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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2006 MAR -7 P 12:11

March 7, 2006

MEMORANDUM

AGENDA ITEM
For Meeting of: 03-09-06

TO: The Commission

THROUGH: Robert J. Costa *RC*
Acting Staff Director

FROM: Lawrence H. Norton *LH*
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Cheryl A.F. Hemsley *CAH*
Attorney

SUBMITTED LATE

SUBJECT: Notice of Availability - Petition for Rulemaking on an Exception for Certain "Grassroots Lobbying" Communications from the Definition of "Electioneering Communication"

On February 16, 2006, the Commission received a Petition for Rulemaking ("Petition") from the AFL-CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the National Education Association, and OMB Watch. The Petition asks the Commission to revise its regulations by exempting certain communications consisting of "grassroots lobbying" that otherwise meet the definition of an "electioneering communication" under the Federal Election Campaign Act of 1971, as amended. See Attachment 1.

The Office of General Counsel has examined the Petition and determined that it meets the requirements of 11 CFR 200.2(b). Therefore, we have drafted the attached Notice of Availability ("Notice") seeking comment on whether the Commission should initiate a rulemaking on the exception proposed in the Petition. See Attachment 2. The Notice will be published in the *Federal Register* pursuant to 11 CFR 200.3(a)(1).

In keeping with the Commission's usual procedure, the Notice does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.

The Office of the General Counsel requests that this draft be placed on the agenda for the March 9, 2006, open meeting.

Attachments

FEDERAL ELECTION COMMISSION

PETITION FOR RULEMAKING: ELECTIONEERING COMMUNICATION
AND GRASSROOTS LOBBYING EXEMPTION

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COUNSEL

Introduction

Pursuant to 11 C.F.R. Part 200, and in light of *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. _____, 126 S. Ct. 1016 (2006), petitioners respectfully urge the Commission to initiate a rulemaking proceeding in order to promulgate an exemption for at least some forms of grassroots lobbying from the Federal Election Campaign Act's (the Act) proscription of union- and corporate-financed "electioneering communications." Because the relevant periods of time when the Act's proscription attaches are already upon us, we request that the Commission issue a notice of availability, establishing a period of 10 days for public comments and, as promptly as possible thereafter, issue a notice of proposed rulemaking.

Previous Rulemaking

The term "electioneering communication" includes a television, radio or satellite broadcast that refers to a clearly identified federal candidate either 60 days before a general election or 30 days before a primary election or nominating caucus or convention, and can be received by 50,000 persons within the candidate's electorate. 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. §§ 100.29(a)(1-3). In adding this concept to the Act and imposing related funding proscriptions and disclosure requirements in the Bipartisan Campaign Reform Act (BCRA),

Congress both recognized several explicit exemptions and delegated authority to the Commission to promulgate others by regulation in order to "ensure the appropriate implementation" of the new requirements, with the sole caveat that the exemption could not include a communication "described in" 2 U.S.C. § 431(20)(A)(iii), that is, one that "promotes or supports" or "attacks or opposes" (PASO) a "candidate." See 2 U.S.C. § 434(f)(3)(B)(iv).

In its original rulemaking proceeding to implement this aspect of BCRA, the Commission issued a notice of proposed rulemaking (NPRM) that presented four alternative formulations to exempt lobbying-type communications from the definition of "electioneering communication." See NPRM, "Electioneering Communications," 67 Fed. Reg. 51131, 51145 (Aug. 7, 2002). The Commission received comments and held a public hearing on the overall proposal, including these alternative exemptions. Nonetheless, the Commission declined at that time to adopt any lobbying communications exemptions. Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65201-02 (Oct. 23, 2002).

