a Federal candidate. Accordingly, an EC that qualifies for the safe harbor would be deemed to be permissible under section 114.15(a) and may be paid for with corporate or labor organization funds. However, an EC that does not qualify for the safe harbor may still come within the general exemption under the analysis described below in section 114.15(c).

The NPRM's proposed safe harbor provisions for grassroots lobbying communications and commercial and business advertisements each contained four prongs, all of which would have had to be met for an EC to qualify for the proposed safe harbor. The first two prongs of both proposed safe harbors would have focused on the content of the communication, while the last two prongs of both safe harbors would have

focused on the presence of "indicia of express advocacy" as described in the WRTL II decision. See NPRM at 50265, 50269.

In order to simplify the final rule, the Commission has adopted one safe harbor provision with three prongs. An EC qualifies for the safe harbor if it (1) does not mention "any election, candidacy, political party, opposing candidate, or voting by the general public;" (2) does not take a position on the candidate's "character, qualifications, or fitness for office;" and (3) either "focuses on a legislative, executive or judicial matter or issue" or "proposes a commercial transaction." See 11 CFR 114.15(b)(1)-(3). An EC will qualify for the safe harbor only if it satisfies all three prongs. The safe harbor provision in the final rule applies both to ECs that would have been considered "grassroots lobbying communications" and to ECs that would have been considered "commercial and business advertisements" under the rule proposed in the NPRM.

a. 11 CFR 114.15(b)(1) and (2) – Mentioning an Election or Candidacy and Taking a Position on Character or Qualifications

The Supreme Court determined that WRTL's advertisements were not the "functional equivalent of express advocacy" because the communications' content was "consistent with that of a genuine issue ad" and the communications lacked "indicia of express advocacy." WRTL II, 127 S. Ct. at 2667. The Court found that WRTL's communications lacked "indicia of express advocacy" because they did not mention "an election, candidacy, political party, or challenger," and the communications did not "take a position on a candidate's character, qualifications, or fitness for office." Id. The first two prongs of the safe harbor in the final rule incorporate the factors the Court used to determine whether a communication lacks "indicia of express advocacy." In order to

satisfy the safe harbor's first prong, the EC must not "mention any election, candidacy, political party, opposing candidate, or voting by the general public." See 11 CFR 114.15(b)(1). To satisfy the safe harbor's second prong, the EC must not "take a position on any candidate or officeholder's character, qualifications, or fitness for office." See 11 CFR 114.15(b)(2).

The NPRM included these same provisions as the last two prongs of the proposed safe harbors for grassroots lobbying communications and commercial and business advertisements. See NPRM at 50266-67, 50270. Some commenters believed that these provisions adequately limited the scope of the proposed rule. A few commenters urged the Commission to refrain from adding anything to the list of references in the WRTL II decision, such as the reference to "voting by the general public" proposed in the NPRM. However, the final rule retains this addition, which applies to ECs that include tag lines that suggest voting by the general public in elections, such as "Vote. It's important to your future," but does not apply to other references to voting such as "ask Congressman Smith to support the Voting Rights Bill."

The NPRM sought public comment on whether certain examples constitute "mentioning" elections, candidacy, political parties, or opposing candidates, or take a position on a candidate's character, qualifications or fitness for office sufficient to transform an EC into the functional equivalent of express advocacy or to remove them from the proposed new safe harbors. See NPRM at 50266-67. Some commenters noted that many of the examples were actually references to officeholder status or to an officeholder's conduct of his or her official duties and should not be construed as mentioning a "candidacy" or taking a position on "character." Other commenters

believed that everything in the proposed list of references that would constitute indicia of express advocacy should be allowed in an EC so long as the EC focuses on issue advocacy. Some commenters argued that issue advocacy groups should be free to run ECs that comment on officeholders' character and fitness for office in order to hold those officeholders accountable. Other commenters argued that condemning the record or past actions of a candidate or officeholder should automatically disqualify an EC from the exemption.

The following is a non-exclusive list of examples that will be considered to "mention" an election, candidacy, political party, opposing candidate or voting by the general public under section 114.15(b)(1), thereby causing an EC to fail to satisfy the first prong of the safe harbor. The Commission notes that because these examples only apply to the safe harbor provisions and to one factor in the rules of interpretation for the general exemption, use of these words or phrases will not necessarily disqualify any EC from the general exemption in section 114.15(a).

- Specific references to an election date such as "Support gun rights this November 5" or references to election-related themes, such as pictures of a ballot or voting booth.
- General references to voting such as "Remember to vote to protect the environment."
- Specific references to the named candidate's office or candidacy, such as "Bob Jones is running for Senate."
- References to political parties by official names, such as "Democrats," or by nicknames or proxy descriptions such as "GOP."

- Comparative references to incumbent and opposing candidate, such as "Bob Smith supports our troops; Bill Jones cut veteran's benefits by 20%."
- Implied references to incumbents such as "It's time to take out the trash, select real change with Bob Smith" or "This November, we can do better."

The Commission agrees with the many commenters who argued that a reference to the past voting record of the officeholder or candidate on a particular issue does not by itself constitute taking a position on a candidate's or officeholder's character, qualifications, or fitness for office. Therefore, in determining whether an EC takes a position on the candidate's or officeholder's "character, qualifications, or fitness for office" under section 114.15(b)(2) the Commission will examine the entirety of the content of the EC. The Commission is providing examples of ECs below (see section 114.15(e)) that illustrate this analysis.

b. 11 CFR 114.15(b)(3) – Lobbying Communications or Commercial Advertisements

The third prong of the final rule's safe harbor combines the first two prongs of the NPRM's proposed grassroots lobbying communications safe harbor and the commercial and business advertisements safe harbor. In order to satisfy the third prong, an EC must meet either section 114.15(b)(3)(i) describing certain lobbying communications or section 114.15(b)(3)(ii) describing certain commercial advertisements.

In addition to finding an absence of "indicia of express advocacy," the WRTL II decision concluded that WRTL's communications contained content "consistent with that of a genuine issue ad" because they "focus on a legislative issue, take a position on the issue, exhort the public to adopt the position, and urge the public to contact public

officials with respect to the matter." See WRTL, 127 S. Ct. at 2667. Based on the Court's analysis, the NPRM's proposed safe harbor for grassroots lobbying communications covered any EC that "exclusively discusses a pending legislative or executive matter or issue" and "urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue." See NPRM at 50265-66.

Many commenters argued that the first prong of the safe harbor would be too narrow in several respects, including: (1) it required that the EC discuss the issue "exclusively;" (2) it required that the issue be "pending;" and (3) it was limited to ECs discussing "legislative or executive" issues. Some commenters also argued that the second prong of the safe harbor would be too narrow because it would be limited to officeholders and would not cover ECs that urged the public to contact the candidate simply to ascertain the candidate's position on a particular issue. Other commenters supported the proposed safe harbor's prongs as written and urged the Commission to limit the scope of the safe harbor. These commenters noted that a safe harbor should be narrower than the general exemption.

