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Done at Washington, DC on August 27, 2007.

Alfred Almanza,  
Administrator.

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 100, 104, and 114

[Notice 2007-16]

#### Electioneering Communications

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Election Commission requests comments on proposed revisions to its rules governing electioneering communications. These proposed rules would implement the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, which held that the prohibition on the use of corporate and labor organization funds for electioneering communications is unconstitutional as applied to certain types of electioneering communications. The Commission has made no final decision on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

**DATES:** Comments must be received on or before October 1, 2007. The Commission will hold a hearing on the proposed rules on October 17, 2007 at 10 a.m. Anyone seeking to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

**ADDRESSES:** All comments must be in writing, must be addressed to Mr. Ron B. Katwan, Assistant General Counsel, and must be submitted in 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 [wrtl.ads@fec.gov](mailto:wrtl.ads@fec.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 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:** Mr. Ron B. Katwan, Assistant General Counsel, Mr. Anthony T. Buckley, Attorney, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Commission is seeking public comment on proposed revisions to 11 CFR parts 100, 104 and 114 that would implement the recent U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (June 25, 2007), available at [http://www.fec.gov/law/litigation/wrtl\\_sct\\_decision.pdf](http://www.fec.gov/law/litigation/wrtl_sct_decision.pdf).

#### I. Background

##### A. Statutory and Regulatory Provisions Governing Electioneering Communications

The Bipartisan Campaign Reform Act of 2002 ("BCRA")<sup>1</sup> amended the Federal Election Campaign Act of 1971, as amended<sup>2</sup> (the "Act" or "FECA"), by adding a new category of political communications, "electioneering communications," to those already governed by the Act. See 2 U.S.C. 434(f)(3). Electioneering communications are broadcast, cable or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i). Those who make electioneering communications are subject to certain reporting obligations. See 2 U.S.C. 434(f)(1) and (2). Corporations and labor organizations are prohibited from using general treasury funds to finance electioneering communications, directly or indirectly. 2 U.S.C. 441b(b)(2).

The Act exempts certain communications from the definition of "electioneering communication" found in 2 U.S.C. 434(f)(3)(B)(i) to (iii), and specifically authorizes the Commission to promulgate regulations exempting other communications as long as the exempted communications do not promote, support, attack or oppose ("PASO") a candidate. See 2 U.S.C.

434(f)(3)(B)(iv), citing 2 U.S.C. 431(20)(A)(iii).

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

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

In *McConnell v. FEC*, 540 U.S. 93 (2003) ("McConnell"), the U.S. Supreme Court upheld BCRA's electioneering communication provisions against various constitutional challenges. *Id.* at 194, 201-02, 207-08. Specifically, the Supreme Court held that the prohibition on the use of general treasury funds by corporations and labor organizations to pay for electioneering communications in 2 U.S.C. 441b(b)(2) was not facially overbroad. *Id.* at 204-06. In *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("WRTL I"), the U.S. Supreme Court explained that *McConnell's* upholding of section 441b(b)(2) against a facial constitutional challenge did not preclude further as-applied challenges to the corporate and labor organization funding prohibitions. See *WRTL I*, 546 U.S. at 411-12. Subsequently, in *FEC v.*

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

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

<sup>1</sup> Pub. L. 107-155, 116 Stat. 81 (2002).

<sup>2</sup> 2 U.S.C. 431 *et seq.*

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

The Commission is initiating this rulemaking to implement the Supreme Court’s decision in *WRTL II*. The Commission seeks public comment generally regarding the effect of the *WRTL II* decision on the Commission’s rules governing corporate and labor organization funding of electioneering communications, the definition of “electioneering communication,” and the rules governing reporting of electioneering communications.

## II. Proposed Rules on Electioneering Communications

### A. Scope of the Rulemaking

#### 1. Scope of the Proposed Electioneering Communications Exemption

The Commission is seeking public comment on two proposed alternative ways to implement the *WRTL II* decision in the rules governing electioneering communications. The first alternative would incorporate the new exemption into the rules prohibiting the use of corporate and labor organization funds for electioneering communications in 11 CFR part 114. The second alternative would incorporate the new exemption into the definition of “electioneering communication” in 11 CFR 100.29.

*Alternative 1—Proposed revisions to the corporate and labor organization prohibition.*

Under the Act, electioneering communications are subject to both

funding restrictions and reporting requirements. Specifically, entities that spend a total of more than \$10,000 on electioneering communications in a calendar year must file disclosure reports with the FEC. See 2 U.S.C. 434(f)(1). Corporations and labor organizations are prohibited from using general treasury funds to pay for any electioneering communication. See 2 U.S.C. 441b(b)(2). The plaintiff in *WRTL II* challenged only BCRA’s corporate and labor organization funding restrictions and did not contest either the definition of “electioneering communication” in section 434(f)(3), or the reporting requirement in section 434(f)(1). See *WRTL II*, 127 S. Ct. at 2658–59; see also Verified Complaint for Declaratory and Injunctive Relief, ¶ 36 (July 28, 2004) in *Wisconsin Right to Life, Inc. v. FEC* (No. 04–1260), available at [http://fecdocs005.fec.gov/law/litigation\\_related.shtml#wrtl\\_dc](http://fecdocs005.fec.gov/law/litigation_related.shtml#wrtl_dc) (“*WRTL* does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements.”) Accordingly, the Commission could construe the Supreme Court’s holding that the Act’s electioneering communication funding restrictions are unconstitutional as applied to certain advertisements as not extending to the reporting requirements for electioneering communications.

BCRA added the electioneering communications reporting requirements to the Act through a different provision (section 201) than the BCRA provision containing the corporate prohibition on making electioneering communications (section 203). The Commission seeks comment as to whether the scope of the *WRTL II* decision is limited to an as-applied challenge to the section 203 prohibitions and whether the Commission has the authority to change its electioneering communications rules beyond what is required by the Supreme Court’s decision. Does the holding in *WRTL II* depend on a finding that the prohibition on using corporate and labor organization funds for electioneering communications in section 203 is a direct limitation on speech? Do the reporting requirements in section 201 implicate the same concerns about direct restrictions on First Amendment rights, given that *McConnell* specifically upheld the electioneering communications reporting provisions as constitutional because they “d[o] not prevent anyone from speaking?” *McConnell*, 540 U.S. at 201 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)) (internal quotations

omitted). See also *Alaska Right To Life Comm. v. Miles*, 441 F.3d 773, 788 (9th Cir. 2006) (“The [*McConnell*] Court was not \* \* \* explicit about the appropriate standard of scrutiny with respect to disclosure requirements. However, in addressing extensive reporting requirements applicable to \* \* \* ‘electioneering communications’ \* \* \*, the Court did not apply ‘strict scrutiny’ or require a ‘compelling state interest.’ Rather, the Court upheld the disclosure requirements as supported merely by ‘important state interests.’”) (internal quotation omitted); *Buckley v. Valeo*, 424 U.S. 1, 60–84 (1976) (upholding FECA’s reporting requirements); *c.f.* *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 98–99 (1982) (reporting requirements found unconstitutional when there was a “reasonable probability” that disclosure of information would lead to economic reprisals or physical threats).

Therefore, under Alternative 1, the Commission proposes to implement the *WRTL II* decision by creating an exemption solely from the prohibition on the use of corporate and labor organization funds to finance electioneering communications. The proposed revisions to 11 CFR 114.2 and proposed new section 114.15 would not create an exemption from either the overall definition of “electioneering communication” in section 100.29 or from the reporting requirements in section 104.20. Thus, corporations and labor organizations would be permitted to use general treasury funds for electioneering communications that qualify for the proposed exemption, but would be required to file electioneering communications disclosure reports once they spend more than \$10,000 in a calendar year on such communications. See proposed revision to 11 CFR 104.20. The Commission seeks comment on this approach.