McCconnell v. Federal Election Commission

The following year, the Supreme Court rejected facial First Amendment overbreadth and under-inclusiveness challenges to the "electioneering communications" provisions of BCRA. See *McCconnell v. Federal Election Commission*, 540 U.S. 93, 189-93, 203-11 (2003). In doing so, however, the Court provided only limited guidance as to what specific kinds of advertisements falling within the statutory definition could be constitutionally proscribed. Eschewing a detailed analysis of that record, the Court observed that "the precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute

between the parties and among the judges on the District Court.... Nevertheless, the vast majority of ads clearly had such a purpose." *Id.* at 206. The Court held that the plaintiffs' overbreadth argument "fails to the extent that the issue ads" covered by the proscription are "the functional equivalent of express advocacy," that is, "intended to influence the voters' decisions and hav[ing] that effect, *id.* at 207, and the Court similarly stated that non-express advocacy ads are "functionally identical" to express advocacy ads if they are "used to advocate the election or defeat of a clearly identified candidate," *id.* at 126 (echoing the original formulation in *Buckley v. Valeo*, see 424 U.S. 1, 80 (1976) (footnote omitted)), and "are specifically intended to affect election results...." 540 U.S. at 127.

The Court referred to very few specific ads or classes of ads in the record in support of these conclusions. In referring generically to ads that "although...not urg[ing] the viewer to vote for or against a candidate in so many words, ...are no less clearly intended to influence the election," *id.* at 193 (footnote omitted), the Court illustrated them with a "striking example," namely, a 1996 Montana ad that compared a congressional candidate's alleged assault of his wife and failure to pay child support with his legislative voting record. *See id.* at 193 n. 78. The Court also attributed a "vote-for" message to ads that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *See id.* at 127 (footnote omitted). But the Court did not directly discuss either other kinds of ads or any other particular advertisements in the record. *McConnell* suggests, then, that a particular "electioneering communication" is the "functional equivalent of express advocacy," and therefore constitutionally subject to regulation, if it both pertains to an individual's candidacy or an election and seeks to persuade a voter to make a particular voting decision with respect to that candidate.

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Wisconsin Right to Life, Inc. v. Federal Election Commission

In 2004, in the absence of a Commission-crafted exemption for lobbying communications that are neither "the functional equivalent of express advocacy" nor otherwise subject to the PASO exception, the Commission defended a constitutional challenge brought by Wisconsin Right to Life, Inc. (WRTL) to protect its right to broadcast advertisements calling upon Wisconsin's two Senators to oppose filibusters of President Bush's judicial nominees. *See Wisconsin Right to Life, Inc. v. Federal Election Commission*, 126 S. Ct. 1016 (2006). The Commission contended that the *McConnell* decision foreclosed all as-applied challenges to the "electioneering communication" proscription. *See* Brief for the Appellee at 18-25.

In a unanimous decision issued just six days after oral argument, the Court rejected this reading of *McConnell*, explaining that the decision "did not purport to resolve future as-applied challenges." *Id.* at 1017. The Court then remanded the case to the district court to consider WRTL's as-applied challenge on its merits because it was "not clear" that the district court had intended to do so in its decision under review. *Id.* at 1018. Notably, in its brief discussion of the background of the case, the Court noted:

Although the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here.

Id.

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Grounds for a Regulatory Exemption

Petitioners respectfully urge the Commission to exercise its statutory authority noted in the *WRTL* decision in order to define by regulation a class of lobbying communications that are exempt from the "electioneering communications" definition. There are compelling reasons for the Commission to do so.

First, although the Court's decision in *WRTL* did not reach the merits of *WRTL*'s particular challenge, it did confirm that there is a class of legislative "genuine issue ads," in *McConnell*'s terminology, *see* U.S. 540 at 206 n. 88, that remain constitutionally immune from regulation. But absent a regulatorily defined exemption for at least those ads¹, unions and corporations that are subject to the funding proscription cannot know, without bringing or defending costly and possibly lengthy litigation, what communications they may undertake. *Second*, the Commission has strong institutional reasons to promulgate an exception. As the *WRTL* litigation itself demonstrates, if the scope of a lobbying exemption is left to constitutional adjudication, then the Commission's resources will be repeatedly expended in addressing the inevitable administrative complaints against particular ads, and in dealing with injunctive proceedings brought by groups that wish to broadcast particular ads. A rulemaking, as Congress contemplated, would be a far more economical and orderly approach.

¹ The Commission need not confine its exemption of "electioneering communications" to ads that it believes are constitutionally immune from regulation, for BCRA broadly authorizes it to promulgate regulatory exemptions in order to "ensure the appropriate implementation" of the "electioneering communications" provision, subject only to the PASO exception.