In response to some of these comments, the final rule incorporates certain modifications in the third prong of the safe harbor. Section 114.15(b)(3)(i) covers any EC that "focuses on a legislative, executive or judicial matter or issue" and either "urges a candidate to take a particular position or action with respect to the matter or issue" or "urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue." See 11 CFR 114.15(b)(3)(i)(A)-(B). This formulation adopts the

WRTL II decision's language that describes issue advertisements as ECs that "focus" on an issue rather than the NPRM's more narrow language that limits the safe harbor to ECs that "exclusively discuss" the issue. Thus, under this prong, an EC may qualify for the safe harbor even if it mentions other issues in addition to focusing on matters or issues listed in the safe harbor. In addition, the Commission agrees with the commenters that the safe harbor should cover not only legislative and executive issues as proposed in the NPRM, but also judicial matters. Furthermore, the final rule does not, as did the proposed rule, limit the subject matter of the EC to "pending" issues or matters. Instead, the new rule covers ECs that focus on any legislative, executive or judicial issue regardless of whether it is pending before one or more branches of government. This revision allows organizations to address, for example, issues that they believe should be placed on the legislative, executive, or judicial agenda in the future.

Finally, the Commission agrees with those commenters who pointed out that issue advocacy groups may urge a candidate who is not a sitting officeholder to take a certain position on a legislative, executive, or judicial issue, not because they want to advocate the candidate's election or defeat, but because they want the candidate to commit to taking action on a certain issue if the candidate is elected. Therefore, unlike the rule proposed in the NPRM, the final rule includes not only references to sitting officeholders but also references to any Federal candidates. However, in order to qualify for the safe harbor, the EC must either urge the candidates themselves to take a position, or urge the public to take a position and contact the candidates. General appeals to the public to "educate themselves" or to contact an organization to learn more about the issue will not satisfy this prong of the safe harbor. Appeals to the public to donate to the organization to

help spread the word about the issue will not alone satisfy this prong of the safe harbor. However, such appeals to learn more or contribute will not disqualify from the safe harbor a communication which also includes exhortations to candidates or to the public to contact candidates. In addition, an appeal to learn about issues or to raise awareness (such as asking for donations to "help spread the word") may qualify as a "call to action or other appeal" under 11 CFR 114.15(c)(2)(iii) (see below).

The second part of the safe harbor's third prong in section 114.15(b)(3)(ii) is also based upon the safe harbor for commercial and business advertisements proposed in the NPRM, but includes slightly revised language. The NPRM proposed a safe harbor for any EC that "exclusively advertises a Federal candidate's or officeholder's business or professional practice or any other product or service" and that "is made in the ordinary course of business of the entity paying for the communication." See NPRM at 50270. Many commenters supported the creation of a commercial and business advertisements safe harbor as consistent with the WRTL II decision. However, some commenters supporting the safe harbor argued that the proposed provision was too narrow to be useful to the business community. Specifically, a few commenters argued that the Commission should remove the "ordinary course of business" prong in the proposed rule. Another commenter criticized the proposed safe harbor as too ambiguous and difficult for advertisers to apply when deciding whether a particular EC may be run.

Other commenters urged the Commission not to adopt any additional safe harbors besides one for grassroots lobbying communications as specifically addressed in the WRTL II decision. However, the language of the Supreme Court's general test for determining whether an EC is exempt from the EC funding restrictions is not limited just

to grassroots lobbying advertisements but covers any EC that is susceptible of a reasonable interpretation other than as an appeal to vote. As explained in the NPRM, many ECs could reasonably be interpreted as having a non-electoral, business or commercial purpose. Therefore, the Commission believes that explaining how the WRTL II exemption applies to commercial and business advertisements is helpful to provide adequate guidance to those seeking to comply with the EC provisions.

Accordingly, the last part of the safe harbor's third prong applies to an EC that "proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event." See 11 CFR 114.15(b)(3)(ii). The final rule substitutes "proposes a commercial transaction" for the "in the ordinary course of business" requirement proposed in the NPRM. As several commenters pointed out, determining whether an EC is made in the ordinary course of business would require the Commission to look beyond the four corners of the EC and probe into the outside business affairs of the speaker. By contrast, the new "proposes a commercial transaction" language appropriately focuses the Commission's inquiry on the objective meaning of the content of the EC.

This prong of the safe harbor will be satisfied regardless of whether the product or service is provided by a business owned or operated by, or employing, the candidate referred to in the EC.[7] Both ECs advertising a Federal candidate's appearance to promote a business or other commercial product or service, and ECs in which the Federal candidate is referred to as the subject of a book, video, or movie will be eligible for the safe harbor. The final rule clarifies that an advertisement urging the public to attend a

[7] The Commission notes that these communications may nevertheless be subject to the Commission's coordination regulations. 11 C.F.R. 109.21

film exhibition or other commercial event for a fee is also eligible for the safe harbor. By contrast, advertisements for non-commercial events, such as for charities or political events, do not meet this prong and do not qualify for the safe harbor, although they may qualify for the general exemption.

The Commission is providing examples of ECs that illustrate the analysis of this third prong of the safe harbor provision below (see section 114.15(e)).

3. 11 CFR 114.15(c) – Rules of Interpretation for Electioneering Communications That Do Not Qualify for the Safe Harbor

The Commission has added new section 114.15(c) to explain how the Commission will analyze ECs that do not qualify for the safe harbor, given that the safe harbor does not include every EC that is permissible under section 114.15(a). Specifically, paragraph (c) of the final rule states that if an EC does not qualify for the safe harbor in section 114.15(b), the Commission will consider: "whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." As with the three prongs of the safe harbor, this analysis is drawn from the WRTL II decision's analysis of "indicia of express advocacy" and the content of WRTL's communications.

Sections 114.15(c)(1) and (c)(2) describe in more detail the two factors that the Commission will consider in determining whether an EC qualifies for the general exemption in section 114.15(a). The Commission will consider both factors in all cases

and will balance the findings under both parts of the test to determine whether an EC has no reasonable interpretation other than as an appeal to vote and is therefore not permissible under section 114.15(a).

For example, even if the Commission found that an EC includes no "indicia of express advocacy," it could still determine that the EC does not have content that would support a determination the EC has an interpretation other than as an appeal to vote, and conclude overall that the EC is not permissible under section 114.15(a) because, on balance, the EC has no reasonable interpretation other than as an appeal to vote. Conversely, even if the Commission found that an EC does include "indicia of express advocacy," it could determine that the EC nevertheless has content that would support a determination that a EC has an interpretation other than a call to electoral action, and conclude overall that the EC is permissible under section 114.15(a) because, on balance, that interpretation is reasonable despite the presence of indicia of express advocacy. The Commission could also find no indicia of express advocacy in an EC, decide that there is content in the EC to support an interpretation of the EC as something other than a call to electoral action, but conclude overall that the EC is not permissible under section 114.15(a) because, on balance, that interpretation is not reasonable.

a. 11 CFR 114.15(c)(1) – Indicia of Express Advocacy

Section 114.15(c)(1) states that under the first factor of this analysis, an EC "includes indicia of express advocacy" if it "mentions any election, candidacy, political party, opposing candidate, or voting by the general public" or "takes a position on any candidate's or officeholder's character, qualifications, or fitness for office." See 11 CFR 114.15(c)(1)(i)-(ii). This list is taken from the WRTL II decision, and is a combination of the two lists contained in the first two prongs of the safe harbor in section 114.15(b).