*Alternative 2—Proposed revisions to the definition of “electioneering communication.”*

Under Alternative 2, the Commission proposes to place the new exemption in 11 CFR 100.29(c) as an additional exemption from the definition of “electioneering communication.” This alternative would construe the Supreme Court’s decision in *WRTL II* to hold that communications that qualify for the *WRTL II* exemption may not be constitutionally regulated as electioneering communications (*i.e.*, if a communication satisfies the Court’s test, it is not an “electioneering communication,” as that term is used in the Act), meaning that the associated reporting requirements are no longer applicable.

Placing the exemption within section 100.29(c) in the definition of “electioneering communication” would have at least two practical implications. First, if a communication satisfies the *WRTL II* exemption, and is therefore exempted from the definition of “electioneering communication,” the electioneering communications reporting requirements would not apply to the exempted communication. Second, an exemption from the definition of “electioneering communication” would extend beyond corporations and labor organizations to *all* “persons” paying for communications that satisfy the exemption articulated in *WRTL II*. See 11 CFR 104.20. The Commission understands this distinction would extend the Supreme Court’s exemption to individuals, unincorporated entities, and QNCs, in addition to corporations and labor organizations. Would any other “persons” be affected?<sup>5</sup> The Commission seeks comment on all aspects of the impact of these proposed regulations on “persons” under the Act.

Does *WRTL II* either permit or necessitate an exemption from the definition of “electioneering communication,” or give the Commission authority to create such an exemption? Would the Commission’s statutory authority to create exemptions under 2 U.S.C. 434(f)(3)(B)(iv) be sufficient to create an exemption that satisfies the requirements of *WRTL II*? If the Commission were to use its statutory authority set forth at 2 U.S.C. 434(f)(3)(B)(iv) to create exemptions, would the statutory provision’s PASO requirement be applicable, or does *WRTL II* supersede that requirement with respect to a communication that qualifies for the *WRTL II* exemption? Would *WRTL II*’s functional equivalent test be a reasonable statutory construction of PASO? The Commission seeks comment on all aspects of the appropriate scope of, and authority for, a new exemption.

The choice between Alternative 1 and Alternative 2 would also have implications for the coordinated communications rules, which rely in part on the definition of “electioneering communication” in section 100.29. See 2 U.S.C. 441a(a)(7)(C); 11 CFR 109.21(c). The Commission’s coordinated

communications rule includes four different content standards: (1) Electioneering communications; (2) public communications that republish campaign materials; (3) public communications that include express advocacy; and (4) public communications that refer to a Federal candidate during certain time periods before an election. See 11 CFR 109.21(c)(1)–(4). The proposed rules in Alternative 1 do not affect the coordinated communications rules because communications that qualify for the proposed exemption in section 114.15 would still be considered “electioneering communications” and thus meet the “electioneering communication” content standard in 11 CFR 109.21(c)(1). By contrast, because Alternative 2 creates an exemption from the definition of “electioneering communication,” any communication that qualifies for the exemption in proposed section 100.29(c)(6) could no longer meet the “electioneering communication” content standard in section 109.21(c)(1). However, under both alternatives, a communication that qualifies for the proposed new exemption may still be a “coordinated communication” under one of the other three content standards in sections 109.21(c)(2)–(4). Thus, under both alternatives, exempt communications made by corporations or labor organizations may still be prohibited in-kind contributions as “coordinated communications.” The Commission seeks comment on the effects of each alternative on the coordinated communication rule.

## 2. Impact on the Definition of Express Advocacy

*WRTL II* demarcated the constitutional reach of the Act’s electioneering communications funding restrictions. Does *WRTL II* also provide guidance regarding the constitutional reach of other provisions in the Act? *WRTL II*’s “functional equivalent of express advocacy” test limiting the electioneering communication prohibition draws upon the Supreme Court’s express advocacy construction of “independent expenditure,” first appearing in *Buckley v. Valeo*, 424 U.S. 1 (1976), and later applied in the context of section 441b’s corporate expenditure ban in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Court’s equating of the “functional equivalent of express advocacy” with communications that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” bears considerable resemblance to

components of the Commission’s definition of express advocacy at 11 CFR 100.22. Section 100.22(a) deems communications that “in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)” to be express advocacy. Express advocacy may also be found under section 100.22(b) when, in context, a communication “could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s).” Does *WRTL II* require the Commission to revise or repeal any portion of its definition of express advocacy at section 100.22? Does the “functional equivalent of express advocacy” test from *WRTL II* also demarcate the constitutional reaches of Commission regulation of independent expenditures?

Section 434(f)(3)(B)(ii) excludes “an expenditure or an independent expenditure” from the definition of “electioneering communication.” Would a definition of “express advocacy” (which, in turn, defines “independent expenditure”) that subsumes all electioneering communications effectively nullify section 434(f) by deeming all “functional equivalent” communications to be “expenditures” and thus by definition not electioneering communications? Would these coextensive definitions leave any independent meaning to the electioneering communications reporting requirements, because there would be no remaining class of electioneering communications to be reported? Would this combination of definitions likewise rob the electioneering communication prohibition in section 441b(b)(2) (and proposed new 11 CFR 114.15) of independent significance by construing the corporate expenditure prohibition as coextensive with the corporate electioneering communications prohibition? What are the implications of having different regulatory language defining the scope of the prohibitions?

## B. General Prohibition on Corporations and Labor Organizations Making Electioneering Communications

Alternative 1—Proposed Revisions to 11 CFR 114.2

Section 114.2(b)(2)(iii) implements the funding restrictions of 2 U.S.C. 441b(b)(2) by prohibiting corporations and labor organizations from “[m]aking payments for an electioneering communication to those outside the restricted class.” After the *WRTL II*

<sup>5</sup>Political committees are not currently subject to the Act’s electioneering communications provisions because communications that constitute either expenditures or independent expenditures, provided that the expenditures or independent expenditures are required to be reported under the Act or Commission regulations, are exempt from the definition of “electioneering communication.” See 11 CFR 100.29(c)(3); *EC E&J*, 67 FR at 65197–98.

decision, that section must be amended to reflect that corporations and labor organizations cannot constitutionally be prohibited from funding certain types of communications that fall within the statutory definition of electioneering communications. However, placing a detailed exemption based on the *WRTL II* decision within section 114.2(b) could be confusing and difficult for the reader to find. Thus, the Commission proposes to set out the *WRTL II* exemption in a new proposed section 114.15, and to amend section 114.2(b) by cross-referencing the exemption in section 114.15. See proposed 11 CFR 114.2(b)(3) (“Except as provided at 11 CFR 114.10 and 114.15 \* \* \*”).<sup>6</sup>

#### Alternative 2—No Proposed Changes

Under Alternative 2, no revisions to section 114.2(b) are proposed. If a communication is exempted from the definition of “electioneering communication” at 11 CFR 100.29, it would not be subject to the prohibition set forth at current section 114.2(b).

#### C. The *WRTL II* Exemption

##### Alternative 1—Proposed 11 CFR 114.15—Permissible Use of Corporate and Labor Organization Funds for Certain Electioneering Communications

The new exemption in proposed section 114.15 would only apply to certain types of communications that meet the current definition of “electioneering communication” in 11 CFR 100.29. Proposed paragraph (a) would set forth the general standard for determining whether the use of corporate and labor organization funds for an electioneering communication is permissible under *WRTL II*. Proposed paragraph (b) would include safe harbor provisions for two common types of communications: grassroots lobbying communications, and commercial or business advertisements. Proposed paragraph (c) would address reporting obligations for corporations and labor organizations that choose to use general treasury funds to pay for permissible electioneering communications.

