



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2006 AUG 28 A 11:08

Memorandum

To: The Commission

Through: Patrina M. Clark
Staff Director

From: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Amy L. Rothstein
Acting Assistant General Counsel

Ron B. Katwan
Attorney

Subject: Petition for Rulemaking to Exempt "Grassroots Lobbying" from
Electioneering Communications: Notice of Disposition

On February 16, 2006, the Commission received a petition for rulemaking (the "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 "Petitioners"). The Petition asked the Commission to revise its regulations by exempting from the definition of "electioneering communication" certain "grassroots lobbying" communications.

The Office of General Counsel was asked to prepare for Commission consideration a draft Notice of Disposition (the "Notice") in response to the Petition. *See* Attachment 1. The Notice states that the Commission has decided not to initiate a rulemaking at this time, although the Commission recognizes that it may consider initiating a rulemaking on this subject in the future.

The Office of General Counsel has also prepared for Commission consideration a draft letter to the Petitioners, informing them of the Commission's decision on this matter. *See* Attachment 2.

Attachments

AUG 28 2006

AGENDA ITEM
For Meeting of: 08-29-06

SUBMITTED LATE

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[Notice 2006 -]**

4 **Exception for Certain “Grassroots Lobbying” Communications from the Definition of**
5 **“Electioneering Communication”**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of disposition of Petition for Rulemaking.

8 **SUMMARY:** The Commission announces its disposition of a Petition for Rulemaking
9 (“Petition”) filed on February 16, 2006, by the AFL-CIO, the Alliance for
10 Justice, the Chamber of Commerce of the United States, the National
11 Education Association, and OMB Watch. The Petition asks the
12 Commission to revise its regulations by exempting from the definition of
13 “electioneering communication” certain communications consisting of
14 “grassroots lobbying.” The Commission has decided not to initiate a
15 rulemaking in response to the Petition at this time. The Petition is
16 available for inspection in the Commission’s Public Records Office and on
17 its website, <www.fec.gov>. Further information is provided in the
18 supplementary information that follows.

19 **FOR FURTHER**
20 **INFORMATION**

21 **CONTACT:** Ms. Amy L. Rothstein, Acting Assistant General Counsel, or Mr. Ron B.
22 Katwan, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202)
23 694-1650 or (800) 424-9530.

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2 **SUPPLEMENTARY**
3 **INFORMATION:**
4

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

18 On February 16, 2006, the Commission received a Petition for Rulemaking (“Petition”)
19 from the AFL-CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the
20 National Education Association, and OMB Watch (collectively, “Petitioners”). The Petitioners
21 asked the Commission to revise 11 CFR 100.29(c) to exempt from the definition of
22 “electioneering communication” certain “grassroots lobbying” communications that reflect all of
23 the following six principles: (1) “The ‘clearly identified federal candidate’ is an incumbent
24 public officeholder;” (2) “The communication exclusively discusses a particular current
25 legislative or executive branch matter;” (3) “The communication either (a) calls upon the

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

8 On March 16, 2006, the Commission published a Notice of Availability (“NOA”) seeking
9 comment on whether to initiate a rulemaking on this proposed exception to the definition of
10 “electioneering communication.” Notice of Availability on Rulemaking Petition: Exception for
11 Certain “Grassroots Lobbying” Communications From the Definition of “Electioneering
12 Communication,” 71 FR 13557 (Mar. 16, 2006). The Commission received nine timely
13 comments and two late comments in response to the NOA. In addition to these comments, the
14 Commission received 180 form letter comments. Most of the commenters supported the Petition
15 primarily on the grounds that the current electioneering communication rules limit the ability of
16 organizations to run ads whose purpose is not to influence Federal elections, but to support or
17 defeat legislation at the most critical time (i.e., when the legislation is before Congress,
18 regardless of the election cycle). These commenters argued that such “grassroots lobbying” ads
19 are entitled to First Amendment protection and should therefore be exempt from the
20 electioneering communication rules. However, one group of commenters opposed the Petition,
21 arguing that the Commission had already considered this question in the 2002 rulemaking that
22 adopted the current electioneering communication rules and had concluded correctly that it

1 lacked statutory authority to promulgate a “grassroots lobbying” exemption.¹ These commenters
2 further asserted that “there are no changed circumstances that warrant reconsideration of that
3 decision.” Copies of the comments are available on the Commission’s website at
4 http://www.fec.gov/law/law_rulemakings.shtml#lobbying.

5 On August 29, 2006, the Commission voted to decline to initiate a rulemaking at this time
6 on the proposed exception for certain “grassroots lobbying” communications from the definition
7 of “electioneering communication,” given the Commission’s other administrative priorities. The
8 Commission recognized, however, that it has the statutory authority to create exemptions to the
9 electioneering communication rules (provided the exemptions do not permit PASO
10 communications) and that it may consider initiating a rulemaking on this subject in the future.

11 Initiating a rulemaking at this time would not be an efficient or effective use of the
12 Commission’s resources. See 11 CFR 200.5(e). The Commission is currently defending the
13 constitutionality of BCRA’s electioneering communication provisions against two as-applied
14 challenges to the statute involving communications that the plaintiffs claim are “grassroots
15 lobbying” communications. See Wisconsin Right to Life v. FEC, Civ. No. 04-1260 (D.D.C.);
16 Christian Civic League of Maine v. FEC, Civ. No. 06-614 (D.D.C.). Even if the Commission
17 were to grant the Petitioners’ request to begin a rulemaking to create a “grassroots lobbying”
18 exemption, the plaintiffs in these cases may well continue to pursue litigation or to initiate new
19 litigation, particularly if the Commission were to craft an exemption narrower than that
20 contemplated by the plaintiffs. Moreover, any eventual court decisions in these lawsuits may
21 provide the Commission with guidance on whether and how the Commission should exercise its
22 discretion in this area. Judicial guidance may well necessitate a reevaluation of any rules the

¹ The Commission considered several proposals for “grassroots lobbying” exemptions in the 2002 rulemaking but did not adopt any of them. See Notice of Proposed Rulemaking on Electioneering Communications, 67 FR 51131, 51136, 51145 (Aug. 7, 2002); Final Rules on Electioneering Communications, 67 FR 65190, 65201 (Oct. 23, 2002).

1 Commission were to propose now. Therefore, in light of the pending as-applied challenges to
2 the constitutionality of the electioneering communication provisions, the Commission believes
3 that initiating a rulemaking at this time would not be an effective use of its resources or an
4 appropriate way to proceed.

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Michael E. Toner
Chairman
Federal Election Commission

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12 DATED: _____

13 BILLING CODE: 6715-01-U

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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Re: Notice of Disposition of Petition for Rulemaking

Dear Ms. McCormick and Messrs. Gold, Pomeranz, Baran, and Bauer:

On August 29, 2006, the Commission decided not to initiate a rulemaking at this time to exempt certain “grassroots lobbying” communications from regulation as “electioneering communications,” as proposed in the Petition for Rulemaking that you filed on February 16, 2006.

Enclosed for your information is the Notice of Disposition approved by the Commission.

Sincerely,

Rosemary C. Smith
Associate General Counsel

Enclosure