The Commission agrees with the many commenters who argued that mentioning an election or opposing candidate, referring to a candidate's qualifications, or commenting on a sitting officeholder's character should not by itself disqualify an EC from the general exemption in section 114.15(a). Thus, although an EC that includes any one of the references on the list is automatically disqualified from the safe harbor, such an EC may still qualify for the general exemption under the analysis in section 114.15(c).

b. 11 CFR 114.15(c)(2) – Content of Communications

The second factor in paragraph (c)(2) states: "Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes" three types of content. See 11 CFR 114.15(c)(2). This list of the three types of content is non-exhaustive and the Commission may also consider other types of content to determine whether an EC has some other interpretation besides urging electoral action.

The first type of content that supports a determination that an EC has an interpretation other than as an appeal to vote is content that "focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to

contact the candidate about the issue." See 11 CFR 114.15(c)(2)(i). This provision is broader than the issue advocacy provision of the safe harbor in section 114.15(b) in two ways. First, it considers whether the EC focuses on a "public policy issue" rather than, as required by the safe harbor, a "legislative, executive, or judicial matter." Thus, an EC's content may support a determination that it has an interpretation other than as an appeal to vote if it discusses any matter of public importance even if the matter is not a "legislative, executive, or judicial matter," but is instead, for example, a State action or an international event. Second, this provision considers whether an EC urges viewers to contact the candidate about the issue, rather than, as required by the safe harbor, urge viewers "to adopt a particular position" and contact the candidate about the issue.

Paragraph (c)(2)(ii) sets out the second type of content that supports a determination that an EC has an interpretation other than as an appeal to vote. This consists of content that "proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event." This provision is identical to the commercial transaction provision of the safe harbor in section 114.15(b)(3)(ii). However, the Commission might have to analyze an EC that satisfies the commercial transaction provision of the safe harbor under the rules of interpretation in section 114.15(c), because the EC included references to candidacies or elections that preclude qualification for the safe harbor. For example, a commercial advertisement for a book with the title "50 Reasons Not to Vote for Congressman Smith" would not satisfy the first prong of the safe harbor in section 114.15(b)(1). Therefore, the Commission would analyze such an advertisement under section 114.15(c)(2)(ii).

Section 114.15(c)(2)(iii) is a more general provision intended to apply to other types of ECs not covered by the public policy issue and commercial transaction provisions. The final rule states that an EC has content supporting a determination of an interpretation other than as an appeal to vote if it "includes a call to action or other appeal that interpreted in conjunction with the rest of the communication as urging action other than voting for or against or contributing to a clearly identified Federal candidate or political party." See 11 CFR 114.15(c)(2)(iii). The Commission will look at the entire content of the EC to determine whether an EC includes such a "call to action."

This third provision was added, in part, to respond to commenters who urged the Commission to create a safe harbor provision for other categories of ECs, such as public service announcements. See NPRM at 50270-71. These commenters argued that public service announcements and charity advertisements can easily be interpreted as something other than an appeal to vote even though they simply provide information to the public without any specific "call to action." For example, an EC that urges the public to sign up for a preventative screening for a particular type of cancer and includes a Federal candidate endorsing the organization's work on cancer research, would likely be deemed to have content that supports a determination that the EC has an interpretation other than as an appeal to vote.[8] Another common example is an EC that urges viewers to "find out more" or visit a website for "more information." In analyzing this type of EC, the Commission will look to the actual content of the EC itself to determine whether the "find out more" call to action can be interpreted as something other than a call to vote for or against a Federal candidate. Other possible "calls to action" under this provision are

[8] The Commission notes that these communications may nevertheless be subject to the Commission's coordination regulations. 11 C.F.R. 109.21.

requests to donate money to a particular charitable organization or disaster relief fund. However, the final rule excludes from this provision requests to make contributions to any clearly identified Federal candidate or political party. Finally, as discussed above, the Commission will analyze ECs promoting charity events under this provision.

c. 11 CFR 114.15(c)(3) – Interpreting the Communication

Several commenters argued that in analyzing whether an EC qualifies for the WRTL exemption, the Commission should be guided by the principle, articulated by the Supreme Court in WRTL II, that "[w]here the First Amendment is implicated, the tie goes to the speaker." See WRTL II, 127 S. Ct. at 2669. New section 114.15(c)(3) incorporates the principle that "the tie goes to the speaker" by providing that "in interpreting a communication under paragraph (a), any doubt will be resolved in favor of permitting the communication." See 11 CFR 114.15(c)(3). The Commission intends to follow this principle in determining whether, on balance, the EC is susceptible of a reasonable interpretation other than as an appeal to vote and therefore is permissible under section 114.15(a).

4. 11 CFR 114.15(d) – Information Permissibly Considered

As the NPRM explained, the exemption in section 114.15(a) is objective, focusing on the substance of the EC rather than "amorphous considerations of intent and effect." WRTL II, 127 S. Ct. at 2666. In determining whether a particular EC is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate, the Commission may consider "basic background information that may be necessary to put an ad in context." Id. at 2669.[9] According to the WRTL II

[9] The Commission must also consider certain basic facts such as the timing and targeting of the communication in order to determine whether a communication satisfies the basic definition of EC under

decision, this information could include whether a communication "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future." Id. (internal citation omitted). See also NPRM at 50264. However, the Court cautioned that inquiry into such relevant background should not require burdensome or broad inquiries with extensive discovery. See WRTL II, 127 S. Ct. at 2669.

Many commenters urged the Commission to clarify in the rule the extent to which the Commission would consider contextual information outside the actual text and visuals of the EC itself when applying the WRTL II exemption. The final rule in new section 114.15 includes a new paragraph (d), which limits the contextual information the Commission will consider when analyzing ECs under the WRTL II exemption. Some commenters urged the Commission to include in the rule text a list of the types of information that the Commission would consider in evaluating ECs, such as legislative calendars and news stories, and a list of the types of contextual information that the Commission would not consider in its analysis, such as timing of the EC, prior communications or outside activities of the speaker, and the EC's actual effect on elections. Instead of attempting to create exhaustive lists that would fit every circumstance, the final rule sets forth general principles that will guide the Commission's consideration of "external facts" beyond the four corners of the EC.

Specifically, section 114.15(d) states that when evaluating an EC under the general exemption or the safe harbor, the Commission may consider only the EC itself and "basic background information that may be necessary to put the communication in

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BCRA and section 100.29(a) (i.e., whether the communication was broadcast within the last thirty or sixty days before a Federal election within the district of the referenced Federal candidate).

context and which can be established with minimal, if any, discovery." See 11 CFR 114.15(d). The rule provides the following examples of such basic background information: whether a named individual is a candidate or whether an EC describes a public policy issue. The Commission will also consider similar background facts about the public policy issue, commercial product or service, or other topics discussed in the EC, so long as these facts may be established with minimal discovery.

5. 11 CFR 114.15(e) – Examples of Communications

In the NPRM, the Commission included a number of examples of communications that would, and would not, qualify for the proposed grassroots lobbying communications safe harbor. See NPRM at 50267-69. The Commission sought public comment on whether the final rule should include such examples in the E&J or the rule text itself. See NPRM at 50267. The Commission also asked whether there were additional examples of communications that should be included in the list. The commenters that discussed the question of where examples of communications should be published all favored inclusion of those examples in the E&J instead of the rule text.