##### Alternative 2—Proposed 11 CFR 100.29(c)(6)—Exemption From the Definition of “Electioneering Communication”

The new exemption in proposed section 100.29(c)(6) would apply to certain types of communications that otherwise meet the current definition of

“electioneering communication” in 11 CFR 100.29(a). Proposed paragraph (c)(6) would set forth the general standard for determining whether a communication is exempt from the definition of “electioneering communication” pursuant to *WRTL II*. Proposed paragraphs (c)(6)(i) and (ii) are identical to proposed section 114.15(b), and would include the same safe harbor provisions for two common types of communications: grassroots lobbying communications, and commercial or business advertisements. Alternative 2 does not include a paragraph that is equivalent to proposed section 114.15(c), because there would be no reporting requirements for communications that satisfy the proposed exemption.

Because the substantive requirements of the proposed *WRTL II* exemption and the included safe harbors would be the same under either Alternative 1 or 2, the following discussion applies equally to both alternatives.

##### 1. Proposed 11 CFR 114.15(a) or 11 CFR 100.29(c)(6)—Articulation of the *WRTL II* Exemption

The Supreme Court in *WRTL II* held that the Act’s prohibition on the use of corporate and labor organization funds to pay for electioneering communications is unconstitutional as applied to communications that are not the “functional equivalent” of express advocacy. *WRTL II*, 127 S. Ct. at 2659. Under *WRTL II*, “an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL II*, 127 S. Ct. at 2667.

Under Alternative 1, proposed section 114.15(a) would provide that corporations and labor organizations may make an electioneering communication (as defined in 11 CFR 100.29) without violating the prohibition in section 114.2(b)(3), “if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” Under Alternative 2, proposed section 100.29(c)(6) would provide that if the communication “is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate,” it is exempted from the definition of “electioneering communication” set forth at 11 CFR 100.29(a).

The proposed exemptions in the two alternatives would be objective, “focusing on the substance of the communication rather than amorphous considerations of intent and effect.”

*WRTL II*, 127 S. Ct. at 2666. In determining whether a particular communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate, the Commission may consider “basic background information that may be necessary to put an ad in context.” *Id.* at 2669. According to the *WRTL II* opinion, this information could include whether a communication “describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future.” *Id.* (internal citation omitted). The Commission seeks comment on this approach. Should the Commission include in the Explanation and Justification or the rule itself a list of examples of information that would be included as “basic background information”? What information beyond the “four corners” of the communication may the Commission consider as “basic background information”? What examples should the Commission use?

The Commission proposes, under both alternatives, to supplement the general exemption with two safe harbors. The safe harbors are identical under both alternatives. The two safe harbors would focus on the content of the communication rather than its intent and effect. Satisfying one of the safe harbor provisions would demonstrate that the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a Federal candidate. A communication that qualifies for one of the safe harbors would be deemed to satisfy the general exemption set forth in proposed section 114.15(a) or section 100.29(c)(6). However, a communication that does not qualify for either of the safe harbors may still come within the general exemption in proposed section 114.15(a) or section 100.29(c)(6).

The Commission seeks comment on the proposed approach of creating safe harbors in addition to a general exemption. Do safe harbor provisions based on categorical content-based requirements provide useful additional guidance to entities applying the general exemption, or is the general exemption sufficiently clear so that further guidance is unnecessary? Should the Commission, instead of, or in addition to, creating safe harbors, provide an exhaustive or non-exhaustive list of factors to be considered when determining whether a communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate? If the Commission

<sup>6</sup> To increase clarity and readability, the proposed rule would also revise the title of section 114.2 to include electioneering communications explicitly, and renumber paragraph (b)(2)(iii) as paragraph (b)(3) with conforming changes as necessary in the text of that paragraph.

provides a list of factors, should it include factors in addition to those listed in the proposed safe harbors and *WRTL II*? Are there any factors that could support a conclusion that a communication is *per se* the functional equivalent of express advocacy?

## 2. Proposed 11 CFR 114.15(b)(1) or 11 CFR 100.29(c)(6)(i)—Safe Harbor for Grassroots Lobbying Communications

Under both alternatives, proposed sections 114.15(b)(1) or 100.29(c)(6)(i) would establish identical safe harbors for grassroots lobbying communications based on *WRTL II*'s analysis of the specific advertisements at issue in the case. The Supreme Court determined that *WRTL*'s advertisements were not the "functional equivalent of express advocacy" because the communications' content was "consistent with that of a genuine issue ad" and the communications lacked "indicia of express advocacy." *WRTL II*, 127 S. Ct. at 2667. The Supreme Court concluded that the content of the communications was "consistent with that of a genuine issue ad" because they focused on a legislative issue, took a position on the issue, exhorted the public to adopt the position, and urged the public to contact public officials with respect to the issue. *Id.* The Court found that the communications lacked "indicia of express advocacy" because they did not mention any election, candidacy, political party, or challenger, and the communications did not take positions on a candidate's character, qualifications, or fitness for office. *Id.*

Accordingly, the first two prongs of the proposed safe harbor for grassroots lobbying communications (proposed 11 CFR 114.15(b)(1)(i) and (ii) or 11 CFR 100.29(c)(6)(i)(A) and (B)) would incorporate the factors the Court used to determine whether a communication's content is "consistent with that of a genuine issue ad." The third and fourth prongs (proposed 11 CFR 114.15(b)(1)(iii) and (iv) or 11 CFR 100.29(c)(6)(i)(C) and (D)) would incorporate the factors the Court used to determine whether a communication lacks "indicia of express advocacy." A communication would qualify for the proposed safe harbor for grassroots lobbying communications only if it satisfies all four prongs. The Commission invites comment on whether a showing that the communication meets all four prongs (and all elements of each prong) should be required to come within the safe harbor. If not all elements or prongs are essential, how should the safe harbor be constructed? What is the relationship between the first two positive content

prongs (discussing a pending legislative matter and urging a position on an officeholder or the public) and the last two negative or exclusionary prongs (not mentioning certain topics and not taking a position on certain issues)? Should the safe harbors be described only by the "positive content prongs" and the exclusionary factors be used as tests for the "no other reasonable meaning" portion of the general exemption in proposed section 114.15(a)? Should the grassroots lobbying communications safe harbor contain different requirements depending upon whether the Commission decides to implement the exemption in proposed section 114.15(a) or proposed section 100.29(c)(6)?

### a. Proposed 11 CFR 114.15(b)(1)(i) or 11 CFR 100.29(c)(6)(i)(A)

The first prong of the safe harbor in proposed 11 CFR 114.15(b)(1)(i) or 11 CFR 100.29(c)(6)(i)(A) would be that the communication "exclusively discusses a pending legislative or executive matter or issue." A "pending legislative or executive matter or issue" includes: a legislative proposal introduced in Congress as a bill or resolution, or a pending proposal that has not yet been formally introduced as a bill; the confirmation of a nominee; or the use of legislative procedures such as filibustering, cloture votes, or earmarking. The proposed safe harbor would also include communications discussing pending "executive" matters because Federal candidates who are officeholders in the executive branch of Federal, State or local government also may be lobbied to take action on matters involving public policy. In addition, this prong would include current and pending matters of public debate that engage Congress or the Executive Branch. In describing the legislative focus of the advertisement, the *WRTL II* opinion does not use the term "exclusive." If an advertisement is "exclusively" about a legislative issue (as proposed in the rule), are the exclusionary factors (limiting other content) necessary?

The Commission is considering whether to include the following as examples of what would constitute a "legislative or executive matter or issue" under this proposed prong:

- 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, such as border control;

- An issue that is given prominence by a Supreme Court decision, such as eminent domain.

Should these examples appear in the Explanation and Justification that would accompany the final rule or should they be incorporated into the rule itself? Should this prong of the safe harbor be limited to pending State or local matters if the named Federal candidate is a State or local officeholder? Should further examples be added to the list or should some examples be removed from it? The safe harbor currently requires that a matter or issue be "pending." How should the Commission determine whether a given matter or issue is "pending?" Should this requirement be removed, so that the safe harbor protects discussion of matters or issues, even if they are not "pending?"

