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AGENDA ITEM
For Meeting of: 8-29-06

Memorandum

DATE: August 3, 2006

TO: The Commission

FROM: Commissioner Hans A. von Spakovsky

SUBJECT: Proposed Interim Final Rule

Attached please find the proposed Interim Final Rule regarding a grassroots lobbying exemption to the electioneering communications provisions that I plan to offer for consideration at the Commission's Open Session on August 29, 2006. This proposal is offered in response to the Petition for Rulemaking received by the Commission on February 16, 2006, and the Notice of Availability published in the *Federal Register* on March 16, 2006.

Interim Final Rule Exempting Grassroots Lobbying Communications From the Definition of "Electioneering Communication"

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2006-xx]

AGENCY: Federal Election Commission

ACTION: Interim Final Rule

SUMMARY: The Federal Election Commission ("Commission") is amending its rules defining "electioneering communication." The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Federal Election Campaign Act of 1971 ("FECA" or the "Act") by adding the term "electioneering communication," which includes certain television and radio communications that refer to a clearly identified Federal candidate and that are publicly distributed to the relevant electorate within 60 days prior to a general election or within 30 days prior to a primary election for Federal office. This Interim Final Rule promulgates an exemption to the definition of "electioneering communication" for certain grassroots lobbying communications. The Commission is promulgating these rules on an interim final basis. The Commission is soliciting comments on all aspects of the Interim Final Rule and may amend the Interim Final Rule as appropriate in response to comments received. Further information is provided in the SUPPLEMENTARY INFORMATION that follows.

DATES: The Interim Final Rule is effective upon its publication in the *Federal Register*. Comments must be received on or before September 30, 2006. If the Commission

receives sufficient requests to testify, it may hold a hearing on this Interim Final Rule. If the Commission decides to hold a hearing, it will announce the date after the end of the comment period. Persons wishing to testify at a hearing should so indicate in their written or electronic comments.

ADDRESSES: All comments must be in writing, must be addressed to ***[attorney]***, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to ensure timely receipt and consideration. E-mail comments must be sent to either ***[e-mail address]*** or submitted through the Federal eRegulations Portal at www.regulations.gov. If e-mail comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with paper copy follow-up. Paper copy comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW, Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends.

FOR FURTHER INFORMATION CONTACT: ***[attorneys]***, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116 Stat. 81 (2002), amended FECA by adding a new category of communications, "electioneering communication," to those already regulated by the Act. *See* 2 U.S.C. 434(f)(3). Electioneering communications are television and radio communications that refer to a clearly identified candidate for Federal office, are

publicly distributed within 60 days before a general election or 30 days before a primary election, and are targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a). Electioneering communications carry certain reporting obligations and funding restrictions. *See* 2 U.S.C. 434(f)(1) and (2), and 441b(a) and (b)(2).

BCRA exempts certain communications from the definition of "electioneering communication" and expressly authorizes the Commission to promulgate regulations exempting other communications to ensure the appropriate implementation of the electioneering communications provisions. *See* 2 U.S.C. 434(f)(3)(B)(i) – (iv). Any exemption promulgated pursuant to this grant of authority must be is consistent with the electioneering communications provisions and any exempted communication that otherwise meets the requirements of 2 U.S.C. 434(f)(3) must not promote, support, attack, or oppose ("PASO") a Federal candidate. *See* 2 U.S.C. 434(f)(3)(B)(iv) *citing* 2 U.S.C. 431(20)(A)(iii).

On October 23, 2002, the Commission promulgated regulations to implement BCRA's electioneering communications provisions. *See Final Rules and Explanation and Justification on Electioneering Communications*, 67 FR 65190 (Oct. 23, 2002) ("*EC E&J 2002*"). Aspects of these Final Rules were invalidated in *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). The Commission revised its electioneering communications regulations to comply with the court's rulings. *See Final Rules and Explanation and Justification on Electioneering Communications*, 70 FR 75713 (Dec. 21, 2005) ("*EC E&J 2005*").

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 requests that the Commission revise its regulations by exempting certain communications consisting of "grassroots lobbying" that otherwise meet the definition of an "electioneering communication," and which are therefore subject to certain restrictions under the Act. The Petition is available for inspection in the Commission's Public Records Office and on the Commission's website, http://www.fec.gov. A Notice of Availability of this Petition was published in the *Federal Register* on March 16, 2006.[1] Statements in support of, or in opposition to, the Petition could be submitted through April 17, 2006. *Rulemaking Petition: Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication,"* 71 F.R. 13557 (March 16, 2006).

After considering the comments received, along with other information relevant to the subject matter of the Petition, the Commission has determined that the Petition has merit and that a rulemaking is warranted.[2] Under the Administrative Procedure Act ("APA"), 5 U.S.C. 553(b), agencies must provide public notice and an opportunity for comment ("notice and comment" before they may promulgate final rules. However, the "good cause" exemption allows an agency to waive this requirement if the agency determines that notice and comment is "impracticable, unnecessary or contrary to the public interest." *See* 5 U.S.C. 553(b)(B). For the reasons set forth below, the Commission has determined that good cause exists to dispense with issuing a Notice of

[1] *See* 11 CFR 200.3(a)(1).
[2] *See* 11 CFR 200.4(a).

Proposed Rulemaking ("NPRM") and accepting comment on the NPRM at this time. Further notice and comment would be impracticable and contrary to the public interest. Therefore, the Commission invokes its authority under 5 U.S.C. 553(b)(3)(B) to issue this Interim Final Rule, to take effect upon its publication in the *Federal Register*. Furthermore, the Interim Final Rule shall take effect immediately, without the ordinary 30-day delay following publication in the *Federal Register*, because it is "a substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. 553(d)(1).

Seeking public comment on a rule that has taken effect permits the Commission simultaneously to implement FECA (as amended by BCRA) properly, and to seek and consider additional public comment before promulgating a Final Rule in this area. The Interim Final Rule provides that it will not apply to activities or communications that take place after September 30, 2007. *See* new 11 CFR 100.29(c)(6)(vi). The Commission expects to consider any public comments and may adopt a Final Rule that can be effective on or before that date.

Under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1)(A), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate before they take effect. The Interim Final Rule was transmitted to Congress on ***[date]***. Unless the final rules are major rules, the effective date for final rules is the date they become effective under the APA. Because the Interim Final Rule is not a major rule, it takes effect on ***[date]*** for the reasons stated above.

Explanation and Justification for 11 CFR 100.29(c)(6)

I. Introduction

BCRA includes three statutory exemptions from the definition of "electioneering communication."[3] In addition, the statute expressly authorizes the Commission to promulgate regulations exempting other communications, to ensure the proper implementation of the electioneering communications provisions. That Congressional grant of authority reads:

> The term 'electioneering communication' does not include— . . . (iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in [2 U.S.C. 431(20)(A)(iii)].

2 U.S.C. 434(f)(3)(B)(iv) (referencing 2 U.S.C. 431(20)(A)(iii)). 2 U.S.C. 431(20)(A)(iii) describes "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."

[3] BCRA provides that "[t]he term 'electioneering communication' does not include – (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate; (ii) a communication which constitutes an expenditure or an independent expenditure under the Act; (iii) a communication which constitutes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum." 2 U.S.C. 434(f)(3)(B).