After consideration of the comments, the Commission has decided to include examples of communications in the E&J instead of the rule. In addition, section 114.15(e) includes a statement to direct readers of the regulation to the Commission's web site on which the Commission will place the examples discussed in this E&J. The Commission intends to update this web page to include examples from court cases, advisory opinions and enforcement matters that apply the WRTL II exemption in the future.

The following examples are illustrative only and are not intended to create a requirement for any particular words or phrases to be included before an EC will be permissible under the WRTL II exemption. These examples are drawn from past court cases and Commission advisory opinions and enforcement matters.

a. Examples of Communications that Qualify for the Safe Harbor in 11 CFR 114.15(b)

Example 1

> LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . .
>
> COUPLE: Yes, yes . . . we're listening.
>
> OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca . . .
>
> VOICE-OVER: Sometimes it's just not fair to delay an important decision.
>
> But in Washington, it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.
>
> It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
>
> Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
>
> Visit: BeFair.org
>
> Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.[10]

[10] "Loan," Wisconsin Right to Life, Inc. v. FEC, 466 F. Supp. 2d 195, 198 n.4 (D.D.C. 2006). The Supreme Court held that this advertisement was not the "functional equivalent of express advocacy. WRTL II, .127 S. Ct at 2670.

All commenters that discussed the examples agreed with the NPRM's assessment that this example would qualify for the proposed grassroots lobbying communications safe harbor. See NPRM at 50267. This example also qualifies for the final rule's safe harbor. First, the communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)). Second, the communication does not take a position on the character, qualifications, or fitness for office of either Senator Feingold or Senator Kohl (section 114.15(b)(2)), or any other candidate. Third, this communication satisfies section 114.15(b)(3)(i) because it focuses on the legislative matter of Senate filibuster votes on judicial nominees, and urges the public to oppose the filibuster and to contact Senators Feingold and Kohl to take a position with respect to the filibuster issue. Therefore, this example qualifies for the safe harbor and is permissible under section 114.15(a).

Example 2

> Our country stands at the crossroads – at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges – by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.
>
> Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.[11]

[11] "Crossroads," Verified Complaint for Declaratory and Injunctive Relief, Exhibit A (Apr. 3, 2006), Civic Christian League of Maine v. FEC, 443 F. Supp. 2d 81 (D.D.C. 2006) (No. 06-0614), available at http://www.fec.gov/law/litigation/christian_civic_league_complaint.pdf. The Commission filed a joint

All commenters that discussed the examples agreed with the NPRM's statement that this example would qualify for the proposed grassroots lobbying communications safe harbor. See NPRM at 50268. This example also qualifies for the final rule's safe harbor. First, the communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public under the first prong in section 114.15(b)(1). The communication also satisfies the second prong in section 114.15(b)(2) because it criticizes the Senators' past voting records only as part of a broader discussion of particular legislation, not as an attack on their personal character, qualifications, or fitness for office. Finally, this example satisfies the third prong of the safe harbor in section 114.15(b)(3)(i) because it focuses on the legislative issue of the legal definition of marriage, and urges the public to support a constitutional amendment, and to contact Senators Snowe and Collins to urge them to support the upcoming vote on the Marriage Protection Amendment. Therefore, this example satisfies all three prongs of the safe harbor and is an EC permissible under section 114.15(a).

Example 3:

> [VOICE OVER SPEAKING WHILE SHOWING VARIOUS FOOTAGE OF DEALERSHIP]: Cadillac. Style. luxury. Visit Joe Smith Cadillac in Waukesha. Where we uphold the Cadillac legacy of style, luxury and performance everyday. At Joe Smith Cadillac, you'll find a huge selection of Cadillacs and receive award-winning service every time you bring your Cadillac in. Whether you're in the market for a classic sedan or SUV, you can be sure Joe Smith Cadillac has it. And while shopping for your Cadillac, a single detail won't be missed. We know the importance of taking care of our customers. That's why you'll always find incredible service specials to help to maintain your Cadillac. When it comes to care for your Cadillac, you shouldn't settle for anything less than the best.

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motion asking the Court to hold this advertisement meets the WRTL II exemption. See "Joint Motion" (July, 13, 2007), Civic Christian League of Maine v. FEC, (No. 06-0614).

We're Wisconsin's all-time sales leader and we want to be your Cadillac dealership.

[VOICE OVER SPEAKING WHILE VIDEO OF INSIDE DEALERSHIP ZOOMS IN ON FRAMED PICTURE ON WALL OF JOE SMITH]: Stop into Joe Smith Cadillac, on Highway 18 in Waukesha, and see what Cadillac style really is all about.[12]

The NPRM provided this communication as an example that would qualify for the proposed commercial and business advertisements safe harbor. The few commenters who addressed this example agreed that it would qualify for the proposed safe harbor. Assuming that Joe Smith is a Federal candidate, this example also qualifies for the final rule's safe harbor. First, the communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)). Second, this communication does not take a position on the character, qualifications, or fitness for office of the candidate, Joe Smith (section 114.15(b)(2)). Third, the communication "proposes a commercial transaction" by advertising the car dealership owned by candidate Joe Smith and inviting viewers to purchase cars at that business (section 114.15(b)(3)(ii)). The external facts that Joe Smith is a candidate and that he owns this business are permissible background facts that the Commission may consider in its analysis of this communication pursuant to section 114.15(d). These facts may be established with minimal, if any, discovery. Thus, this example qualifies for the safe harbor and is permissible under section 114.15(a).[13]

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[12] This example is drawn from one of the advertisements in Advisory Opinion ("AO") 2004-31 (Darrow), Attachment A at 3 (Sept. 10, 2004), in which the Commission found that under the particular facts of this advisory opinion, the advertisements did not meet the definition of "electioneering communication" because the use of the name "Russ Darrow" referred to a business or another individual (in this case, the candidate's son) who was not a Federal candidate.

[13] The Commission notes that these communications may nevertheless be subject to the Commission's coordination regulations. 11 C.F.R. 109.21

b. Examples of Communications that Do Not Qualify for the Safe Harbor in 11 CFR 114.15(b), but are Permissible Under 11 CFR 114.15(a)

Example 1:

> It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.[14]

The NPRM asked for public comment as to whether this example should qualify for the proposed grassroots lobbying safe harbor or the general exemption. See NPRM at 50268. Most commenters generally agreed that this example does not qualify for the proposed safe harbor because it does not discuss a pending legislative issue (proposed first prong) and criticizes Representative Ganske's character and fitness for office (proposed fourth prong).[15] However, the commenters disagreed as to whether this example nonetheless qualifies for the general exemption proposed in the NPRM. Some commenters argued that because the communication focuses on the issue of air pollution and related legislative matters, it can reasonably be interpreted as seeking support for certain environmental issues. These commenters thought that the example should qualify for the general exemption as a "genuine issue advertisement," even though it criticizes the Representative Ganske's past position on environmental issues. Other commenters contended that there was no reasonable interpretation of this communication other than as

[14] See McConnell v. FEC, 251 F. Supp. 2d 176, 876 (D.D.C. 2003) (Leon, J.), available at http://www.fec.gov/pages/bcra/mem_opinion_leon.pdf.

[15] At least one commenter argued that this example should meet the proposed safe harbor because it does not include any critique of the candidate's character, qualifications or fitness for office. This commenter argued that the information about contributions from corporations merely provides background information to the viewer about the past positions of the candidate on environmental issues, not an attempt to impugn character.

an appeal to vote against Representative Ganske because it includes a personal attack on Representative Ganske's character.