### b. Proposed 11 CFR 114.15(b)(1)(ii) or 11 CFR 100.29(c)(6)(i)(B)

The second prong of the proposed safe harbor in proposed 11 CFR 114.15(b)(1)(ii) or 11 CFR 100.29(c)(6)(i)(B) would be that the communication "urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue." In addition to communications that urge the public to contact a public official (such as those in *WRTL II*), this requirement would also be met if the communication directly urges the officeholder to take a particular position or action regarding the legislative or executive matter or issue.

Communications discussing a Federal candidate who is not a Federal, State or local officeholder would not come within the proposed safe harbor. The Commission seeks comment on this approach. Should the safe harbor be so limited, or should communications discussing Federal candidates who are not officeholders also be eligible for the safe harbor? For example, could a communication that asks a Federal candidate who is not an officeholder to sign a pledge to support a particular issue if elected be reasonably construed as other than an appeal to vote for or against that candidate? Are there instances in which an entity has "lobbied" a Federal candidate to take a particular position or action once elected?

The Commission is also considering whether to include the following as examples of what would constitute exhortations to the officeholder under the proposed prong:

- "Congressman Smith, vote yes on H.R.1."

• “The Association of Local Merchants calls on Governor Smith to Sign the Tax Reduction Act of 2006.”

• “We urge President Smith to stand with America’s workers and support expanded health care coverage.”

• “Congressman Smith, vote for the President’s health care initiative.” Similarly, some examples of urging the general public to act under the proposed safe harbor would include the following:

• “Call Congressman Smith at (202) 555-1234 and tell him to vote yes on H.R.1.”

• “Write to Governor Smith at the address on the screen and ask him to sign the Tax Reduction Act of 2006.”

• Send President 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@whitehouse.gov*.”

• “Contact Congressman Smith and ask him to vote for the President’s health care initiative [contact information on screen].”

Should these examples appear in the Explanation and Justification that would accompany the final rule or should they be incorporated into the rule itself? Should further examples be added to the list or should some examples be removed from it? Should an advertisement that urges the public to “Call Congressman Smith and thank him for voting for H.R. 1” satisfy this prong of the safe harbor?

The Commission seeks comment on whether the criteria for the safe harbor in proposed section 114.15(b)(1)(i) and (ii) or section 100.29(c)(6)(i)(A) and (B) accurately reflect the content of a “genuine issue ad” as noted by *WRTL II*. Should the Commission add further prongs to ensure that the content of the communication would be fully consistent with that of a grassroots lobbying communication?

*c. Proposed 11 CFR 114.15(b)(1)(iii) or 11 CFR 100.29(c)(6)(i)(C)*

The third prong of the proposed safe harbor in proposed 11 CFR 114.15(b)(1)(iii) or 11 CFR 100.29(c)(6)(i)(C) would be that the communication “does not mention any election, candidacy, political party, opposing candidate, or voting by the general public.” The proposed prong would include “voting by the general public” in addition to the terms listed in the *WRTL II* decision as further indicia of express advocacy. For example, a communication would not meet this prong if it discussed a Federal candidate’s position on certain pending legislative issues, but concluded with the tag line “Vote. It’s important to your

future.” Should references to voting by the general public in an election be included as additional indicia of express advocacy? Could communications that provide the address of campaign headquarters as an officeholder’s contact information satisfy this prong of the proposed safe harbor under either alternative, or would such communications be considered to be referring to the officeholder’s candidacy? Should only communications that provide contact information at the incumbent officeholder’s Federal or State government office or a district office qualify for the proposed safe harbors?

The Commission invites comment on whether the following examples “mention” elections, candidacy, political parties or opposing candidates sufficient to transform a communication into the functional equivalent of express advocacy (if these factors are used to assess permissible electioneering communications) or to remove them from the proposed new safe harbors.

#### Elections

• Specific reference to a named election date, such as “Support gun rights this November 5” or “Perform your civic duty November 5 to protect the environment.”

• Specific reference to elections in general, such as “Remember to vote to preserve private property come election time.”

• Reference to election-related themes, such as pictures or text references to: (1) a ballot, (2) ballot box, (3) polls, (4) franchise, (5) suffrage.

#### Candidacy

• Specific description of named candidate and the election, such as “Bob Jones is running for Senate;” or “Before Bob Jones ran for the House he never paid property taxes.”

• Specific description of named candidate, such as “Tim Wirth has a right to run for Senate, but he doesn’t have a right to \* \* \*.”<sup>7</sup>

• Specific reference to office or candidacy, such as “Vote for liberty when picking your Senator!” or “There’s an important choice for Senator this year.”

• Reference to candidacy by unique events or actions related to office, such as “Remember the House Bank scandal? This November, let’s do better.”

• Implied references to candidacy, such as: (1) Photo shots of candidate near Capitol; (2) candidate appears in

mock-setting of government office; (3) other images reasonably suggesting candidacy.

#### Political party

• Specific reference to a recognized party, such as “Democrats,” “Republicans,” “Libertarians,” or “Greens.”

• Reference to political parties by nickname or proxy description, “Remember to support the GOP!” or “liberals in Congress;” or “the War party in Washington;” or “Support the party of Lincoln and Reagan;” or graphics reasonably understood to reference the party (e.g. elephants or donkeys).

#### Opposing Candidate

• Reference to incumbent and opposing candidate, such as “Bob Barry supports our troops; Bill Jones cut veterans’ benefits by 20%.”

• Reference to incumbent, implying opposing candidate, such as “It’s time to take out the trash, select real change with Bob Barry.”

• Generic references to opposing candidate, such as an advertisement in which the opposing candidate appears as “Rocky” the prizefighter.

*d. Proposed 11 CFR 114.15(b)(1)(iv) or 11 CFR 100.29(c)(6)(i)(D).*

The final prong of the proposed safe harbor would state that the communication “does not take a position on any candidate’s or officeholder’s character, qualifications, or fitness for office.” See proposed 11 CFR 114.15(b)(1)(iv) or 11 CFR 100.29(c)(6)(i)(D). It may be argued, however, that effective lobbying may require reference to an officeholder’s position or record on a particular issue. For example, an organization may find it difficult to convey its support for, or opposition to, an officeholder’s prior position on a public policy issue unless that position is identified. Thus, a discussion of an officeholder’s position on a public policy issue or legislative record may be consistent with the content of a genuine issue advertisement and may, therefore, not automatically render a communication ineligible for the proposed safe harbor. However, if a communication discusses an officeholder’s past position on an issue in a way that implicates the officeholder’s character, qualifications, or fitness for office, then the communication would not meet this prong of the proposed safe harbor. The Commission seeks comment on this approach. How should the Commission determine if an officeholder’s past position on an issue is discussed in a way that implicates the officeholder’s

<sup>7</sup> See *FEC v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015, 1018 n.1 (10th Cir. 1995), *rev’d*, 518 U.S. 604 (1996).

character, qualifications, or fitness for office?

In *McConnell*, the Supreme Court used a hypothetical “Jane Doe” advertisement as an example of the type of advertisements that would be subject to the electioneering communications rules. This hypothetical advertisement “condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’” *McConnell*, 540 U.S. at 127. The Justices in *WRTL II* disagreed as to whether this Jane Doe hypothetical would be considered “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” See 127 S. Ct. at 2667 n.6 (Roberts, C.J.) (distinguishing the Jane Doe hypothetical from the *WRTL* advertisements); 127 S. Ct. at 2683 n.7 (Scalia, J.) (contending that the new exemption covers the Jane Doe hypothetical); 127 S. Ct. at 2698–99 (Souter, J.) (arguing that the *WRTL* advertisements are indistinguishable from the Jane Doe hypothetical). The Commission seeks comment on how an advertisement similar to the Jane Doe hypothetical should be treated under the proposed rule. If an advertisement merely condemns a candidate’s record on an issue would it fail to satisfy the fourth prong of the safe harbor? Would such an advertisement also fail to meet the general exemption in proposed section 114.15(a) or 100.29(c)(6)? Would the outcome be different if the advertisement condemned a candidate’s record but also included a discussion of the legislative issue itself? Does eligibility for the *WRTL II* exemption depend on the strength of the condemnation or on whether the condemnation is the sole or main content of the advertisement? Are there advertisements that describe issues in such inflammatory terms that merely to recite the candidate or officeholder’s position is to comment on the individual’s character, qualifications, or fitness for office? (E.g., “H.R. 6000 would legalize infanticide. Congressman Jones supports this bill. Call Congressman Jones and tell him to stop supporting baby killing and oppose H.R. 6000.”) Are there criteria the Commission could use to define such advertisements, or would any attempt by the Commission to devise such criteria risk impairing the speaker’s “autonomy to choose the content of his own message?” See *WRTL II*, 127 S. Ct. at 2671 n.9.