The primary architects of BCRA's electioneering communications provisions indicated during floor debate that those provisions were not intended to limit grassroots lobbying communications. The electioneering communications provisions were proposed by Senators Olympia Snowe and James Jeffords. In remarks about the Snowe-Jeffords Amendment, Senator Jeffords stated that the electioneering communications provisions:

> will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes. The last point bears repeating. The Snowe-Jeffords provisions do not stop the ability of any organization to urge their members and the public through grassroots communications to contact their lawmakers on upcoming issues or votes. That is one of the biggest distortions of the Snowe-Jeffords provisions. Any organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provisions any organization still can undertake this most important task.

147 Cong. Rec. S2813 (March 23, 2001) (statement of Sen. Jeffords). Senator Snowe made the same observation, stating "let's look at the genuine issue ad, which is the difference, if we are talking about a genuine issue ad, which this provision would not apply to." 147 Cong. Rec. S2458 (March 19, 2001).

Senator Paul Wellstone subsequently offered an amendment to the Snowe-Jeffords Amendment to eliminate an exception to the electioneering communications provisions for incorporated 501(c)(4) and 527 organizations. In describing his amendment, which was approved, Senator Wellstone stated, "I am not talking about ads

. . . that are legitimately trying to influence policy debates – rather, this amendment only targets those ads that we all know are trying to skew elections but until now have been able to skirt the law. I am not talking about legitimate policy ads. I am not talking about ads that run on any issue." 147 Cong. Rec. S2847 (daily ed. March 26, 2001) (statement of Sen. Wellstone).

The electioneering communications provisions were never intended to suppress grassroots lobbying communications of the sort described by the Petitioners. To the extent that current Commission regulations may be interpreted to do so, they are a distortion of Congressional intent that must be remedied "to ensure the appropriate implementation" of BCRA.

The Supreme Court recently confirmed both the possibility that BCRA's electioneering communications provisions may be unconstitutional as applied to certain types of communications and the Commission's authority to issue regulations exempting certain communications. The Court held that *McConnell*, "[i]n upholding [the electioneering communications provisions] against a facial challenge, . . . did not purport to resolve future as-applied challenges," and noted that "[a]lthough 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." *Wisconsin Right to Life, Inc. v. FEC*, 126 S.Ct. 1016, 1018, 1017 (2006).

When considering a potential exemption to the electioneering communications provisions, the Commission continues to use the express language of the statute as guidance regarding the extent of its exemption authority. *See EC E&J 2002*, 67 FR at

65198. The statutory authorization to exempt communications is expressly limited in two ways. First, the exemption must be promulgated "consistent with the requirements" of the statutory electioneering communication provision. The most natural reading of the language "consistent with the requirements of this paragraph," and the Commission's understanding of that phrase, is that any regulatory exemption must not contravene the terms set forth in 2 U.S.C. 434(f)(3).[4] Second, no communication may be exempted if that communication otherwise satisfies the definition of an "electioneering communication" *and* is a "public communication" that refers to a clearly identified candidate for Federal office and promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.[5] *See* 2 U.S.C. 434(f)(3)(B)(iv) (referencing 2 U.S.C. 431(20)(A)(iii)).

II. 2002 Electioneering Communications Rulemaking and Subsequent History

A. 2002 Rulemaking

In the first electioneering communications rulemaking, in 2002, the Commission considered "four alternatives . . . that would exempt communications that are devoted to urging support for or opposition to particular pending legislation or other matters, where the communications request recipients to contact various categories of public officials regarding the issue." *EC E&J 2002,* 67 FR at 65201. *See also Notice of Proposed Rulemaking: Electioneering Communications*, 67 FR 51131, 51136, 51145 (Aug. 7, 2002).

[4] The Commission is cognizant of the views of some of BCRA's Congressional sponsors, who " explained [that] the exemption authority would 'allow the Commission to exempt communications that 'plainly and unquestionably' are 'wholly unrelated' to an election and do not 'in any way' support or oppose a candidate." *EC E&J 2002*, 67 FR at 65198 *citing* Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays). These views were also set forth in the Comments of Senators McCain, Feingold, Snowe and Jeffords, and Representatives Shays and Meehan (Aug. 23, 2002) submitted in response to the *Notice of Proposed Rulemaking on Electioneering Communications*, 67 FR 51131 (Aug. 7, 2002).

[5] The term "public communication" is defined at 2 U.S.C. 431(22) and 11 CFR 100.26.

The first proposal "would have excluded any communication devoted exclusively to urging support for or opposition to particular pending legislation or executive matters, where the communication only requests recipients to contact an official without promoting, supporting, attacking, or opposing a candidate or indicating the candidate's position on the legislation in question." *EC E&J 2002*, 67 FR at 65201.

The second proposal "would have excluded any communication concerning only a pending legislative or executive matter, in which the only reference to a Federal candidate is a brief suggestion that the candidate be contacted and urged to take a particular position, and no reference to a candidate's record, position, statement, character, qualifications, or fitness for an office or to an election, candidacy, or voting is included." *EC E&J 2002*, 67 FR at 65201.

The third proposal "would have excluded any communication that does not include express advocacy, and that refers either to a specific piece of legislation or to a general public policy issue and contains contact information for the person whom the communication urges the audience to contact." *EC E&J 2002*, 67 FR at 65201.

The fourth proposal "would have excluded any communication that urges support of or opposition to any legislation or policy proposal and only refers to contacting a clearly identified incumbent candidate to urge the legislator to support or oppose the matter, without referring to any of the legislator's past or present positions." *EC E&J 2002*, 67 FR at 65201.

Additionally, "[s]ome commenters urged the Commission to promulgate another proposal that shares most of the elements of [the second proposal]. With disagreement about only one issue, these commenters proposed an exemption for communications that

contain the following elements: (A) The communication is devoted exclusively to a pending legislative or executive branch matter and (B) its only reference to a clearly identified Federal candidate is a statement urging the public to contact the Federal candidate or a reference that asks the candidate to take a particular position on the pending legislative or executive branch matter. The proposed formulation of the exemption advocated by these commenters would *not* extend to any communication that included any reference to any of the following: any political party, the candidate's record or position on any issue, or the candidate's character, qualifications or fitness for office or to the candidate's election or candidacy." *EC E&J 2002*, 67 FR at 65201.[6] The commenters, who were also BCRA's congressional sponsors, described their proposal as "allow[ing] individuals and entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows."

The Commission, however, decided not to adopt any of the four proposals, or the commenters' proposal, explaining that it "concludes that communications exempted under any of the alternatives for this proposal *could well be understood* to promote, support, attack, or oppose a Federal candidate. Although some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications *could be reasonably perceived* to promote, support, attack, or oppose a candidate in some manner. The Commission has determined that all of the

[6] This proposal was submitted by BCRA's sponsors, Senators McCain, Feinfold, Snowe, and Jeffords, and Congressmen Shays and Meehan. *See* Comments of Senators John McCain, Russell Feingold, Olympia Snowe, and James Jeffords, and Congressmen Christopher Shays and Martin Meehan at 10 (Aug. 23, 2002). A substantially similar proposal was submitted by Common Cause and Democracy 21, the Center for Responsive Politics, and the Campaign and Media Legal Center.

alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement." *EC E&J 2002*, 67 FR at 65201-65202 (emphasis added).