The Commission has determined that this example does not qualify for the safe harbor in section 114.15(b), but is permissible under the general exemption in section 114.15(a). The example satisfies the first prong of the safe harbor because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)). Under the second prong, the communication's criticism of Representative Ganske's past voting record in the context of a broader discussion of the issue of environmental protection does not constitute taking a position on Representative Ganske's character, qualifications, or fitness for office (section 114.15(b)(2)). However, the communication's statement that Representative Ganske voted for particular environmental bills supported by corporations who gave contributions to Representative Ganske is an attack on his character and fitness for office because, without reference to any external facts, the statement suggests that his past votes are a sign of corruption. Therefore, the example fails the second prong in section 114.15(b)(2) and does not qualify for the safe harbor.

The example must then be analyzed under the general exemption in section 114.15(a), using the two-factor approach described in section 114.15(c). As discussed above, this communication takes a position on Representative Ganske's character and fitness for office. Therefore, the communication includes "indicia of express advocacy" under the second provision in the first factor (section 114.15(c)(1)(ii)). Under section 114.15(c)(2)(i), the communication includes content that would support a determination that the communication has an interpretation other than as an appeal to vote against

Representative Ganske because its content focuses on the public policy matter of environmental regulation of air pollutants and urges the public to call Representative Ganske about the issue and tell him to take action on the issue in the future. Finally, the Commission must balance both the presence of indicia of express advocacy under the first factor and the finding of content supporting another interpretation under the second factor to determine whether the communication is susceptible of no reasonable interpretation other than as an appeal to vote against Representative Ganske. Keeping in mind that any doubt is to be resolved in favor of finding the communication permissible under section 114.15(c)(3), the Commission determines that this communication is permissible under section 114.15(a) because it is susceptible of a reasonable interpretation other than as an appeal to vote for or against a Federal candidate, despite the presence of indicia of express advocacy.

Example 2:

> Announcer: Hello, I'm Sally Smith. Most of us think of heart disease as a problem that mostly affects men. But today, heart disease is one of the leading causes of death among American women. It doesn't have to stay that way. Lower cholesterol, daily exercise, and regular visits to your doctor can help you fight back. So have heart, America, and together we can reduce the risk of heart disease.
>
> Voice Over: This message brought to you by DISH Network.[16]

This example was not included in the NPRM for public comment. Assuming that Sally Smith is a Federal candidate, the Commission concludes that this example does not qualify for the safe harbor in section 114.15(b), but is permissible under the general exemption in section 114.15(a). The example satisfies the first two prongs of the safe

[16] This example is drawn from the sample advertisement in AO 2006-10 (EchoStar), Exhibit A (June 30, 2006). Under the particular facts of that advisory opinion, these advertisements were not analyzed as ECs because the requestor stated these advertisements would not be broadcast during the EC time period.

harbor because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)) and it does not take a position on Sally Smith's character, qualifications, or fitness for office (section 114.15(b)(2)). However, the communication does not satisfy the third prong of the safe harbor because it does not focus on a "legislative, executive or judicial matter" (section 114.15(b)(3)(i)) or "propose[] a commercial transaction" (section 114.15(b)(3)(ii)). Thus, this example does not qualify for the safe harbor.

Nonetheless, this communication is permissible under the two-factor analysis for the general exemption in section 114.15(a). First, the communication does not include indicia of express advocacy because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(c)(1)(i)), or take a position on Sally Smith's character, qualifications, or fitness for office, (section 114.15(c)(1)(ii)). Nor does the example include any other content that would constitute indicia of express advocacy. Second, this example contains content that would support a determination that the communication has an interpretation other than as an appeal to vote for or against Sally Smith under the third provision in section 114.15(c)(2)(iii). The communication's "call to action" is an appeal to viewers to lower their cholesterol, participate in daily exercise, and visit their doctors regularly. The rest of the communication is focused on heart disease and the risk of heart disease for women. In conjunction with the rest of the communication, the call to action can be interpreted as urging action separate from electoral activity. Balancing both factors, this communication is permissible under section 114.15(a) because it is susceptible of a

reasonable interpretation other than as an appeal to vote for or against a Federal candidate.

c. Examples of Communications that are Not Permissible under 11 CFR 114.15(a)

Example 1:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.[17]

All commenters that discussed the examples agreed with the NPRM's statement that this example would not qualify for the proposed grassroots lobbying communications safe harbor. See NPRM at 50268. The commenters were also in agreement that this example has "no reasonable interpretation other than as an appeal to vote for or against a specific candidate" and should not qualify for the general exemption. Some commenters noted that the Supreme Court in McConnell held that this advertisement was the functional equivalent of express advocacy and that it should serve as a model for the types of character attacks that will not be permissible under the final rule.

The Commission has determined that this example does not qualify for the safe harbor and is not permissible under the final rule's general exemption. Although the example meets the first prong of the safe harbor because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1), this communication attacks Bill Yellowtail's character by referring to alleged actions he took against his spouse, as well as his supposed delinquent child-

[17] "Bill Yellowtail," McConnell v. FEC, 540 U.S. 93, 193 n.78 (2003). The Court noted that this advertisement was "clearly intended to influence the election." Id.

support payments, and his past felony conviction. Such statements clearly constitute taking a position on the candidate's character, qualifications, or fitness for office under the second prong (section 114.15(b)(2)). Therefore, the example does not qualify for the safe harbor.

Nor is the example permissible under the two-factor analysis for the general exemption in section 114.15(a). Under the first factor, the communication includes indicia of express advocacy because it attacks the candidate's character (section 114.15(c)(1)(ii)). This example also does not have any of the types of content supporting a determination that the communication has an interpretation other than as an appeal to vote against the Bill Yellowtail. First, although a past vote "against child support enforcement" is mentioned, the communication does not focus on any public policy issue under section 114.15(c)(2)(i). Instead, the communication focuses on the candidate's own personal and legal history. The communication does not propose any commercial transaction under section 114.15(c)(2)(ii). Finally, the communication appears to include a "call to action": "Call Bill Yellowtail. Tell him to support family values." However, when examined in conjunction with the rest of the communication that focuses on personal character attacks against Bill Yellowtail, this vague appeal does not provide an interpretation other than urging the public to vote against the candidate.

Balancing both the presence of indicia of express advocacy and the lack of content supporting another interpretation, this communication is <u>not</u> permissible under section 114.15(a) because it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a Federal candidate.

<u>Example 2:</u>

> What's important to America's families? [middle-aged man, interview style]: "My pension is very important because it will provide a significant amount of my income when I retire." And where do the candidates stand? Congressman Charlie Bass voted to make it easier for corporations to convert employee pension funds to other uses. Arnie Arnesen supports the "Golden Trust Fund" legislation that would preserve pension funds for retirees. When it comes to your pension, there is a difference. Call or visit our website to find out more.[18]

The NPRM requested public comment as to whether this example should qualify for the proposed grassroots lobbying safe harbor or the general exemption. See NPRM at 50269. The commenters generally agreed that this example did not qualify for the proposed safe harbor because it mentioned the Representative Bass' candidacy and his opposing candidate in the election, Arnie Arnesen (proposed third prong). However, the commenters disagreed as to whether this example qualified for the proposed general exemption. Some commenters argued that this communication was an issue advertisement focusing on pension protection and merely contrasted the candidates' different positions on that issue. These commenters argued that the example can be reasonably interpreted as providing information about the pensions issue and the candidates' positions on that issue. In contrast, most commenters thought that this example is the "functional equivalent of express advocacy" and does not qualify for the general exemption. These commenters noted that the discussion of candidacies in the communication made it unreasonable to interpret the communication in any way other than as urging the viewer to vote for one candidate over the other.