Third, the Commission has ample room for the development of an exemption that is consistent with the PASO condition. In promulgating an exemption for lobbying communications the Commission need not purport to definitively explicate what PASO *is*, but simply demarcate one category of such communications that PASO is *not*, for purposes of union and corporate "electioneering communications." PASO, properly applied, does not reach all issue advocacy directed toward named government officials. PASO by its terms applies to the promotion of candidates as *candidates*: it is a standard by which electoral speech, not issues speech, is restricted in the service of the Act's campaign-related purposes. Indeed, Congress explicitly imported PASO into its exemption provision from the BCRA definition of "federal election activity" (FEA). In reviewing the provisions governing FEC, the Supreme Court held that the PASO standard is not unconstitutionally vague only as applied to "potential *party* speakers" (emphasis added), because "actions taken by political parties are presumed to be in connection with election campaigns." *See id.* at 170 n. 64. This presumption is not lawfully or appropriately extended beyond the electoral context and political organizations for which it was established.

Principles of a Proposed Exemption

Petitioners recommend that the Commission promulgate an exemption from the definition of "electioneering communication" for a communication that reflects all of the following principles:

1. The "clearly identified federal candidate" is an incumbent public officeholder;

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2. The communication exclusively discusses a particular current legislative or executive branch matter;
3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so;
4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter;
5. The communication does not refer to an election, the candidate's candidacy, or a political party; and
6. The communication does not refer to the candidate's character, qualifications or fitness for office.

We believe that these principles are reasonably derived from the Court's analysis in *McConnell* and *WRTL*, and that their incorporation into an exemption would properly shape a reasonable and constitutionally informed interpretation of the PASO exception to the Commission's exemption authority. This standard would "ensure the appropriate implementation" of BCRA's "electioneering communications" restrictions by exempting from regulation advertisements that in every pertinent respect are essentially legislative in nature and that eschew other election-related characteristics. The proposed exemption allows for corporate and union funding of communications that refer to a candidate in his or her

incumbent officeholding capacity in taking particular official action, but this allowance would not extend to the funding of even those communications if they also include references to candidacy, an election, a political party or the character of the candidate.

This exemption comprises a carefully tailored safe harbor that balances the relevant statutory and constitutional considerations.² The proposed standard is administratively practicable because it turns almost entirely upon the text of the communication, requiring an examination of context only to determine whether or not the issue discussed in the ad is a "particular current legislative or executive branch matter."

In light of the imminent electoral calendar and the ongoing federal executive and legislative dockets that are replete with profoundly important matters of national and international security and economic and other domestic policy, which petitioners and others subject to the "electioneering communications" proscription may wish to address in broadcast advocacy, petitioners respectfully request that the Commission grant their petition and schedule an expedited rulemaking.

² As may readily be discerned, this proposed exemption is narrower than the proposal recently rejected by the Commission to exempt *all* non-PASO communications from the definition of "electioneering communication." See Final Rules, "Electioneering Communications," 70 Fed. Reg. 75713, 75716 (Dec. 2, 2005).

Respectfully submitted:

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Date: February 16, 2006

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1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[NOTICE 2006 - XX]**

4 **Rulemaking Petition: Exception for Certain "Grassroots Lobbying"**

5 **Communications from the Definition of "Electioneering Communication"**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Rulemaking petition: notice of availability.

8 **SUMMARY:** On February 16, 2006, the Commission received a Petition for
9 Rulemaking ("Petition") from the AFL-CIO, the Alliance for
10 Justice, the Chamber of Commerce of the United States, the
11 National Education Association, and OMB Watch. The Petition
12 asks the Commission to revise its regulations by exempting
13 certain communications consisting of "grassroots lobbying" that
14 otherwise meet the definition of an "electioneering
15 communication" under the Federal Election Campaign Act of
16 1971, as amended. The Petition is available for inspection in
17 the Commission's Public Records Office and on its website,
18 <www.fec.gov>. Further information is provided in the
19 supplementary information that follows.

20 **DATE:** Statements in support of, or in opposition to, the Petition must
21 be submitted on or before [INSERT DATE THAT IS 30 DAYS
22 AFTER THE DATE OF PUBLICATION IN THE FEDERAL
23 REGISTER].