B. Subsequent History

The Commission attributes its 2002 conclusions largely to concerns regarding the meaning and scope of the terms "promote," "support," "attack," and "oppose," as used in BCRA. BCRA does not provide a definition of those terms. However, since the 2002 electioneering communication rulemaking, the Supreme Court upheld the PASO standard against a challenge of unconstitutional vagueness, and the Commission has interpreted the standard in the context of advisory opinions and utilized the standard in other rulemakings. The conceptual uncertainties surrounding the PASO standard which may have once existed are no longer a barrier to the utilization of that standard.

1. McConnell v. FEC

Following the enactment of BCRA, the electioneering communications provisions (among others) were challenged in court. The Supreme Court upheld the electioneering communications provisions against a facial challenge. *See McConnell* v. *FEC*, 540 U.S. 93, 189-211 (2003). Two aspects of the Court's decision in *McConnell* bear heavily on the Commission's consideration of a "grassroots lobbying" exemption. First, the Court acknowledged that not all advertisements that mention a Federal candidate have an "electioneering purpose." *See McConnell*, 540 U.S. at 206 ("The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief pre-election time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court."). Furthermore, the Court

acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads*." *McConnell*, 540 U.S. at 206 fn 88 (emphasis added). Therefore, the Commission proceeds in this matter under the Supreme Court-endorsed presumption that "genuine issue" advertisements, *i.e.*, advertisements with no "electioneering purpose," do in fact exist, even during the 30- and 60-day electioneering communications periods, and that a different set of interests may be at stake when considering the regulation of such advertisements. Second, in a different context, the Court upheld the PASO standard against a challenge of unconstitutional vagueness, and endorsed the elaboration of the standard through the Commission's advisory opinion process. *See McConnell*, 540 U.S. at 170 fn 64 ("We likewise reject the argument that [2 U.S.C. 431(20)(A)(iii)] is unconstitutionally vague. The words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision. These words 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.' . . . [S]hould plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification . . . and thereby 'remove any doubt there may be as to the meaning of the law' . . . ."). Thus, the Commission regards the PASO standard as valid and enforceable, and looks to its advisory opinions as a legitimate source of authority in determining how that standard should be applied.

2. Advisory Opinion 2003-25

The Commission first had occasion to apply the PASO standard in Advisory Opinion 2003-25 (Weinzapfel). In that matter, a state legislator who was running for

mayor wished to produce a television advertisement in which a sitting U.S. Senator, and candidate for reelection, endorsed his candidacy. The advertisement featured the sitting U.S. Senator, against an American flag background, discussing the mayoral candidate's record and suitability for office.[7] The Commission determined that the advertisement did not constitute "federal election activity" under 2 U.S.C. 431(20)(A)(iii) because it did not PASO the sitting U.S. Senator and candidate for reelection to Federal office. "Under the plain language of the FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate." Advisory Opinion 2003-25. The Commission concluded that the "advertisement endorses the candidacy of [the mayoral candidate] for Mayor . . . and not [the sitting U.S. Senator and candidate for reelection to Federal office], and does not promote, support, attack, or oppose any Federal candidate." *Id.* Thus, the Commission has overcome any fears it may have once had that a mere reference to a clearly identified Federal candidate "could well be understood" or "reasonably perceived" to PASO that candidate when the communication, in context, makes clear that its purpose is not to influence that candidate's election.

3. Coordinated Communication Rulemaking

The Commission recently revised its "coordinated communication" regulations. *See Final Rule and Explanation and Justification on Coordinated Communications*, 71 FR 33190 (June 8, 2006). The new rules contain a safe harbor exemption for certain types of communications, providing that "a public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office, or solicits

[7] The full text of the advertisement, along with a description of the imagery, is set forth in Advisory Opinion 2003-25.

funds for another candidate, or for a political committee or section 501(c) organization as permitted by 11 CFR 300.65, is not a coordinated communication with respect to the endorsing or soliciting Federal candidate *unless the public communication PASOs the endorsing or soliciting candidate*, or another candidate who seeks election to the same office as the endorsing or soliciting candidate." *Id.* at 33201 (emphasis added). *See also* 11 CFR 109.21(g).[8]

Unlike in the 2002 electioneering communications rulemaking, there was general agreement among both the Commission and the commenters "that the PASO standard would be an *appropriate and workable standard* for determining whether communications containing endorsements or solicitations have the purpose of influencing the endorsing or soliciting candidates' elections." *Final Rule and Explanation and Justification on Coordinated Communications*, 71 FR at 33202 (emphasis added).

In light of the foregoing changed circumstances, which reflect an acceptance and developing understanding of the PASO standard, the Commission now concludes that a carefully drawn exemption for "grassroots lobbying" communications does not pose a risk of exempting communications that PASO a clearly identified Federal candidate. Thus, such an exemption is fully consistent with BCRA.

III. Petition for Rulemaking

Petitioners are the Chamber of Commerce of the United States, OMB Watch, the AFL-CIO, the National Education Association, and the Alliance for Justice. Petitioners urge the Commission to undertake a rulemaking for the purpose of considering an exemption to the electioneering communications provisions for "grassroots lobbying"

[8] In Advisory Opinion 2006-10 (Echostar), the Commission concluded that certain planned public service announcements featuring Federal candidates soliciting funds for charitable organizations would not PASO the participating Federal candidates.

communications. "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 and expedited rulemaking."

Included in the Petition for Rulemaking are six principles that petitioners believe should guide the Commission's consideration of any exemption. These principles take the form of "rules" to which an exempted "grassroots lobbying" communication must adhere:

- The "clearly identified federal candidate" is an incumbent public officeholder;
- The communication exclusively discusses a particular current legislative or executive branch matter;
- 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;
- 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;
- The communication does not refer to an election, the candidate's candidacy, or a political party; and
- The communication does not refer to the candidate's character, qualifications or fitness for office.

According to petitioners, "these principles are reasonably derived from the Court's analysis in *McConnell* and *WRTL*, and . . . their incorporation into an exemption would properly shape a reasonable and constitutionally informed interpretation of the PASO exception to the Commission's exemption authority."

Petitioners draw the following conclusions from the Supreme Court's analysis in *McConnell*: "*McConnell* suggests . . . 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." Petitioners also reference the Court's decision in *WRTL*, and its observation that "[a]lthough 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."

Petitioners identify three "compelling reasons" for the Commission to exercise its statutory authority and promulgate an exemption for "grassroots lobbying" communications: (1) *WRTL* confirmed that a class of "genuine issue ads" that remain constitutionally immune from regulation does in fact exist; (2) the Commission has strong institutional reasons to promulgate an exception, namely to conserve resources and promote an orderly approach to the issue; and (3) the Commission has ample room to develop an exemption that is consistent with the PASO condition.

IV. Comments

1. 2002 Rulemaking

In 2002, the comments received by the Commission in response to its four proposed exemptions for lobbying communications were generally negative in tone. "A wide range of commenters addressed these alternatives, and none of the alternatives was favorably received. The most frequently expressed comments were that each of the alternatives could be easily evaded so that a communication that met the requirements for an exemption nonetheless would also promote, support, attack, or oppose a Federal candidate. Each of the alternatives included terms that commenters found vague. The PASO standard was considered inappropriate by some for this context, which will apply to entities other than candidates and political party committees." *EC E&J 2002*, 67 FR at 65201. However, while the Commission's four *specific* proposals may have met with skepticism, there was broad support among the commenters for the concept of a "grassroots lobbying" exemption.