The Commission has determined that this example does not qualify for the safe harbor and is not permissible under the final rule's general exemption. The example fails the first prong of the safe harbor in section 114.15(b)(1) because it specifically discusses

[18] Adapted from McConnell v. FEC, 251 F. Supp. 2d 176, 918 (D.D.C. 2003) (Leon, J.), available at http://www.fec.gov/pages/bcra/mem_opinion_leon.pdf.

"the candidates," including Representative Bass and his opponent, Arnie Arnesen. The fact that Arnie Arnesen is running against Representative Bass is the type of external background fact that the Commission may consider in its analysis under section 114.15(d) because it requires minimal, if any, discovery. Therefore, the communication does not qualify for the safe harbor.

The Commission then applies the two-factor analysis in section 114.15(c) to determine if the communication is permissible under the general example in section 114.15(a). Under the first factor, the communication includes indicia of express advocacy because, as discussed above, it mentions a candidacy and an opposing candidate (section 114.15(c)(1)(i)). Moreover, this example does not have any of the types of content listed in the second factor that support an interpretation other than as an appeal to vote against Representative Bass. Although the communication discusses the public policy issue of pension funds generally, and the "Golden Trust Fund" legislation specifically, it does not urge the candidate(s) to take a particular position on that issue or urge the public to contact the candidate(s) about that issue (section 114.15(c)(2)(i)). Instead, the communication urges the public to "Call or visit our website to find out more." This type of call to action is analyzed under the third provision in section 114.15(c)(2)(iii).[19] The Commission may not consider the content of the external website referenced in the communication, but must examine the communication's appeal to the public to "find out more" in conjunction with the rest of the communication. See 11 CFR 114.15(d). The communication characterizes Representative Bass' position on the issue negatively and Arnie Arnesen's position on the issue positively. Moreover, it describes

[19] The communication does not have content supporting another interpretation under the second provision in section 114.15(c)(2)(ii) because it does not propose any commercial transaction.

these two positions as "where the candidates stand" (emphasis added) rather than as where an officeholder stands. Thus, in conjunction with the rest of the communication, the call to action here does not constitute content that supports an interpretation other than as an appeal to vote. Considering both factors, this communication is not permissible under section 114.15(a) because it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a Federal candidate.

6. 11 CFR 114.15(f) – Corporate and Labor Organization Reporting Requirement

New section 114.15(f) states that corporations and labor organizations that make electioneering communications permissible under section 114.15(a) aggregating in excess of $10,000 in a calendar year must file statements according to the EC reporting requirements in 11 CFR 104.20. The final rule adopts the NPRM's proposed language, which was not discussed by any of the commenters. Details regarding the reporting obligations for these entities are discussed below.[20]

D. Revisions to the Reporting Requirements for Electioneering Communications

The Act and current Commission regulations require any person that has made ECs aggregating in excess of $10,000 in a calendar year to file a disclosure statement. See 2 U.S.C. 434(f)(1); 11 CFR 104.20(b). Generally, these statements must disclose the identities of the persons making the EC, the cost of the EC, the clearly identified

[20] In addition to complying with the reporting obligations under section 104.20, all ECs that are permissible under section 114.15, must contain a disclaimer. See 2 U.S.C. 441d and 11 CFR 110.11(a)(4). The disclaimer must include the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, as well as a statement that the communication is not authorized by any candidate or candidate's committee. See 11 CFR 110.11(b)(3). The disclaimer must be clear and conspicuous and must include both audio and written statements identifying the person responsible for the communication. See 11 CFR 110.11(c)(1) and (c)(4)(i)-(iii).

candidate appearing in the EC and the election in which he or she is a candidate, and the disclosure date. See 2 U.S.C. 434(f)(2)(A)-(D); 11 CFR 104.20(c)(1)-(6). Persons making ECs must also disclose the names and addresses of each person who donated an amount aggregating $1,000 or more during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. See 2 U.S.C. 434(f)(2)(F); 11 CFR 104.20(c)(8). However, the Act and Commission regulations provide the option that persons making ECs may create a segregated bank account for funding ECs in order to limit reporting to the donors to that account. See 2 U.S.C. 434(f)(2)(E); 11 CFR 104.20(c)(7). The segregated bank account may only include funds contributed by individuals who are U.S. citizens or nationals, or permanent residents. Id. If a person does not create a segregated bank account and funds ECs from its general account, that person must disclose all donors of over $1,000 to the entity during the current and preceding calendar year. See 2 U.S.C. 434(f)(2)(F); 11 CFR 104.20(c)(8). Moreover, persons that do not use a segregated bank account must be able to demonstrate through a reasonable accounting method that no corporate or labor organization's funds were used to pay any portion of an EC. See 11 CFR 114.14(d)(1).

Alternative 1, proposed in the NPRM, would have required corporations and labor organizations making ECs that are permissible under proposed section 114.15 to comply with the same reporting requirements as other entities making ECs. Thus, under Alternative 1, corporations and labor organizations would have been required to disclose the names and addresses of each person, including corporations and labor organizations, who donated an amount aggregating $1,000 or more during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. In addition,

the proposed regulations would have allowed any person making an EC permissible under section 114.15, including corporations and labor organizations, to establish a segregated bank account to accept funds for that purpose.

All commenters who addressed disclosure of ECs stated that corporations and labor organizations should not be required to report the sources of funds that made up their general treasury funds. However, commenters disagreed on what specific EC reporting requirements should apply to corporations and labor organizations.

Some commenters proposed that disclosure by corporations and labor organizations should be limited to funds that are either designated for ECs or received in response to solicitations that specifically request donations for making ECs. Another commenter suggested that the current reporting rules for individuals, unincorporated entities, and qualified nonprofit corporations making ECs also be applied to corporations making ECs. This commenter's proposal would allow a corporation or labor organization to establish an account pursuant to 11 CFR 114.14(d)(2)(i) and only report the identities of those persons who contributed to that account. Without such an account, however, a corporation or labor organization would have to report the identities of everyone who donated $1,000 or more to that corporation or labor organization. If a corporation or labor organization receives no donations, and it paid for an EC out of its general treasury funds, it would only have to report that fact.

One commenter argued that the concepts of "donor" and "donate" should exclude membership dues, investment income, or other commercial or business income. This commenter also suggested that use of general treasury money by a labor organization, i.e. funds derived from union dues, should not require a labor organization to report

individual union members as donors, and that labor organizations should only have to report the source of funds as general treasury funds. The same commenter further asserted that segregated bank accounts are not a meaningful alternative for labor organizations, and argued that disclosing the sources of their general treasury funds would impose a heavy burden on labor organizations.