1 **ADDRESSES:**

2 All comments must be in writing, must be addressed to Mr.
3 Brad C. Deutsch, Assistant General Counsel, and must be
4 submitted in either e-mail, facsimile, or paper copy form.
5 Commenters are strongly encouraged to submit comments by e-
6 mail or fax to ensure timely receipt and consideration. E-mail
7 comments must be sent to either GRLECNOA@fec.gov or
8 submitted through the Federal eRegulations Portal at
9 <www.regulations.gov>. If e-mail comments include an
10 attachment, the attachment must be in either Adobe Acrobat
11 (.pdf) or Microsoft Word (.doc) format. Faxed comments must
12 be sent to (202) 219-3923, with paper copy follow-up. Paper
13 comments and paper copy follow-up of faxed comments must
14 be sent to the Federal Election Commission, 999 E Street, NW,
15 Washington, DC 20463. All comments must include the full
16 name and postal service address of the commenter or they will
17 not be considered. The Commission will post comments on its
18 website after the comment period ends.

18 **FOR FURTHER**
19 **INFORMATION**
20 **CONTACT:**

21 Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Cheryl
22 A.F. Hemsley, Attorney, 999 E Street, NW, Washington, DC
23 20463, (202) 694-1650 or (800) 424-9530.
24

1 **SUPPLEMENTARY**
2 **INFORMATION:**

3 The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Public Law 107-55,
4 116 Stat. 81 (2002), added “electioneering communications” to the communications
5 already regulated by the Federal Election Campaign Act of 1971, as amended (“FECA”).
6 See 2 U.S.C. 434(f)(3). Electioneering communications are television and radio
7 communications that refer to a clearly identified candidate for Federal office, are publicly
8 distributed within 60 days before a general election or 30 days before a primary election,
9 and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29.
10 BCRA exempts certain communications from the definition of “electioneering
11 communication,” 2 U.S.C. 434(f)(3)(B)(i) through (iii), and specifically authorizes the
12 Commission to promulgate regulations exempting other communications as long as the
13 exempted communications do not promote, support, attack or oppose a Federal candidate.
14 2 U.S.C. 434(f)(3)(B)(iv), citing 2 U.S.C. 431(20)(A)(iii). Section 100.29(c) of the
15 Commission’s regulations contains the regulatory exemptions to the definition of
16 “electioneering communications.” 11 CFR 100.29(c).

17 The Federal Election Commission (“Commission”) has received a Petition for
18 Rulemaking (“Petition”) from the AFL-CIO, the Alliance for Justice, the Chamber of
19 Commerce of the United States, the National Education Association, and OMB Watch
20 (collectively, “Petitioners”). The Petitioners ask the Commission to revise 11 CFR
21 100.29(c) to exempt from the definition of “electioneering communication” certain
22 “grassroots lobbying” communications that reflect all of the following principles: 1. The
23 ‘clearly identified federal candidate’ is an incumbent public officeholder; 2. The
24 communication exclusively discusses a particular current legislative or executive branch

1 matter; 3. The communication either (a) calls upon the candidate to take a particular
2 position or action with respect to the matter in his or her incumbent capacity, or (b) calls
3 upon the general public to contact the candidate and urge the candidate to do so; 4. If the
4 communication discusses the candidate's position or record on the matter, it does so only
5 by quoting the candidate's own public statements or reciting the candidate's official
6 action, such as a vote, on the matter; 5. The communication does not refer to an election,
7 the candidate's candidacy, or a political party; and 6. The communication does not refer
8 to the candidate's character, qualifications or fitness for office.

9 The Commission seeks comments on whether the Commission should initiate a
10 rulemaking on this proposed exception to the definition of "electioneering
11 communication."

12 Copies of the Petition are available for public inspection at the Commission's
13 Public Records Office, 999 E Street, NW, Washington, DC 20463, Monday through
14 Friday between the hours of 9 a.m. and 5 p.m., and on the Commission's website,
15 <www.fec.gov>.

16 Consideration of the merits of the Petition will be deferred until the close of the
17 comment period. If the Commission decides that the Petition has merit, it may begin a
18 rulemaking proceeding. Any subsequent action taken by the Commission will be
19 announced in the **Federal Register**.

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Michael E. Toner
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U