In comments received in response to the Notice of Availability of the Petition for Rulemaking, one commenter made special note of this broad agreement within the regulated community in 2002, writing, "[t]he assortment of individuals and groups that have supported a lobbying exemption of some kind is striking. We know of no other issue of campaign finance law on which all of these significant participants in the debate agreed." The commenter observed that BCRA's sponsors – Senators McCain, Feingold, Snowe, and Jeffords, and Congressmen Shays and Meehan – proposed a lobbying exemption to the Commission in their 2002 comments. "The advocacy groups that led the charge to pass BCRA" filed similar comments, proposing a "lobbying exemption that was substantially identical to the lobbying exemption proposed by BCRA's key

sponsors." Furthermore, many of the current petitioners "supported a lobbying exemption during the original electioneering communications rulemaking."

2. Current Matter

The response to the Notice of Availability of the Petition for Rulemaking was overwhelmingly supportive of the grassroots lobbying exemption proposed by the petitioners. The criticisms of the regulated community that were conveyed in 2002 are, for the most part, not present in the 2006 comments.

The Commission received statements from a total of 207 individuals and organizations in response to the Petition, nearly all of which supported the promulgation of a regulatory exemption for "grassroots lobbying" communications. The statements of support were submitted by individuals, organizations and associations representing the full ideological spectrum in American politics, from the political left to the political right, from Democrats to Republicans, from non-profits to for-profit corporations. Only two organizations submitted statements opposing an exemption.

One hundred eighty individuals and non-profit organizations ranging from the PFLAG Transgender Network to Jewish Community Housing for the Elderly to the Hyacinth AIDS Foundation to the Jesus Lives Here Ministries to the Michigan Nonprofit Association, the Pennsylvania Association of Nonprofit Organizations, the Connecticut Association of Nonprofits, and the Maryland Association of Nonprofit Organizations, joined together to urge the Commission to exempt grassroots lobbying communication because BCRA's "restrictions on legitimate issue ads infringe on the central constitutional right of the people to bring their grievances before their elected representative. These restrictions effectively shut down grassroots lobbying ads during

the crucial closing weeks of the congressional term, when Congress is most likely to act on issues of vital importance. The sponsors of BCRA and the groups that lobbied for it are all on record as supporting an exception for grassroots lobbying ads. . . . Regardless of the election calendar, nonprofits must be allowed to use television or radio to support their work and to broadcast their stands on public policy issues."

An additional 25 organizations and associations also urged the Commission to promulgate an exemption for genuine "grassroots lobbying" communications. As one commenter stated, "an exception for grassroots lobbying requires immediate action by the Commission because of the critical nature of the affected speech. By keeping constituents informed of pending legislative and policy matters, grassroots lobbying is a vital component to representative democracy...when grassroots lobbying is limited by the electioneering communications provision, the stock of information upon which constituents base views is correspondingly limited."

Many commenters emphasized that organizations have no control over the Congressional legislative calendar and that the current electioneering communications provisions can have the effect of preventing grassroots lobbying efforts when an issue is being debated within the 30- and 60-day time frames of the statute. One commenter wrote, "[t]he most crucial time for associations to be able to issue 'grassroots lobbying' communications is during the timeframe that Congress is considering relevant legislation – a timeframe that associations have no control over. In such situations, the goal of the grassroots lobbying communication is the passage or defeat of a piece of legislation, not the election or defeat of a particular federal candidate. Thus, it is of the utmost importance that associations be able to issue bona fide 'grassroots lobbying'

communications when relevant issues are before Congress, regardless of the federal election cycle." Another commenter urged the Commission to adopt an exemption because "without it, incorporated nonprofits . . . are needlessly limited in representing their members and in opposing detrimental legislation during the corporate electioneering communication blackout periods – periods when Congress is often in session and acting on legislation."

In detailed comments, the American Civil Liberties Union ("ACLU"), which noted that "[i]n the 85 years since it was established, has never endorsed or opposed a candidate for federal, state, or local office," further elaborated on this issue. The ACLU explained that

> The timing of the ACLU's lobbying ads is never determined by the electoral calendar. But the electoral calendar often determines when issues are brought up for a vote on the floor of Congress. For obvious reasons, elected officials like to build a record of accomplishment just prior to elections. Also, politicians often perceive a political advantage in forcing their opponents to cast a controversial vote just before elections are held. As a result of these factors, beyond the control of the [commenter], the organization's issue ads run in support of its legislative agenda often need to be run within the 60/30 day windows used to define BCRA's prohibition on corporate expenditures for electioneering communications. See 2 U.S.C. § 434(f)(3)i)(II). In October 2004, for example, the ACLU sponsored radio ads opposing several anti-immigrant provisions of a bill being considered by Congress to implement the recommendations of the 9/11 Commission. The timing of these ads resulted entirely from Congress' legislative schedule.

The American Cancer Society, the American Federation of State County and Municipal Employees, the Human Rights Campaign, the Mexican American Legal Defense Education Fund, the National Council of Nonprofit Associations, the Sierra Club, the National Lower Income Housing Coalition, NARAL, the National Council of Jewish Women, the Unitarian Universalist Association of Congregations, OMB Watch, the National Employment Lawyers Association, the National Partnership for Women & Families, the Michigan Partnership to Prevent Gun Violence, and the Wilderness Society also agreed, stating in their joint comment that the electioneering communications provisions "if narrowly construed, could result in a 'blackout' of many nonpartisan, non-electoral advocacy communications by nonprofits. This kind of genuine issue advocacy is entitled to constitutional protection, and the Commission could take an important step in providing this protection in its proposed rules...this is the intended and appropriate result, since BCRA...gives the Commission the power to create additional exceptions."

Without an exemption for communications intended to lobby Congress on pending matters, incumbents are shielded from a form of grassroots lobbying even when they force votes prior to an election for the reasons cited by the ACLU. As one commenter observed,

> The 60-day period prior to an election, during which broadcast communications featuring candidates are considered electioneering communications, is frequently a period of intense legislative activity. Between September 4 and Election Day in 2004, over 100 roll call votes were taken in the United States House of Representatives. The Senate took nearly 50 roll call votes. The issues presented during that time included important or high-profile issues of public policy, such as

> welfare reform, a constitutional amendment on marriage, tort reform, and Department of Defense and other agency appropriations. The disproportionate legislative activity that occurs during the black-out periods imposed by BCRA is also evident from the number of bills enacted into law by the United States House of Representatives and Senate during election and non-election years: 300 in 2004 versus 198 in 2003; 241 in 2002 versus 136 in 2001.

(citations omitted). Yet at the time that such critical votes were being cast, "BCRA deprive[d] corporations and labor unions of an essential tool: broadcast media communications urging members of the public to contact specific policymakers and influence policy decisionmaking."

The two commenters who opposed the creation of a grassroots lobbying exemption wrote, "[w]e urge the Commission to deny the petition to initiate a rulemaking because the Commission has already decided the matter presented by the petition, and there are no changed circumstances that warrant reconsideration of that decision." For the reasons set forth above in Section II.B, the Commission strongly disagrees that "there are no changed circumstances that warrant reconsideration of that decision." The Commission also notes that in 2002, these same commenters (in separate submissions) proposed their own grassroots lobbying exemption for the Commission's consideration. *See supra* fn 7. One of these commenters wrote, "we are amenable to the prospect of an exception addressing certain lobbying communications in a manner consistent with the constraints on the Commission's authority in this area and with constitutional requirements." The other wrote, "the effort to draft an appropriate and narrow exclusion for 'lobbying' communications is not inconsistent with the purpose of [BCRA's

electioneering communications provisions]." The Commission regards commenters' conclusion that "[t]he Commission correctly concluded that it therefore lacks the statutory authority to promulgate a 'grassroots lobbying' exemption," as incorrect as a factual matter. As the *EC E&J 2002* states, the Commission did not conclude that it lacked the statutory authority to promulgate a "grassroots lobbying" exemption. Rather, the Commission simply declined to issue an exemption at that time. *See EC E&J 2002,* 67 FR at 65201-65202.