The Commission invites comment on whether the following examples of statements about a candidate take a position on a candidate’s “character,

qualifications, or fitness for office” sufficient to transform a communication into the functional equivalent of express advocacy.

- The candidate is acting from an improper motive: favoring special interests, or specific interests for improper or insufficient reasons.
- Defamatory statements about the candidate.
- The candidate is failing to adhere to standards of a profession, trade or office.
- The candidate is failing to abide by religious convictions.
- The candidate is failing to fulfill family, personal, civil or legal obligations or duties (e.g. divorce proceedings, family law matters, fidelity, bankruptcy, medical or professional malpractice proceedings, sexual harassment or employment-related litigation).
- Allegations that the candidate has violated a law or ordinance.
- The candidate has poor performance in job or school (based on official work/academic record or based on peer judgment of candidate’s school and work record).
- Allegations that the candidate misrepresented his own record or accomplishments.
- Negative characterizations of a candidate’s vote, voting record or position on an issue, such as “Congressman Rogers has the worst environmental voting record in the Calizona Congressional delegation.”
- Peer’s recollection of candidate’s reputation (e.g. “hardworking,” “scandalous,” “faithful public servant,” “philanderer,” “tenacious”).
- The candidate’s untruthfulness or untrustworthiness, truthfulness or reliability.
- The candidate’s patriotism or lack thereof.
- The candidate’s sound judgment or lack thereof.
- The candidate’s effectiveness in politics or professional endeavors (receipt of awards or recognition).
- The candidate’s history or absence of public, military, or community service.
- The candidate’s loyalty to political party.
- The candidate’s service to constituents.
- Demonstration of the candidate’s knowledge of requisite topics.
- Medical, psychological or mental fitness of the candidate: Is the candidate in good medical standing for public service?

#### *e. Examples.*

The Commission is considering whether to include in the rule or the Explanation and Justification for the

final rule examples of communications that would, and would not, satisfy the four prongs of the safe harbor for grassroots lobbying communications. These examples are drawn from actual communications evaluated by the courts in electioneering communications cases. The Commission is also considering whether to provide, in the rule or the Explanation and Justification for the final rule, examples of communications that would be the functional equivalent of express advocacy under the general exemption in proposed section 114.15(a) or section 100.29(c)(6). The Commission seeks comment on whether such examples should be provided, and what types of communications would be appropriate examples.

The following examples are illustrative only and are not intended to create a requirement for any particular words or phrases that must be included for a communication to qualify for the safe harbor. The Commission seeks comment on the application of the proposed safe harbor to these examples, and asks whether further examples would be helpful.

#### Example 1

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We’ve reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well \* \* \*

COUPLE: Yes, yes \* \* \* we’re listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca \* \* \*

VOICE-OVER: Sometimes it’s just not fair to delay an important decision.

But in Washington, it’s happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple “yes” or “no” vote. So qualified candidates aren’t getting a chance to serve.

It’s politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.<sup>8</sup>

This communication would come within the proposed safe harbor in either of the two alternatives. Its content is consistent with that of a genuine issue advertisement because it focuses exclusively on the pending legislative matter of Senate filibuster votes on judicial nominees (proposed section 114.15(b)(1)(i) or section 100.29(c)(6)(i)(A)), and urges viewers to

<sup>8</sup> “Loan,” *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 198 n.4 (D.D.C. 2006). The Supreme Court held that this advertisement was not the “functional equivalent of express advocacy.” *WRTL II*, 127 S. Ct. at 2670.



contact Senators Feingold and Kohl to take a position with respect to the filibuster issue (proposed section 114.15(b)(1)(ii) or section 100.29(c)(6)(i)(B)). Further, the communication does not contain indicia of express advocacy: it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (proposed section 114.15(b)(1)(iii) or section 100.29(c)(6)(i)(C)), and it does not take a position on the character, qualifications, or fitness for office of Senators Feingold or Kohl (proposed section 114.15(b)(1)(iv) or section 100.29(c)(6)(i)(D)).

#### Example 2

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order \* \* \* but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.<sup>9</sup>

This communication fails to satisfy the proposed safe harbor in either of the two alternatives in several ways. Although the advertisement mentions a past vote against child support enforcement, the communication does not exclusively discuss a pending legislative matter or issue. Instead, it discusses the candidate's own personal and legal history. Similarly, the exhortation, "Tell him to support family values," does not urge the public to tell Yellowtail to take a specific position or action with respect to a pending legislative matter or issue. Therefore, the communication's content is not consistent with that of a genuine issue advertisement. Further, the communication attacks Bill Yellowtail's character by referring to alleged actions he took against his spouse, his delinquent child-support payments, and his past felony conviction (proposed 114.15(b)(1)(iv) or section 100.29(c)(6)(i)(D)). Thus, the communication also contains indicia of express advocacy.

If the Commission decides to provide examples of communications that would be the functional equivalent of express advocacy under the general exemption in proposed section 114.15(a) or section 100.29(c)(6), would the Yellowtail advertisement be an appropriate example? What

considerations would support a conclusion that this communication is susceptible of no reasonable interpretation other than as an appeal to vote against Bill Yellowtail? If this communication is not the functional equivalent of express advocacy, of what reasonable interpretation other than as an appeal to vote against Bill Yellowtail is the communication susceptible?

#### Example 3

Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202–224–3121 and ask for your senators. Again, that's 202–224–3121. Thank you for making your voice heard.

Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.<sup>10</sup>

This communication would come within the proposed safe harbor in either of the two alternatives. Its content exclusively focuses on the pending legislative matter of the Marriage Protection Amendment (proposed 114.15(b)(1)(i) or section 100.29(c)(6)(i)(A)), and urges viewers to contact Senators Snowe and Collins to urge them to support this pending legislation (proposed 114.15(b)(1)(ii) or section 100.29(c)(6)(i)(B)). This communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (proposed 114.15(b)(1)(iii) or section 100.29(c)(6)(i)(C)). In contrast to Example 2 above, this communication criticizes the Senators' past voting records only as part of a broader discussion of particular legislation, and it does not include or function as an attack on their personal character, qualifications, or fitness for office (proposed 114.15(b)(1)(iv) or section

100.29(c)(6)(i)(D)). Therefore, this communication does not include indicia of express advocacy.

#### Example 4

It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.<sup>11</sup>

The Commission seeks comment on whether this communication should come within the proposed safe harbor in either of the two alternatives. Does its content exclusively discuss a pending legislative or executive matter or issue (proposed 114.15(b)(1)(i) or section 100.29(c)(6)(i)(A))? Does the sentence "Tell him to protect America's environment" urge Congressman Ganske to take a particular position or action with respect to the matter or issue? Does the sentence "Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air" discuss a past voting record as part of a broader discussion of a particular matter or issue, or does it serve to function as an attack on Congressman Ganske's character, qualifications, or fitness for office? If the sentence serves both purposes, should the advertisement come within the safe harbor? Does the sentence, "Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions," function as an attack on Congressman Ganske's character, qualifications, or fitness for office (proposed 114.15(b)(1)(iv) or section 100.29(c)(6)(i)(D))? If this sentence is removed, does that change the analysis? If the communication does not fall within the safe harbor, does the communication fall within the general exemption in proposed section 114.15(a) or section 100.29(c)(6)? If the sentence regarding corporate contributions is removed, does the communication fall within the general exemption?