Finally, one commenter argued that disclosure by nonprofit corporations should be limited to those amounts listed on line 1 of the corporation's IRS Form 990, which includes "[c]ontributions, gifts, grants, and similar amounts received" by an organization exempt from income tax, because nonprofit corporations have a wide variety of sources of income, and unlimited disclosure would create a heavy burden for them. This commenter also argued that more extensive reporting requirements would far exceed all other reporting requirements that currently apply to nonprofit organizations, such as reporting to the Internal Revenue Service. This commenter also suggested that corporations and labor organizations should only be required to report grants and donations that are designated to support ECs.

As discussed in detail below, after consideration of the comments, the Commission has decided to depart from the rules proposed in the NPRM and instead to require corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs made by that corporation or labor organization pursuant to 11 CFR 114.15. The Commission emphasizes that all the other reporting requirements that apply to any person making ECs, which are set forth at 2 U.S.C. 434(f)(2)(A)-(E) and 11 CFR 104.20(c)(1)-(6), apply also to corporations and labor organizations making ECs

permissible under section 114.15. Thus, like all persons making ECs that cost, in aggregate, more than $10,000, corporations and labor organizations must also disclose their identities as the persons making the ECs, the costs of the ECs, the clearly identified candidates appearing in the communications and the elections in which the candidates are participating, and the disclosure dates.

1. Revised 104.20(c)(8) and New 11 CFR 104.20(c)(9) - Reporting the Use of Corporate and Labor Organization Funds to Pay for Permissible Electioneering Communications

A for-profit corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services. These investors and customers do not necessarily support the corporation's issue advocacy. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's issue advocacy.

Corporations and labor organizations thus differ materially from those entities, such as QNCs, that are required to disclose the identities of donors, including individuals, whose funds are used for ECs. First, individuals and organizations typically donate funds to a QNC because they support the QNC's goals. Thus, any funds the QNC spends on issue advocacy advertisements will generally be funds it has received from those who are sympathetic to the positions it advocates on those issues.

Furthermore, witnesses at the Commission's hearing testified that the effort necessary to identify those persons who provided funds totaling $1,000 or more to a

corporation or labor organization would be very costly and require an inordinate amount of effort. Indeed, one witness noted that labor organizations would have to disclose more persons to the Commission under the ECs rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act.

For these reasons, the Commission has determined that the policy underlying the disclosure provisions of BCRA is properly met by requiring corporations and labor organizations to disclose and report only those persons whose donations are intended to fund ECs. Thus, new section 104.20(c)(9) does not require corporations and labor organizations, with the exception of QNCs, to report the identities of everyone who provides them with funds for any reason. Instead, new section 104.20(c)(9) requires a labor organization or a corporation that is not a QNC to disclose the identities only of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs pursuant to 11 CFR 114.15, during the reporting period. This period begins on the first day of the preceding calendar year and runs through the disclosure date. Donations made for the purpose of furthering an EC include funds received in response to solicitations specifically requesting funds to pay for ECs as well as funds specifically designated for ECs by the donor.[21]

In the Commission's judgment, requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering ECs appropriately provides the public with information about those persons who actually support the message conveyed by the ECs without imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers,

[21] The "for the purpose of furthering" standard in 11 CFR 104.20(c)(9) is drawn from the reporting requirements that apply to independent expenditures made by persons other than political committees. See 2 U.S.C. 434(c)(2)(C), 11 CFR 109.10(e)(1)(vi).

investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs.

The Commission is also making a conforming amendment to 11 CFR 104.20(c)(8), which sets forth reporting requirements for ECs that were not paid for exclusively from a segregated bank account, by inserting the phrase "and were not made by a corporation or labor organization pursuant to 11 CFR 114.15," after the phrase "described in paragraph (c)(7) of this section." This modification clarifies that the pre-existing reporting requirements that apply to individuals, QNCs, and unincorporated organizations making ECs do not apply to corporations and organizations making ECs permissible under new section 114.15.

2. Revised 11 CFR 104.20(c)(7) and 114.14(d)(2) – Using Segregated Bank Accounts for Electioneering Communications

Previously, section 104.20(c)(7) only addressed segregated bank accounts containing funds solely from individuals who are "United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20)." Following the approach proposed in the NPRM, the Commission has decided to divide section 104.20(c)(7) into paragraphs (c)(7)(i) and (c)(7)(ii). New paragraph (c)(7)(i) is substantially the same as former paragraph (c)(7) and sets forth the reporting requirements that apply to a segregated bank account used by individuals, unincorporated associations, and QNCs to pay for any ECs that do not come under new section 114.15. Corporations and labor organizations continue to be prohibited from donating to such an account.

In contrast, new paragraph (c)(7)(ii) sets forth the reporting requirements for a segregated bank account to be used to pay for ECs that are permissible under 11 CFR 114.15. Because this second type of account is used exclusively to pay for ECs permissible under new section 114.15, paragraph (c)(7)(ii) provides that such an account may contain corporate and labor organization funds. The reporting requirements that apply to a person setting up a segregated bank account to pay for ECs that are permissible under section 114.15 are the same as they are under previous paragraph (c)(7) and new paragraph (c)(7)(i), that is, such a person must report the identity of every person who donates an amount aggregating $1,000 or more to the person making the disbursement during the preceding calendar year.

Additionally, as proposed in the NPRM, the Commission is making conforming changes to 11 CFR 114.14(d)(2), which applies to the use of segregated bank accounts by persons that receive funds from corporations or labor organizations. Specifically, consistent with the changes to section 104.20(c)(7), the Commission is dividing section 114.14(d)(2) into two paragraphs. Paragraph (d)(2)(i) allows any person, other than corporations and labor organizations, wishing to make ECs permissible under 11 CFR 114.15 to establish a segregated bank account for that exclusive purpose. Such an account would report only donations made to the account for the purpose of making ECs, pursuant to 11 CFR 104.20(c)(7)(ii). Consistent with new section 104.20(c)(7)(ii), an account set up under section 114.14(d)(2)(i) may contain corporate and labor organization funds. The Commission notes that QNCs, like all corporations, are excluded from setting up a segregated account under paragraph (d)(2)(i) because they are, by definition, prohibited from accepting any corporate or labor organization funds.

Revised paragraph (d)(2)(ii) is substantially the same as former paragraph (d)(2) and continues to allow persons other than corporations (except for QNCs) and labor organizations to establish a segregated bank account to be used exclusively to pay for ECs that do not come under the new exception in section 114.15.

The Commission believes that if organizations that are not corporations or labor organizations intend to use corporate or labor organization funds to make some ECs that comply with the new WRTL II exemption, and intend to make other ECs that do not, or might not, come within the exemption, they would be well-advised to establish two separate bank accounts to ensure that corporate and labor organization funds are only accepted and used to fund exempt ECs. Please note, however, that separate bank accounts are not mandatory because organizations need only show that they used a reasonable accounting method to separate corporate and labor organization funds under 11 CFR 114.14(d)(1).

E. Conforming Revisions to Other Commission Regulations

1. Revisions to 11 CFR 114.4 – Communications Beyond the Restricted Class

Paragraph 114.4(c) sets out the types of communications that corporations and labor organizations may make either to the general public or to all employees and members. Such communications include registration and voting communications, official registration and voting information, voting records, and voting guides. The Commission is adding new paragraph (c)(8) to state that any corporation or labor organization may make ECs to the general public that fall within the new exemption in section 11 CFR 114.15. Paragraph (c)(8) also makes clear that QNCs may make ECs

regardless of whether they are permissible under 11 CFR 114.15. In addition, the Commission is making a conforming change to section 114.4(c)(1), which lists the paragraphs that describe communications that corporations and labor organizations may make to the general public, by adding a reference to paragraph (c)(8).