V. The First Amendment Right to Petition the Government

Freedom of speech considerations, as construed by the Supreme Court in *Buckley* v. *Valeo* and *McConnell*, are not the only rights at issue in this rulemaking. *Cf. McConnell*, 540 U.S. at 206 fn 88 ("the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"). Grassroots lobbying of the government also implicates the First Amendment right to "petition the Government for a redress of grievances." Where the Commission has the opportunity to further the First Amendment right of petition, while fully respecting freedom of speech rights, as construed by the Court, in a way that does not undermine or contravene the government's compelling interest in battling corruption and the appearance thereof in the electoral process, the Commission has an obligation to do so.

The right to "petition the Government for a redress of grievances" is protected by the First Amendment. In fact, the right to petition the Government for a redress of grievances is fundamental to the American concept of liberty. In 1641, the Massachusetts Body of Liberties was the first royal charter to protect this right expressly, recognizing that "[e]very man whether Inhabitant or fforeginer, free or not free shall have

libertie to come to any publique Court, Councel or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information." The Liberties of the Massachusetts Collonie in New England (established by the Massachusetts General Court, December, 1641), clause 12. "[T]he Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances." *McDonald* v. *Smith*, 472 U.S. 479, 482-483 (1985). The Founders subsequently recognized this right in the document that galvanized the creation of the United States. On July 4, 1776, in the Declaration of Independence, one of the grievous claims invoked against the King was that "[i]n every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury." The right of citizens to petition the government was deemed so fundamental and of such central importance that it formed a basis for the American Revolution.

The Supreme Court has, of course, expressed the same sentiments. "The First Amendment guarantees 'the right of the people . . . to petition the Government for a redress of grievances.' The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 2 Otto 542, 92 U.S. 542 (1876), the Court declared that this right is implicit in '[t]he very idea of government, republican in form.' *Id.*, at 552. And James Madison made clear in the congressional debate on the proposed amendment that people 'may communicate their will' through direct petitions to the legislature and government officials. 1 Annals of Cong. 738 (1789)." *McDonald*, 472 U.S. at 482. *See also United Mine Workers of America* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)

("the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights").

One court also recognized that "[t]he objective of the 'right to petition' clause is not merely to guarantee the opportunity for seeking redress. [I]t is also designed to provide some assurance that public decision-makers will be sufficiently informed to carry out their function. Thus, the right to petition shares with other First Amendment rights a focus on the importance of maintaining a free flow of ideas." *Osborn* v. *Pennsylvania-Delaware Service Station Dealers Assn.*, 499 F. Supp. 553, 556 (D. Del. 1980).

Important and controversial public policy issues that are of great interest to citizens, associations, banks, labor unions, and corporations (both non-profit and for-profit) are always before Congress and the Executive Branch. These issues impact basic constitutional and statutory rights, lives and livelihoods, and even an entity's very existence. Citizens and all entities with opinions on issues of public policy should not have their ability to lobby their Congressional representatives, the Executive Branch, or the general public restricted or prohibited by Commission regulations that unnecessarily burden core First Amendment rights, namely the right to petition the government. As one court observed, "[w]hile the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition." *Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968).

The potential impact of the electioneering communications provisions was vividly illustrated during the period leading up to July 13, 2006, when the House of Representatives debated H.R. 9, a bill renewing the expiring provisions of the Voting

Rights Act of 1965. Many citizens consider this to be among the most important pieces of legislation considered by Congress this year. Congressmen leading the debate included Congressmen John Lewis, Lynn Westmoreland, and Charles Norwood, all of Georgia. Congressmen Westmoreland and Norwood sponsored several amendments that were supported or opposed by Congressman Lewis and other Representatives. H.R. 9 and these amendments were fiercely debated on the floor of the House of Representatives prior to a final vote. However, Georgia's Congressional primary was scheduled for July 18, 2006. Thus, debate on H.R. 9 took place within the 30 day period prior to the Georgia primary election, and the electioneering communications provisions of BCRA severely restricted the ability of associations and other entities to broadcast grassroots lobbying communications directed at these Members of Congress from Georgia. An interested, publicly-spirited corporation or labor union that wished to broadcast a communication in Georgia on the eve of the congressional debate asking the public to call Congressmen Westmoreland, Norwood or Lewis and urge them to vote a particular way on this legislation, could not do so without violating the electioneering communications provisions and facing legal penalty. It is indeed an ironic and profound violation of fundamental core principles that the electioneering communications provisions may have prevented grassroots lobbying on an issue as important as the right to vote.

All of the charitable, educational, and religious associations that have urged the Commission to promulgate a grassroots lobbying exemption to preserve their right to petition the government on issues vital to their interests and existence are examples of the types of organizations that illustrate the finest features of American democracy,

American life, and American culture. We have an important interest in not unnecessarily impeding these associations and organizations and the work they do everyday, often through volunteers, to tend to the poor, the disabled, the sick, and to the many individual citizens who need assistance in one form or another. Alexis de Tocqueville first observed in 1835 in *Democracy in America* that "[i]n no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America. . . . In the United States, associations are established to promote the public safety, commerce, industry, morality, and religion. There is no end which the human will despairs of attaining through the combined power of individuals united into a society." As Tocqueville correctly observed, the work of these associations is particularly important to ensuring that the majority in a democracy do not oppress the minority: "There are no countries in which associations are more needed to prevent the despotism of faction or the arbitrary power of a prince than those which are democratically constituted."

While it is true the electioneering communications provisions do not prevent associations from forming, the provision does impede their lobbying the prince, *i.e.*, the federal government, on issues that are important to the work they do and on legislation that can impact the effectiveness of their efforts to improve American society, democracy, government, culture, and industry. To assert that this type of grassroots lobbying by these charitable and nonprofit organizations would lead to corruption in our electoral process, or that this type of civic involvement is somehow deleterious to our democracy, is a baseless claim that belies the historical development of our government and our nation. The same principles apply to corporations and labor unions that have a

vital interest, and a right, to petition the government on issues that affect their industry and their livelihood.

2006 is a congressional election year. Federal primary elections are currently underway throughout the county. Colorado, Connecticut, Michigan, Nevada, Alaska, Tennessee, and Wyoming will hold primaries in August. In September, Florida, Arizona, Delaware, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Wisconsin, Massachusetts, Washington, and Hawaii will hold their congressional primary elections. The 30-day electioneering communications pre-primary election window is already open in many States, and will become applicable in additional States throughout the months of August and September. The general election will be held on November 7, 2006. The 60-day electioneering communications pre-general election window will open on September 7, 2006. It is of vital importance that the Commission immediately promulgate a "grassroots lobbying" exemption as an Interim Rule to take effect as soon as possible (and certainly before September 7) to remedy the effect the current electioneering communications provisions are having, and will continue to have, on genuine grassroots lobbying activity.