#### Example 5

What's important to America's families? [middle-aged man, interview style]: "My pension is very important because it will provide a significant amount of my income when I retire." And where do the candidates

<sup>9</sup> "Bill Yellowtail," *McConnell v. FEC*, 540 U.S. 93, 193 n.78 (2003). The Court noted that this advertisement was "clearly intended to influence the election." *Id.*

<sup>10</sup> "Crossroads," Verified Complaint for Declaratory and Injunctive Relief, Exhibit A (Apr. 3, 2006), *Civic Christian League of Maine v. FEC*, 443 F. Supp. 2d 81 (D.D.C. 2006) (No. 06–0614), available at [http://www.fec.gov/law/litigation/christian\\_civic\\_league\\_complaint.pdf](http://www.fec.gov/law/litigation/christian_civic_league_complaint.pdf). The Commission filed a joint motion asking the Court to hold this advertisement meets the WRTL II exemption. See "Joint Motion" (July 13, 2007), *Civic Christian League of Maine v. FEC*, (No. 06–0614).

<sup>11</sup> See *McConnell v. FEC*, 251 F. Supp. 2d 176, 876 (D.D.C. 2003) (Leon, J.), available at [http://www.fec.gov/pages/bcra/mem\\_opinion\\_leon.pdf](http://www.fec.gov/pages/bcra/mem_opinion_leon.pdf).



stand? Congressman Charlie Bass voted to make it easier for corporations to convert employee pension funds to other uses. Arnie Arnesen supports the "Golden Trust Fund" legislation that would preserve pension funds for retirees. When it comes to your pension, there is a difference. Call or visit our website to find out more.<sup>12</sup>

The Commission seeks comment on whether this communication should come within the proposed safe harbor in either of the two alternatives. Does its content exclusively discuss a pending legislative or executive matter or issue (proposed 114.15(b)(1)(i) or section 100.29(c)(6)(i)(A))? Does it contain an adequate call to action (proposed 114.15(b)(1)(ii) or section 100.29(c)(6)(i)(B))? If the phrase "Call or visit our website to find out more" is replaced with "Contact Congressman Bass and tell him to support the Golden Trust Fund legislation," does that change the analysis? Does the reference to two candidates competing for the same office constitute a reference to an "opposing candidate" (proposed section 114.15(b)(1)(iii) or 100.29(c)(6)(i)(C))? If the communication does not come within the safe harbor, does the communication fall within the general exemption in proposed section 114.15(a) or section 100.29(c)(6)?

#### Example 6

TOM KEAN, JR.

No experience. Hasn't lived in New Jersey for 10 years. It takes more than a name to get things done.

NEVER. Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean, Jr. may be a nice young man and you may have liked his dad a lot—but he needs more experience dealing with local issues and concerns. For the last 5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean, Jr. \* \* \* New Jersey needs New Jersey leaders.

#### Example 7

[Superimposed over a photograph of Mr. Kean wearing a campaign button]

For the last 5 years Tom Kean, Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress—Tom never paid property taxes. No experience. TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS. New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrissey has experience dealing with

important issues. It takes more than a name to get things done. Tell Tom Kean, Jr. \* \* \* NEW JERSEY NEEDS NEW JERSEY LEADERS.<sup>13</sup>

The Commission seeks comment on whether these two advertisements constitute the functional equivalent of express advocacy under either alternative. The Commission previously found reason to believe that both advertisements constituted express advocacy based on *McConnell*. Does the *WRTL II* decision change or strengthen that finding, given that both these advertisements comment on a candidate's qualifications or fitness for office?

#### 3. Proposed 11 CFR 114.15(b)(2) and 11 CFR 100.29(c)(6)(ii)—Safe Harbor for Commercial and Business Advertisements

Under *WRTL II*, corporations and labor organizations may not be prohibited from funding an electioneering communication unless that communication is the functional equivalent of express advocacy, meaning that it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate. The Court found that the advertisements at issue in *WRTL II* were not the functional equivalent of express advocacy because they could be reasonably viewed as issue advocacy. However, issue advocacy is not the only conceivable non-electoral "reasonable interpretation" to which a communication might be susceptible. For example, the Commission has in several instances applied the Act and Commission regulations to communications that advertise a business or a product.<sup>14</sup> Because some communications that meet the definition of "electioneering communication" could reasonably be interpreted as having a non-electoral, business or commercial purpose, the

Commission is proposing a safe harbor for business and commercial advertisements.

The Commission seeks comment on this approach. Is the holding in *WRTL II* limited in application to communications that contain issue advocacy or grassroots lobbying, or does the holding extend to other types of communications such as business and commercial advertisements? See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (refusing to apply strict scrutiny First Amendment analysis to commercial advertisements, instead using four-part intermediate scrutiny test); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (same). The Supreme Court in *Buckley* stated: "The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Does *WRTL II* modify the long-standing jurisprudence that commercial speech is entitled to less Constitutional protection than political speech? The *WRTL II* decision addressed commercial speech, stating:

At the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and "the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy." *McConnell*, *supra*, at 205. This greater-includes-the-lesser approach is not how strict scrutiny works. A corporate ad expressing support for the local football team could not be regulated on the ground that such speech is less "core" than corporate speech about an election, which we have held may be restricted. A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech. That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy; the *McConnell* Court itself made just that point. See 540 U.S., at 206, n. 88. Such a greater-includes-the-lesser argument would dictate that virtually all corporate speech can be suppressed, since few kinds of speech can lay claim to being as central to the First Amendment as campaign speech. That conclusion is clearly foreclosed by our precedent. See, e.g., *Bellotti*, *supra*, at 776–777.

*WRTL II*, 127 S. Ct. at 2671–72.

The safe harbor in both alternatives would employ the same two-step approach that the Court used in *WRTL II* to determine whether a communication is a "genuine issue ad." The first two prongs of the safe harbor

<sup>13</sup> MUR 5024R, Factual and Legal Analysis for Council for Responsible Government, Inc. and its Accountability Project; Gary Glenn; William "Bill" Wilson, at 8–9 (approved by the Commission on April 11, 2005), available at <http://eqs.nictusa.com/eqsdocs/00004C5E.pdf>. The Commission did not analyze the advertisements in Examples 6 and 7 with regard to the electioneering communications provisions because the advertisements appeared in printed flyers in an election held before BCRA was enacted. The application of the proposed exemption and safe harbor assumes that the examples are distributed as a broadcast advertisement.

<sup>14</sup> See, e.g., Advisory Opinions ("AOs") 2004–31 (Darrow), 2004–30 (Citizens United), and 2004–15 (Hardy); Matters under Review ("MURs") 5467 (Michael Moore) and 5410 (Oberweis Dairy, et al.). See also *Notice of Availability of Rulemaking Petition: Exception for the Promotion of Political Documentary Films from "Electioneering Communications,"* 69 FR 52461 (Aug. 26, 2004).

<sup>12</sup> Adapted from *McConnell v. FEC*, 251 F. Supp. 2d 176, 918 (D.D.C. 2003) (Leon, J.), available at [http://www.fec.gov/pages/bcra/mem\\_opinion\\_leon.pdf](http://www.fec.gov/pages/bcra/mem_opinion_leon.pdf).

would ensure that the content of the communication is fully consistent with that of a genuine commercial advertisement, based on the Commission's experience applying the electioneering communications rule to commercial advertising in the past two election cycles. See proposed 11 CFR 114.15(b)(2)(i) and (ii) or proposed 11 CFR 100.29(c)(6)(ii)(A) and (B). The third and fourth prongs would incorporate the factors the *WRTL II* Court used to determine whether a communication lacks "indicia of express advocacy." See proposed 11 CFR 114.15(b)(2)(iii) and (iv) and proposed section 100.29(c)(6)(ii)(C) and (D). A communication would qualify for the proposed safe harbor for genuine business advertisements only if it satisfies all four prongs. The Commission seeks comment on whether it is appropriate to include a proposed safe harbor for commercial advertisements. If so, are the proposed prongs appropriate? Should the commercial advertisements safe harbors contain different requirements depending upon whether the Commission decides to implement the exemption in proposed section 114.15(a) or proposed section 100.29(c)(6)?

