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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 11-20-07

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Ron B. Katwan *RBK*
Assistant General Counsel

Margaret G. Perl *MGP*
Attorney

Anthony T. Buckley *ATB*
Attorney

SUBJECT: Draft Final Rule on Electioneering Communications

Attached are two drafts of a final rule implementing the U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

The substance of the draft final rule implementing a *WRTL* exemption is the same in both drafts. However, Draft A creates an exemption from the definition of "electioneering communication" in 11 CFR 100.29 and does not include any changes to the electioneering communications reporting requirements. Draft B creates an exemption from the corporate and labor organization funding restrictions on electioneering communications in 11 CFR 114.15 and includes changes to the electioneering communications reporting requirements in 11 CFR 104.20 and conforming changes to other sections of part 114. Some Commissioners are concerned about the judicial notice provision in both drafts, and this provision may be revised at the open session.

We request that these drafts be placed on the agenda for November 20, 2007.

Attachments
Drafts A and B

1 **DRAFT A:**

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

5 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

6 1. The authority citation for part 100 would continue to read as follows:

7 **Authority:** 2 U.S.C. 431, 434 AND 438(a)(8).

8 2. Section 100.29 would be revised by adding new paragraph (d) to read as
9 follows:

10 **§ 100.29 Electioneering Communication (2 U.S.C. 434(f)(3)).**

11 * * * * *

12 (d) Notwithstanding paragraph (a), a communication is not an electioneering
13 communication unless the communication is susceptible of no reasonable
14 interpretation other than as an appeal to vote for or against a clearly identified
15 Federal candidate. In making this determination, the Commission will consider
16 whether the communication includes any indicia of express advocacy and whether
17 the communication has a reasonable interpretation other than as an appeal to vote
18 for or against a clearly identified Federal candidate.

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

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

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

- 1 (2) A communication has a reasonable interpretation other than as an appeal
2 to vote for or against a clearly identified Federal candidate if it:
- 3 (i) Focuses on a public policy issue and either urges a candidate to
4 take a position on the issue or urges the public to contact the
5 candidate about the issue; or
- 6 (ii) Proposes a commercial transaction, such as purchase of a book,
7 video or other product or service, or attendance (for a fee) at a film
8 exhibition or other event; or
- 9 (iii) Includes a call to action or other appeal reasonably interpreted in
10 conjunction with the rest of the communication as urging action
11 other than voting for or against or contributing to a clearly
12 identified Federal candidate or political party.
- 13 (3) Rules of Interpretation. In interpreting a communication under this
14 paragraph:
- 15 (i) The Commission may only consider external facts that would
16 qualify for judicial notice, such as whether a named individual is a
17 candidate for office or whether a communication describes a public
18 policy issue.
- 19 (ii) Ambiguities are to be resolved in favor of the permissibility of an
20 electioneering communication under this paragraph.
- 21 (4) Examples of Communications. A list of examples of communications that
22 have been determined to be permissible and of communications that have

DRAFT A

1

been determined not to be permissible under this paragraph is available on

2

the Commission's Web site, <http://www.fec.gov>.

3

1 **DRAFT B:**

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

5 **PART 104 – REPORTS BY POLITICAL COMMITTEES AND OTHER PERSONS**
6 **(2 U.S.C. 434)**

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

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

10
11 2. In section 104.20, paragraphs (c)(7) and (c)(8) are revised and paragraph
12 (c)(9) is added to read as follows:

13 **§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).**

14 * * * * *

15 (c) * * *

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

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

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

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

19 * * * * *

20 **PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY**

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

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

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

3 **§ 114.2 Prohibitions on contributions, expenditures and electioneering**
4 **communications.**

5 * * * * *

6 (b) * * *

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

- 9 (i) Making expenditures as defined in 11 CFR part 100, subpart D; or
10 (ii) Making expenditures with respect to a Federal election (as defined
11 in 11 CFR 114.1(a)), for communications to those outside the
12 restricted class that expressly advocate the election or defeat of one
13 or more clearly identified candidate(s) or the candidates of a
14 clearly identified political party.

15 (3) Corporations and labor organizations are prohibited from making
16 payments for an electioneering communication to those outside the
17 restricted class unless permissible under 11 CFR 114.10 or 114.15.

18 However, this paragraph (b)(3) shall not apply to State party committees
19 and State candidate committees that incorporate under 26 U.S.C.

20 527(e)(1), provided that:

- 21 (i) The committee is not a political committee as defined in 11 CFR
22 100.5;
23 (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) 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

1 electioneering communication that is not permissible under 11 CFR
2 114.15, to any other person.

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

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

11 (1) Use those funds to pay for any electioneering communication that is not
12 permissible under 11 CFR 114.15; or

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

16 * * * * *

17 (d) (1) Persons other than corporations and labor organizations who receive funds
18 from a corporation or a labor organization that do not meet the exceptions
19 of paragraph (c) of this section, must be able to demonstrate through a
20 reasonable accounting method that no such funds were used to pay any
21 portion of any electioneering communication that is not permissible under
22 11 CFR 114.15.

1 names and addresses of those persons who donated or otherwise
2 provided an amount aggregating \$1,000 or more to the segregated
3 bank account, aggregating since the first day of the preceding
4 calendar year.

5 * * * * *

6 7. Section 114.15 is added to read as follows:

7 **§ 114.15 Permissible use of corporate and labor organization funds for certain**
8 **electioneering communications.**

9 (a) Permissible electioneering communications. Corporations and labor organizations
10 may make an electioneering communication, as defined in 11 CFR 100.29, to
11 those outside the restricted class unless the communication is susceptible of no
12 reasonable interpretation other than as an appeal to vote for or against a clearly
13 identified Federal candidate. In making this determination, the Commission will
14 consider whether the communication includes any indicia of express advocacy
15 and whether the communication has a reasonable interpretation other than as an
16 appeal to vote for or against a clearly identified Federal candidate.

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

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

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

22 (2) A communication has a reasonable interpretation other than as an appeal
23 to vote for or against a clearly identified Federal candidate if it:

- 1 (i) Focuses on a public policy issue and either urges a candidate to
2 take a position on the issue or urges the public to contact the
3 candidate about the issue; or
- 4 (ii) Proposes a commercial transaction, such as purchase of a book,
5 video or other product or service, or attendance (for a fee) at a film
6 exhibition or other event; or
- 7 (iii) Includes a call to action or other appeal reasonably interpreted in
8 conjunction with the rest of the communication as urging action
9 other than voting for or against or contributing to a clearly
10 identified Federal candidate or political party.
- 11 (b) Rules of Interpretation. In interpreting a communication under paragraph (a):
- 12 (1) The Commission may only consider external facts that would qualify for
13 judicial notice, such as whether a named individual is a candidate for
14 office or whether a communication describes a public policy issue.
- 15 (2) Ambiguities are to be resolved in favor of the permissibility of an
16 electioneering communication under paragraph (a).
- 17 (c) Examples of Communications. A list of examples of communications that have
18 been determined to be permissible and of communications that have been
19 determined not to be permissible under paragraph (a) is available on the
20 Commission's Web site, <http://www.fec.gov>.
- 21 (d) Reporting requirement. Corporations and labor organizations that make
22 electioneering communications under paragraph (a) aggregating in excess of
23 \$10,000 in a calendar year shall file statements as required by 11 CFR 104.20.