Therefore, it would be impracticable and contrary to the public interest to delay promulgation of the Interim Final Rule to provide notice and comment prior to the implementation of new section 100.29(c)(6).[9] *See* 5 U.S.C. 553(b)(B). For the same reasons the Commission is promulgating the Interim Final Rule under the "good cause" exception in 5 U.S.C. 553(b)(B), the effective date does not need to be delayed 30 days

[9] The Commission has issued regulations in the course of the BCRA rulemaking process regarding the Millionaires Amendment and the definition of Federal Election Activity for certain local elections as interim final rules. *See Interim Final Rules for Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates*, 68 FR 3970 (Jan. 27, 2003); *Interim Final Rule for the Definition of Federal Election Activity*, 71 FR 14357 (March 22, 2006).

from the date of publication in the Federal Register under 5 U.S.C. 553(d)(3). Additionally, the Interim Final Rule may become effective immediately under 5 U.S.C. 553(d)(1), as it is "a substantive rule which grants or recognizes an exemption or relieves a restriction." Therefore, the Interim Final Rule at 11 CFR 100.29(c)(6) will take effect on [***date***].

VI. The Grassroots Lobbying Exemption

The grassroots lobbying exemption to the definition of "electioneering communication" consists of four elements that must be satisfied in order for *any* grassroots lobbying communication to qualify for the exemption, and one additional element that must be met if the communication includes a reference to the clearly identified candidate's position or record with regard to the public policy issue referenced. These elements are in the form of categorical, content-based requirements concerning: (i) how a candidate for Federal office may be referenced; (ii) the appropriate subject matter of the communication; (iii) the appropriate action message conveyed to the candidate or the general public; (iv) the statutory requirement that any exempted communication not promote, support, attack, or oppose a candidate for that Federal office; and (iv) how the candidate's position or record may be referenced.

A. 11 CFR 100.29(c)(6)(i)

In order to qualify for the "grassroots lobbying" communication exemption, any communication that references a clearly identified candidate for Federal office must (i) refer to that candidate only in his or her capacity as an incumbent public officeholder; (ii) not reference that candidate's character, qualifications, or fitness for public office; and (iii) not refer to any Federal election or political party. The first of these requirements

ensures that the communication references the individual in his non-candidate capacity, *i.e.*, in his capacity as a public officeholder, since "grassroots lobbying" necessarily targets officeholders rather than candidates. The second and third requirements provide prophylactic guidelines to ensure that the "grassroots lobbying" character of the communication is maintained.

1. Reference clearly identified candidate only in his or her capacity as an incumbent public officeholder

The first requirement of subsection (i) is that the communication reference the clearly identified candidate for Federal office only in his capacity as an incumbent public officeholder.

Advisory Opinion 2004-31 (Russ Darrow Group, Inc.) made clear that a communication may reference an individual who is a candidate for Federal office in a capacity other than as a candidate. In this matter, Mr. Russ Darrow's name was included in his car dealership names (*e.g.*, Russ Darrow Appleton Chrysler). Mr. Darrow was also a candidate for Federal office. For many years, Mr. Darrow was his company's spokesman, until his son, also named Russ Darrow, assumed those responsibilities. Mr. Darrow asked the Commission if automobile dealership advertisements that included the name "Russ Darrow" would be "electioneering communications" under the Act. The Commission concluded no, resting its determination "on the factual circumstances presented in which the use of the name 'Russ Darrow' refers to a business or to another individual who is not a candidate." Advisory Opinion 2004-31. In other words, the name of an individual who is a candidate may be used in a manner that does not refer to that person in his capacity as a candidate and such use will not qualify as a reference to a

"clearly identified candidate for Federal office," as that phrase is used in the electioneering communications provisions. *See* 2 U.S.C. 434(f)(3)(A)(i)(I), 11 CFR 100.29(a)(1). In adopting this Interim Final Rule, the Commission concludes that an individual who is a candidate for Federal office may be referenced solely in his capacity as an incumbent public officeholder, and that this distinction is readily made on the basis of the plain language of the communication.

Additionally, the Commission has endorsed a so-called "multiple hat theory" in which individuals who concurrently hold more than one position are recognized as being able to act in one capacity while not acting in the other. As the Commission stated, "it is clear that individuals, such as State party chairmen and chairwomen, who also serve as members of their national party committees, can, consistent with BCRA, wear multiple hats, and can raise non-Federal funds for their State party organizations without violating the prohibition against non-Federal fundraising by national parties." *Final Rule and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 FR 49064, 49083 (July 29, 2002). Thus, an individual, provided he takes proper precautions, acts as a national party member when raising funds for the national party, and as a state party chairman when raising funds for the state party. This observation makes clear that a single individual may simultaneously hold multiple positions and recognizes the ability of that person to act in only one capacity. The multiple hat theory was subsequently applied in Advisory Opinion 2003-10 (Rory Reid), in which the Commission noted that "Commissioner Reid, as a prominent state official in Nevada, may at different times act in his capacity as an agent on behalf of the State Party and act as an agent on behalf of Senator Reid." The Commission has no doubt that an

individual may be referenced solely in his capacity as an incumbent public officeholder, and that reference is easily distinguished from a reference to that individual as a candidate for Federal office.

This requirement establishes an objective standard for determining whether an individual is referenced only in his capacity as an incumbent public officeholder that is not dependent on reference to external events or implied meanings or understandings. As the Commission recently noted in separate rulemakings, the requirement "sets forth an objective test that focuses on the communications in context, and does not turn on subjective interpretations by the person making the communication or its recipient." *Final Rules on Definitions of "Solicit" and "Direct,"* 71 Fed. Reg. 13926, 13928 (March 20, 2006). Furthermore, "[t]he regulation turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings. It does not depend on reference to external events, such as the timing or targeting of a [communication], nor is it limited to [communications] that use specific words or phrases that are similar to a list of illustrative phrases." *Final Rule on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056, 68057 (Nov. 23, 2004). Whether the communication references the individual only in his capacity as an incumbent public officeholder, thereby satisfying the requirement, may be determined simply by referencing the plain language of the communication itself.

This requirement is entirely consistent with the electioneering communications provisions. It does not contravene or undermine the requirements set forth at 2 U.S.C. 434(f)(3), and it does not allow for a clearly identified candidate for Federal office to be

promoted, supported, attacked, or opposed. The electioneering communications provision states that the Commission may not exempt any communication that otherwise qualifies as an "electioneering communication" and is described in subsection (A)(iii) of the definition of "federal election activity." *See* 2 U.S.C. 434(f)(3)(B)(iv) (referencing 2 U.S.C. 431(20)(A)(iii)). That subsection describes "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports *a candidate for that office*, or attacks or opposes *a candidate for that office* . . . ." 2 U.S.C. 431(20)(A)(iii) (emphasis added). By its plain terms, this language refers to promoting, supporting, attacking, or opposing an individual *in his or her capacity as a candidate for that office*. Where an individual is referenced solely in his capacity as an incumbent public officeholder, and not as a candidate, it logically follows that such a reference does not PASO that individual *as a candidate for Federal office*.

2. No reference to incumbent public officeholder's character, qualifications, or fitness for public office

The second requirement of subsection (i) is that the exempted communication may not reference the incumbent public officeholder's character, qualifications, or fitness for public office. The reasons for this are clear: these considerations are primarily relevant to the candidate's *election to* public office, but not necessarily to lobbying that individual as an officeholder to take a certain position or action on a pending matter of public policy. The character, qualifications, and fitness for public office of an individual are inextricably linked to that person's electoral suitability. The Commission therefore presumes that a reference to an individual's character, qualifications, or fitness for public office will, in all likelihood, PASO that individual as a candidate for office. This

requirement, therefore, serves the dual purpose of ensuring that the communication does not stray from its "grassroots lobbying" objective, and effectuates BCRA's command that any exempted communication not PASO a clearly identified candidate for Federal office. Similar to the first requirement of subsection (i), discussed above, this requirement also establishes an objective standard which may be applied with simple reference to the plain language of the communication.