As discussed above, a communication that qualifies for the proposed new safe harbor may still be a "coordinated communication" if it satisfies the content and conduct prongs in section 109.21. Thus, exempt communications made by corporations or labor organizations may still be prohibited in-kind contributions as "coordinated communications." The Commission seeks comment on the effects of the commercial safe harbor on the coordinated communication rule.

*a. Proposed 11 CFR 114.15(b)(2)(i) or 100.29(c)(6)(ii)(A)*

The first prong of this proposed safe harbor in proposed 11 CFR 114.15(b)(2)(i) or 100.29(c)(6)(ii)(A) would be that the communication "exclusively advertises a Federal candidate's or officeholder's business or professional practice or any other product or service." This prong would be satisfied both by advertisements in which a Federal candidate or officeholder appears to promote a business, product for sale, or other commercial service, and by advertisements in which a Federal candidate or officeholder is referred to as the subject of a book or movie. This prong would apply to businesses owned or operated by, or employing, the candidate or officeholder, and publishers, distributors or promoters of

books, films or plays that refer to the candidate or officeholder.

*b. Proposed 11 CFR 114.15(b)(2)(ii) or 100.29(c)(6)(ii)(B)*

The second prong of the proposed safe harbor in proposed 11 CFR 114.15(b)(2)(ii) or 100.29(c)(6)(ii)(B) would be that the communication "is made in the ordinary course of business of the entity paying for the communication." For example, a restaurant owned by a Federal candidate could use its corporate general treasury funds to pay for advertisements featuring the owner/candidate. Similarly, an incorporated publisher or distributor of a book about a Federal candidate would be able to pay for an advertisement for that book. How should the Commission determine what constitutes an entity's "ordinary course of business"? Should the Commission review the advertising history or advertising patterns of the entity paying for the communication in order to evaluate this prong of the safe harbor? If the entity in question is a newly established business, should the fact that it has never before distributed broadcast advertisements indicate that it is not operating in the "ordinary course of business"?

*c. Proposed 11 CFR 114.15(b)(2)(iii) and (iv) or 100.29(c)(6)(ii)(C) and (D)*

The third and fourth prongs of the proposed safe harbor for commercial and business advertisements (proposed sections 114.15(b)(2)(iii) and (iv) or sections 100.29(c)(6)(ii)(C) and (D)) would be identical to prongs three and four of the proposed safe harbor for grassroots lobbying communications in both alternatives. Accordingly, a commercial or business advertisement would qualify for the safe harbor only if it "does not mention any election, candidacy, political party, opposing candidate, or voting by the general public" and "does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." See proposed 11 CFR 114.15(b)(2)(iii) and (iv) or 11 CFR 100.29(c)(6)(ii)(C) and (D).

*d. Example*

The Commission is considering whether to include in the Explanation and Justification examples of communications that would satisfy all four prongs of the safe harbor for commercial and business advertisements. The following example is based on an actual communication in a past advisory opinion request. It is illustrative only and is not intended to create a requirement for any particular words or phrases that must be included for a communication to qualify for the safe harbor. The Commission seeks

comment on this example and asks whether further examples would be helpful.

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

[VOICE OVER SPEAKING WHILE VIDEO OF INSIDE DEALERSHIP ZOOMS IN ON FRAMED PICTURE ON WALL OF JOE SMITH]: Stop into Joe Smith Cadillac, on Highway 18 in Waukesha, and see what Cadillac style really is all about.<sup>15</sup>

This communication could satisfy the proposed safe harbor in either alternative.<sup>16</sup> The communication advertises a business owned by candidate Joe Smith (proposed section 114.15(b)(2)(i) or section 100.29(c)(6)(ii)(A)). Assuming the communication was paid for in the ordinary course of business by a car dealership to advertise its business, it would satisfy proposed section 114.15(b)(2)(ii) or section 100.29(c)(6)(ii)(B). Finally, the communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (proposed section 114.15(b)(2)(iii) or section 100.29(c)(6)(ii)(C)), and it does not take a position on the candidate's character, qualifications, or fitness for office (proposed section 114.15(b)(2)(iv) or section 100.29(c)(6)(ii)(D)).

**4. Other Types of Communications**

Are there other common categories of broadcast communication that often involve Federal candidates, yet would

<sup>15</sup> This example is drawn from one of the advertisements in AO 2004-31 (Darrow), Attachment A at 3 (Sept. 10, 2004), in which the Commission found that under the particular facts of this advisory opinion, the advertisements did not meet the definition of "electioneering communication" because the use of the name "Russ Darrow" referred to a business or another individual (in this case, the candidate's son) who was not a Federal candidate.

<sup>16</sup> As discussed above, even if the advertisement qualifies for the safe harbor for commercial advertisements, the advertisement could still implicate the coordinated communication rules.

be reasonably interpreted as something other than as an appeal to vote, such as public service announcements or promotions of charities or charitable events?<sup>17</sup> Do other categories of communication warrant safe harbors similar to those proposed for lobbying and commercial communications? What elements would such a safe harbor contain?

#### *D. Reporting Requirements for Electioneering Communications Under Alternative 1*

Any person that has made electioneering communications aggregating in excess of \$10,000 in a calendar year must file a statement that discloses, *inter alia*, the names and addresses of each donor who donated an amount aggregating \$1,000 or more during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. See 2 U.S.C. 434(f)(1)–(2); 11 CFR 104.20(b)–(c). However, the Act and Commission regulations provide the option that persons making electioneering communications may create a segregated bank account for funding electioneering communications in order to limit reporting to the donors for that account. See 2 U.S.C. 434(f)(2)(E); 11 CFR 104.20(c)(7). The segregated bank account may only include funds contributed by individuals who are U.S. citizens or nationals, or permanent residents. *Id.* If a person does not create a segregated bank account and funds electioneering communications from its general account, that person must disclose *all* donors of over \$1,000 to the entity during the current and preceding calendar year. See 2 U.S.C. 434(f)(2)(F); 11 CFR 104.20(c)(8). Moreover, persons that do not use a segregated bank account must be able to demonstrate through a reasonable accounting method that no corporate or labor organization's funds were used to pay any portion of an electioneering communication. See 11 CFR 114.14(d)(1).

The Commission is proposing to revise its rules on reporting and establishing segregated bank accounts for electioneering communications to accommodate reporting by corporations and labor organizations that choose to make electioneering communications that are permissible under proposed section 114.15.

#### 1. Proposed 11 CFR 114.15(c)—Corporate and Labor Organization Reporting Requirement

Proposed section 114.15(c) would provide that corporations and labor organizations that make electioneering communications permissible under the *WRTL II* exemption in proposed section 114.15(a) totaling over \$10,000 in a calendar year must file reports like other entities that make electioneering communications. This proposed section would include a cross reference to the electioneering communications reporting requirements in 11 CFR 104.20.

#### 2. Proposed Revisions to 11 CFR 104.20 and 114.14—Using Segregated Bank Accounts For Electioneering Communications

Current section 104.20(c)(7) only addresses segregated bank accounts containing funds solely from individuals who are “United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20).” These provisions would continue to be applicable to a segregated bank account used to pay for any electioneering communications that do not come within the new *WRTL II* exemption under proposed 11 CFR 114.15. However, a new provision may be needed regarding reporting the receipt of corporate or labor organization funds to pay for electioneering communications coming under the new *WRTL II* exemption in proposed section 114.15.