2. Revisions to 11 CFR 114.14 – Further Restrictions on the Use of Corporate and Labor Organization Funds for Electioneering Communications

Former section 114.14 prohibited corporations and labor organizations from providing general treasury funds to pay for any ECs whatsoever. The Commission's revisions to this section limit this prohibition to ECs that do not come within the new WRTL II exemption in section 114.15, consistent with the proposed changes to the general prohibition on the use of corporate and labor organizations funds in section 114.2.

Former paragraphs (a)(1) and (a)(2) of this section contained a general ban on corporations and labor organizations providing funds to any other person for the purpose of financing an EC. Likewise, former paragraphs (b)(1) and (b)(2) of this section prohibited persons that accept funds from corporations and labor organizations from using those funds to pay for ECs, or from providing those same funds to any other person for the purpose of paying for an EC. Former paragraph (d)(1) of this section requires any person that receives funds from corporations and labor organizations, and that makes ECs, to demonstrate by a reasonable accounting method that no corporate or labor organization funds were used to pay for the EC.

Paragraphs (a)(1), (b)(1) and (2), and (d)(1) are being modified by adding the phrase "that is not permissible under 11 CFR 114.15" after the word "communication" in

each paragraph. Paragraph (a)(2) is being modified by adding the word "such" after the phrase "pay for." These changes implement WRTL II by limiting the prohibition on the use of corporate and labor organization funds to those ECs that are the functional equivalent of express advocacy, and therefore are not permissible under new 11 CFR 114.15. Paragraph (d)(1) is being further revised by adding the phrase "other than corporations and labor organizations" after the word "Persons." The Commission is making this change to avoid any suggestion that corporations or labor organizations may make ECs that do not come within the new exception articulated in WRTL II.

IV. The Definition of Express Advocacy in 11 CFR 100.22

The NPRM sought public comment on whether WRTL II also provided guidance as to the scope of other provisions in the Act, such as the definition of "express advocacy" in 11 CFR 100.22. See NPRM at 50263. Specifically, the NPRM asked whether WRTL II required the Commission to revise or repeal any portion of the two-part definition in section 100.22. The commenters were divided as to what, if any, guidance WRTL II decision provided the Commission with respect to the proper scope of the "express advocacy" definition in section 100.22. The Commission has decided to leave open the issue of the impact, if any, of WRTL II on the definition of "express advocacy" and to address the question at a later time.

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

The Commission certifies that the attached final rule does not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any small entities affected should not feel a significant economic impact from the final rule. Overall, the final rule relieves a funding restriction that the

prior rules placed on corporations and labor organizations and therefore have a positive economic impact for any affected small entities. The final rule allows small entities to engage in activity they were previously prohibited from funding with corporation or labor organization funding. Moreover, this activity (making and funding ECs) is entirely voluntary, and any reporting obligations are only triggered based on entities choosing to engage in this activity above a threshold of $10,000 per calendar year. The reporting obligations are also limited to donations made for the purpose of furthering electioneering communications and should not have a significant economic impact on any reporting entity.

In addition, there may be few "small entities" that are affected by this final rule. The Commission's revisions affect for-profit corporations, labor organizations, individuals and some non-profit organizations. Individuals and labor organizations are not "small entities" under 5 U.S.C. 601(6). Most, if not all, for-profit corporations that are affected by the proposed rule are not "small businesses" under 5 U.S.C. 601(3). Large national and state-wide non-profit organizations that might produce electioneering communications are not "small organizations" under 5 U.S.C. 601(4) because they are not independently owned and operated and they are dominant in their field.

List of Subjects

11 CFR Part 104

Campaign funds, political committees and parties, reporting and recordkeeping requirements.

11 CFR Part 114

Business and industry, Elections, Labor.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter A of Chapter 1 of Title 11 of the Code of Federal Regulations as follows:

PART 104 – REPORTS BY POLITICAL COMMITEES AND OTHER PERSONS (2 U.S.C. 434)

1. The authority citation for part 104 continues to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, 441a, and 36 U.S.C. 510.

2. In section 104.20, paragraphs (c)(7) and (c)(8) are revised and paragraph (c)(9) is added to read as follows:

§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).

* * * * *

(c) * * *

(7) (i) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications not permissible under 11 CFR 114.15, consisting of funds provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or

(ii) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications permissible under 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(9) If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

* * * * *

PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY

3. The authority citation for part 114 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.

4. In section 114.2, the section heading and paragraph (b)(2) are revised and paragraph (b)(3) is added to read as follows:

§ 114.2 Prohibitions on contributions, expenditures and electioneering communications.

* * * * *

(b) * * *

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D; or

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party.

(3) Corporations and labor organizations are prohibited from making payments for an electioneering communication to those outside the restricted class unless permissible under 11 CFR 114.10 or 114.15. However, this paragraph (b)(3) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(i) The committee is not a political committee as defined in 11 CFR 100.5;

(ii) The committee incorporated for liability purposes only;

(iii) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(iv) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

* * * * *

5. In section 114.4, paragraph (c)(1) is amended by adding the phrase "and (c)(8)" after "(c)(5)," and paragraph (c)(8) is added as follows:

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

* * * * *

(c) * * *

(8) Electioneering communications. Any corporation or labor organization may make electioneering communications to the general public that are permissible under 11 CFR 114.15. Qualified nonprofit corporations, as defined in 11 CFR 114.10(c), may make electioneering communications in accordance with 11 CFR 114.10(d).

* * * * *

6. In section 114.14, paragraphs (a), (b) and (d) are revised 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 that is not permissible under 11 CFR 114.15, 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 such 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 that is not permissible under 11 CFR 114.15; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication that is not permissible under 11 CFR 114.15.

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(d) (1) Persons other than corporations and labor organizations 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 any electioneering communication that is not permissible under 11 CFR 114.15.

(2) (i) Any person other than a corporation or labor organization who wishes to pay for electioneering communications permissible under 11 CFR 114.15 may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided for the purpose of paying for such electioneering communications as described in 11 CFR part 104. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication permissible under 11 CFR 114.15 shall be required to only report the names and addresses of those persons 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.

(ii) Any person, other than corporations that are not qualified nonprofit corporations and labor organizations, who wishes to pay for electioneering communications not permissible under 11 CFR 114.15 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. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering

communication shall be required to only report the names and addresses of those persons 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.

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7. Section 114.15 is added to read as follows:

§ 114.15 Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) Permissible electioneering communications. Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) Safe harbor. An electioneering communication is permissible under paragraph (a) of this section if it:

(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

(c) Rules of interpretation. If an electioneering communication does not qualify for the safe harbor in paragraph (b), the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or

(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:

(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or

(iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

(3) In interpreting a communication under paragraph (a), any doubt will be resolved in favor of permitting the communication.

(d) Information permissibly considered. In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.

(e) Examples of communications. A list of examples derived from prior Commission or judicial actions of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) is available on the Commission's Web site, http://www.fec.gov.

(f) Reporting requirement. Corporations and labor organizations that make electioneering communications under paragraph (a) aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.20.

Robert D. Lenhard
Chairman
Federal Election Commission

DATED _____
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