3. No reference to any Federal election or political party

The third requirement of subsection (i) is that the exempted communication may not reference any Federal election or political party. As is the case with the second requirement of subsection (i), discussed above, Federal elections and political parties are relevant to the candidate's election to public office, but not to lobbying that individual as an officeholder to take a certain position or action on a pending matter of public policy. A reference to a Federal election or a political party would indicate that the communication does not reference the individual solely as an incumbent public officeholder, but rather as either a candidate, or a candidate/officeholder (*i.e.*, in both capacities). Thus, this requirement reinforces the first requirement of subsection (i), discussed above, ensures that the communication does not stray from its "grassroots lobbying" objective, and effectuates BCRA's command that any exempted communication not PASO a clearly identified candidate for Federal office. This requirement establishes an objective standard that may be applied with simple reference to the plain language of the communication.

B. 11 CFR 100.29(c)(6)(ii)

In order to qualify for the "grassroots lobbying" communication exemption, the subject of the communication must be a public policy issue under consideration by either Congress or the Executive Branch. A "public policy issue under consideration by either Congress or the Executive Branch" may take the form of a legislative proposal introduced in Congress as a bill, or a proposal or concept that has not yet been introduced as a bill. A "public policy issue" may also take the form of a matter of public debate which has, or may, engage Congress or the Executive Branch.

More specifically, the following would constitute appropriate "public policy issues" under this subsection:

- a bill designated "H.R.1" or S.1";
- an initiative or undertaking proposed by the President of the United States;
- an issue that rises to prominence through events occurring in the States, *e.g.*, border control;
- an issue given prominence by a Supreme Court decision, *e.g.*, eminent domain.

These examples are illustrative in nature, and this list is not necessarily exhaustive.

This requirement is entirely consistent with the electioneering communications provisions. It does not contravene or undermine the requirements set forth at 2 U.S.C. 434(f)(3), and it does not allow for a clearly identified candidate for Federal office to be promoted, supported, attacked, or opposed. A public policy issue cannot, in and of itself, PASO any candidate. As is the case with the requirements of 11 CFR 100.29(c)(6)(i), discussed above, this requirement establishes an objective standard that may be applied with simple reference to the plain language of the communication.

C. 11 CFR 100.29(c)(6)(iii)

The third requirement is that the exempted communication either (i) urge the incumbent public officeholder to take a particular position or action; or (ii) urge the general public to contact the incumbent public officeholder for the purpose of encouraging that officeholder to take a particular position or action. As set forth in subsection (i) above, this call to action must necessarily address the candidate only in his capacity as an incumbent public officeholder.

1. Urges the incumbent public officeholder to take a particular position or action

The exempted communication may be directly addressed to the candidate only in his capacity as an incumbent public officeholder. The communication must urge the incumbent public officeholder to take a particular position or action with respect to the public policy issue referenced in subsection (ii) above. Appropriate exhortations to the incumbent public officeholder include, but are not necessarily limited to:

- "Congressman Smith, vote yes on H.R.1."
- "The Association of Local Merchants calls on Congressman Smith to cosponsor the Tax Reduction Bill of 2006."
- "We urge Congressman Smith to stand with America's workers and support expanded health care coverage."
- "Congressman Smith, vote for the President's health care initiative."

2. Urges the general public to contact the incumbent public officeholder for the purpose of encouraging the candidate to take a particular position or action

Alternatively, the exempted communication may urge the general public to contact the incumbent public officeholder and encourage the officeholder to take a

particular position or action with respect to the public policy issue referenced in subsection (ii) above. Appropriate exhortations to the general public include, but are not necessarily limited to:

- "Call Congressman Smith at (202) 555-1234 and tell him to vote yes on H.R.1."
- "Write to Congressman Smith in Washington at the address on the screen and ask him to cosponsor the Tax Reduction Act of 2006."
- Send Congressman Smith an e-mail to tell him that you hope he will stand with America's workers and support expanded health care coverage. His e-mail address is Mr.Smith@house.gov."
- "Contact Congressman Smith and ask him to vote for the President's health care initiative [contact information on screen]."

The Commission notes that the contact information provided in the communication must be consistent with the requirement that the communication reference the clearly identified candidate in his or her capacity as an incumbent public officeholder. Contact information at a campaign headquarters would be inconsistent with this requirement. The contact information provided must be to the incumbent public officeholders' government office in Washington, D.C., or to a district office.

This requirement is entirely consistent with the electioneering communications provisions. It does not contravene or undermine the requirements set forth at 2 U.S.C. 434(f)(3), and it does not allow for a clearly identified candidate for Federal office to be promoted, supported, attacked, or opposed. To urge an incumbent public officeholder to take a certain position or action with respect to a public policy issue does not PASO any candidate for Federal office. Whether a quotation or recitation satisfies this requirement

is objectively determinable by simple reference to the plain language of the communication.

D. 11 CFR 100.29(c)(6)(iv)

The fourth requirement implements the statutory command that any communication exempted from the electioneering communications provisions by Commission regulation may not promote, support, attack, or oppose any candidate for the office sought by the candidate that is clearly identified in the communication. *See* 2 U.S.C. 434(f)(3)(B)(iv), 431(20)(A)(iii). No individual requirement of the "grassroots lobbying" exemption may PASO any candidate for the office sought by the candidate that is clearly identified in the communication, and the communication as a whole may not PASO any candidate for the office sought by the candidate that is clearly identified in the communication.

E. 11 CFR 100.29(c)(6)(v)

The fifth requirement is conditional in nature. *If* the communication references the position or record of the clearly identified candidate for Federal office on the public policy issue referenced in subsection (ii), it may only do so by quoting that candidate's own public statements or reciting that candidate's official actions, such as a vote. However, if the communication does not include such reference, then the communication need satisfy only subsections (i) – (iv) in order to qualify for the grassroots lobbying exemption.

The Commission is including this requirement because it recognizes that effective lobbying may require reference to the position or record of the target of the lobbying activity. For example, an organization cannot convey its support for, or opposition to, an

officeholder's position on a public policy issue unless that position is identified. However, the Commission also recognizes that reference to a public officeholder's position or record on an issue provides an opportunity to PASO that officeholder as a candidate through the organization's characterization of that position or record. Therefore, the Commission draws special attention to the specific language of this requirement, namely, that the reference may "quote" the candidate's own public statements, or "recite" the candidate's "official actions." To "quote" is to "repeat or copy the words of (another), usually with acknowledgment of the source." *The American Heritage Dictionary of the English Language, New College Edition*, Houghton Mifflin Company, 1976. A quotation is an exact, verbatim citation. Similarly, to "recite" is to "repeat or utter aloud something rehearsed or memorized, especially publicly," "to relate in detail," or "to list or enumerate." *Id.* Additionally, an "official action" is an action taken by the incumbent public officeholder in his capacity as an officeholder.

The Commission understands the terms "quote" and "recite" to require an objective and neutral presentation, and to exclude the organization's own gloss on, or characterization of, the officeholder's position or record. Consistent with this requirement, an organization may convey objective statements of fact in the form of "quoting" the clearly identified candidate or "reciting" the candidate's official actions.

The Commission finds the following examples to be consistent with this requirement. These lists are illustrative in nature, not exhaustive, and intended only to demonstrate the mechanics of the fifth requirement.

Quotations That Satisfy 11 CFR 100.29(c)(6)(v):

- "Congressman Smith said, 'I cannot vote for this tax bill.'" This example provides a verbatim quotation of Congressman Smith's own statement. Additionally, the statement is introduced in an objective manner.
- "Last week, Congressman Smith told an audience, "I am pro-life." This example also provides a verbatim quotation of Congressman Smith's own statement. The statement is introduced with more detail than the first example, but the additional detail is similarly objective and neutral in nature.

Quotations That Do Not Satisfy 11 CFR 100.29(c)(6)(v):

- "Congressman Smith said, 'I cannot vote [to lower your taxes].'" The quotation requirement is not satisfied here. This is a misquotation – the quoted language does not accurately reflect the Congressman's statement. The quotation is incomplete, which changes the meaning of what Congressman Smith originally said. Putting words in Congressman Smith's mouth, for the sake of "clarity," may also constitute a misquotation, and runs afoul of the requirement that the officeholders' "*own* public statement" be used. Here, the alternative language used reflects the lobbying organization's own characterization of Congressman Smith's statement.
- "Last week, Senator Smith said he did not support a woman's right to choose." This example does not satisfy the requirement because it does not quote Congressman Smith. Rather, it characterizes what he said, and that characterization reflects the lobbying organization's own judgments. Paraphrasing is not permitted under the quotation requirement.

Recitations That Satisfy 11 CFR 100.29(c)(6)(v):

- "Congressman Smith voted against the Brady Handgun Bill." This example accurately "recites" Congressman Smith's official action, *i.e.*, his vote on a piece of legislation. The Commission does not view use of the common name of legislation as problematic.
- "Congressman Smith introduced the Environment First Bill." Like the example above, this example accurately "recites" Congressman Smith's official action, *i.e.*, the introduction of a bill.

Recitations That Do Not Satisfy 11 CFR 100.29(c)(6)(v):

- "Congressman Smith voted to make your children less safe by not restricting access to handguns." This example does not "recite" Congressman Smith's official action. Rather, it characterizes that action.
- "Congressman Smith, beholden to environment interests, introduced a bill that will make your gasoline more expensive." Like the example above, this example does not "recite" Congressman Smith's official action, but rather, includes a characterization of that action, and of Congressman Smith himself.

Limiting references to the officeholder's position or record on the public policy issue to quotations of public statements and recitations of official actions will prevent a reference to position or record from promoting, attacking, supporting, or opposing the clearly identified candidate for Federal office. Rather, it makes the recipient of the communication aware of the clearly identified candidate's *own* words or official actions taken as an officeholder.

This requirement is entirely consistent with the electioneering communications provisions. It does not contravene or undermine the requirements set forth at 2 U.S.C. 434(f)(3), and it does not allow for a clearly identified candidate for Federal office to be promoted, supported, attacked, or opposed. Referencing the position or record of an officeholder by quoting that officeholder or reciting his previous actions does not PASO any candidate for Federal office. Whether an exhortation satisfies this requirement is objectively determinable by simple reference to the plain language of the communication.

F. 11 CFR 100.29(c)(6)(vi)

This subsection provides that the "grassroots lobbying" exemption to the electioneering communications provision shall expire on September 30, 2007, and will not apply to any activities or communications after that date. The Commission expects to consider any public comments prior to the expiration of this exemption and may adopt a Final Rule that can be effective on or before September 30, 2007.

VII. Immediate Effect of Interim Final Rule

Any delay for notice and comment would make it impossible to promulgate an exemption before the ongoing primary elections and the November general election have occurred and would prevent or restrict the regulated community from lobbying Congress on the issues that Congress debates and votes on during the summer and fall months. Therefore, it would be impracticable and contrary to the public interest to delay promulgation of the Interim Final Rule to provide notice and comment prior to the implementation of a new regulation. For the same reasons, the Commission should promulgate the Interim Final Rule immediately under the "good cause" exception in 5 U.S.C. 553(b)(B), and the effective date should not be delayed 30 days from the date of

its publication in the Federal Register. *See* 5 U.S.C. 553d)(3). The Commission must promulgate an Interim Rule for 2006 as soon as possible to cover the electioneering communications period during the federal primaries and general election.

The Commission seeks public comment on the Interim Final Rule. The Commission will consider such comments when reviewing the Interim Final Rule and determining whether it should promulgate a Final Rule. This process will allow the Commission to promulgate a rule immediately as required by exigent circumstances, while providing the Commission with the ability to gauge the effect of the Interim Final Rule in practice, as well as allow the public to comment on its implementation and effect.

The Petition to open a rulemaking that was filed with the Commission provides an informative and well-balanced approach for an exemption that enforces the letter and intent of the electioneering communications provisions at 2 U.S.C. 434(f)(3). The Interim Final Rule will not lead to the circumvention of BCRA. The exemption, which was specifically authorized by Congress when it passed BCRA, is narrowly drawn and does not exempt the electioneering communications that Congress sought to subject to BCRA's funding and reporting restrictions, *i.e.*, "sham issues ads" that have an electioneering purpose. The exemption does not create an opportunity for evasion of the law because the communications that fall within the exemption are genuine grassroots lobbying communications that BCRA was never intended to reach. The electioneering communication regulation, in conjunction with the exemption in this Interim Final Rule, will continue to prevent corruption and the appearance thereof in the electoral process by regulating those communications that are intended to influence Federal elections, but

while avoiding the unnecessary interference with the people's First Amendment right to petition the Government through genuine lobbying activity.

Approval by the Commission of this document and Interim Final Rule will authorize the Office of General Counsel to take all steps necessary to publish the Interim Final Rule as soon as possible, as well as to supplement this Explanation and Justification with technical and other conforming changes as necessary.

11 CFR § 100.29 Electioneering communication (2 U.S.C. 434(f)(3))

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(c) The following communications are exempt from the definition of *electioneering communication*. Any communication that:

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(6) Is a grassroots lobbying communication. For purposes of this section, a grassroots lobbying communication is any communication that:

(i) References a clearly identified candidate for Federal office, but refers to that candidate only in his or her capacity as an incumbent public officeholder, does not reference that person's character, qualifications, or fitness for office, and does not refer to any Federal election or a political party;

(ii) Has as its subject matter a public policy issue under consideration by Congress or the Executive Branch;

(iii) Urges the incumbent public officeholder to take a particular position or action with respect to the public policy issue referenced in

subsection (ii) above, or urges the general public to contact the incumbent public officeholder for the purpose of encouraging such position or action with respect to the public policy issue referenced in subsection (ii) above;

(iv) Does not promote, support, attack, or oppose any candidate for the office sought by the incumbent public officeholder referenced in subsection (i) above; and

(v) References the position or record of the incumbent public officeholder on the public policy issue referenced in subsection (ii) above only by quoting that officeholder's own public statements or reciting that officeholder's official actions, such as a vote. A communication that does not discuss the position or record of the incumbent public officeholder on the public policy issue referenced in subsection (ii) above, but satisfies subsections (i), (ii), (iii), and (iv) is also a grassroots lobbying communication.

(vi) Paragraph (c)(6) of this section shall not apply to any activities or communications after September 30, 2007.