Accordingly, the Commission proposes to divide paragraph 104.20(c)(7) into paragraphs (c)(7)(i) and (c)(7)(ii). Paragraph (c)(7)(i) would address the segregated bank account used to pay for electioneering communications that would not come under new 11 CFR 114.15. It would follow current paragraph (c)(7) by barring corporations and labor organizations from donating to such an account. In contrast, paragraph (c)(7)(ii) would permit a segregated bank account to be used to pay for electioneering communications that are permissible under the new *WRTL II* exemption in 11 CFR 114.15. This second type of account could contain corporate and labor organization funds. The Commission is not proposing revisions to paragraph (c)(8), which provides for the reporting of “donors” when electioneering communications are not made using a segregated bank account.

Under the proposed regulations, how would a corporation or labor organization report an electioneering

communication funded with general treasury funds? If the corporation or labor organization does not pay for the electioneering communication from an account described in proposed sections 104.20(c)(7)(ii) and 114.14(d)(2)(i), would the corporation or labor organization be required to report “the name and address of each donor who donated an amount aggregating \$1,000 or more” to the corporation or labor organization during the relevant reporting period, as required by 2 U.S.C. 434(f)(2)(F) and 11 CFR 104.20(c)(8)? If so, how would a corporation or labor organization determine which receipts qualify as “donations”? Should the Commission limit the “donation” reporting requirement to funds that are donated for the express purpose of making electioneering communications?

Additionally, the Commission proposes to make conforming changes to 11 CFR 114.14(d)(2), which applies to the use of segregated bank accounts by persons that receive funds from corporations or labor organizations. Section 114.14(d)(2) would be divided into two paragraphs consistent with the proposed changes to section 104.20(c)(7). Paragraph (d)(2)(i) would allow any person (including corporations and labor organizations) wishing to make electioneering communications permissible under 11 CFR 114.15 to establish a segregated bank account for that exclusive purpose, and to limit reporting to donations to that account. In this circumstance, a corporation or labor organization that established such an account would report only donations made to the account for the purpose of electioneering communications, pursuant to 11 CFR 104.20(c)(7)(ii). Paragraph (d)(2)(ii) would continue to allow persons (other than corporations and labor organizations) to establish a segregated bank account to be used to exclusively pay for electioneering communications that do not come under the new exception in proposed 11 CFR 114.15. New paragraph (d)(2)(i) contains the same allowances and restrictions as old paragraph (d)(2), but clarifies that this option is not available to corporations and labor organizations.

The Commission believes that if organizations intend to make some electioneering communications that comply with the new *WRTL II* exemption and other electioneering communications that do not, or might not, come within the exemption, they would be well-advised to establish two separate bank accounts to ensure that corporate and labor organization funds are only accepted and used to fund exempt electioneering communications.

<sup>17</sup> See, for example, the communications at issue in AO 2006–10 (EchoStar) and AO 2004–14 (Davis).

Please note, however, that separate bank accounts would not be mandatory because organizations need only show that they used a reasonable accounting method to separate corporate and labor organization funds under 11 CFR 114.14(d)(1).<sup>18</sup> The Commission seeks comment on this approach.

#### *E. Reporting Requirements for Electioneering Communications Under Alternative 2*

Under Alternative 2, a communication that qualifies for the *WRTL II* exemption in proposed section 100.29(c)(6) would be exempted from the definition of "electioneering communication." Provisions of the Commission's regulations imposing reporting requirements on persons making "electioneering communications" are inapplicable where the communication is exempted from the definition of "electioneering communication." Under Alternative 2, the reporting requirements applicable to all communications that continue to meet the definition of "electioneering communication" would remain unchanged.

#### *F. Revisions to Other Provisions Under Alternative 1*

##### **1. Proposed Revisions to 11 CFR 114.4—Communications Beyond the Restricted Class**

Section 114.4(c) sets out the types of communications that corporations and labor organizations may make either to the general public or to all employees and members. Such communications include registration and voting communications, official registration and voting information, voting records, and voting guides. Alternative 1 proposes adding new paragraph (c)(8) to state that any corporation or labor organization may make electioneering communications to the general public that fall within the new exemption in proposed section 11 CFR 114.15. Proposed paragraph (c)(8) would also make clear that QNCs may make electioneering communications regardless of whether they are permissible under 11 CFR 114.15. The Commission is not proposing any changes to its regulations concerning QNCs at section 114.10.<sup>19</sup>

<sup>18</sup> Upon issuance of final rules, the Commission intends to review FEC Form 9 to ensure that it conforms to whatever changes are contained in the final rules.

<sup>19</sup> The Commission is also proposing a conforming change to paragraph 114.4(c)(1). The statement listing the paragraphs that describe communications that corporations and labor organizations may make to the general public

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

Current section 114.14 prohibits corporations and labor organizations from providing general treasury funds to pay for any electioneering communications whatsoever. The Commission's proposed revisions to this section under Alternative 1 would limit this prohibition to electioneering communications that do not come within the new *WRTL II* exemption in proposed section 114.15, consistent with the proposed changes to the general prohibition on the use of corporate and labor organizations funds in section 114.2.

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

The proposed rule would modify paragraphs (a)(1), (b)(1) and (2), and (d)(1) by adding the phrase "that is not permissible under 11 CFR 114.15" after the word "communication" in each paragraph. These proposed changes would implement *WRTL II* by limiting the prohibition on the use of corporate and labor organization funds to those electioneering communications that are the functional equivalent of express advocacy, and therefore would not be permissible under proposed new 11 CFR 114.15. Paragraph (d)(1) would be further revised by adding the phrase "other than corporations and labor organizations" after the word "Persons." The Commission is proposing this change to avoid any suggestion that corporations and labor organizations may make electioneering communications that do not come

would be amended to include paragraph 114.4(c)(8).

within the new exception articulated in *WRTL II*. The Commission seeks comment on this approach.

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

The Commission certifies that the attached proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any small entities affected would not feel a significant economic impact from the proposed rule. Overall, the proposed rules would relieve a funding restriction that the current rules place on corporations and labor organizations and would therefore have a positive economic impact for any affected small entities. The proposed rules would allow small entities to engage in activity they were previously prohibited from funding with corporation or labor organization funding. Moreover, this activity (making and funding electioneering communications) is entirely voluntary, and any reporting obligations would only be triggered based on entities choosing to engage in this activity above a threshold of \$10,000 per calendar year.

In addition, there are few "small entities" that would be affected by these proposed rules. The Commission's proposed revisions could affect for-profit corporations, labor organizations, individuals and some non-profit organizations. Individuals and labor organizations are not "small entities" under 5 U.S.C. 601(6), and most, if not all, for-profit corporations that would be affected by the proposed rule are not "small businesses" under 5 U.S.C. 601(3). Large national and state-wide non-profit organizations that might produce electioneering communications are not "small organizations" under 5 U.S.C. 601(4) because they are not independently owned and operated and they are dominant in their field. In addition, the factual record developed by the Commission in past electioneering proceedings indicates that few, if any, section 501(c)(3) non-profit organizations make broadcast, cable or satellite communications that refer to Federal candidates during the electioneering communication time frames to the targeted audience.

#### **List of Subjects**

##### *11 CFR Part 100*

Elections.

**11 CFR Part 104**

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

**11 CFR Part 114**

Business and industry, Elections, Labor.

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

**Alternative 1****PART 104—REPORTS BY POLITICAL COMMITTEES AND OTHER PERSONS (2 U.S.C. 434)**

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

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

2. In § 104.20, paragraph (c)(7) would be revised to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

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

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

\* \* \* \* \*

**PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY**

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

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

4. In § 114.2, the section heading and paragraph (b)(2) would be revised and

paragraph (b)(3) would be added to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

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

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

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

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

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

(ii) The committee incorporated for liability purposes only;

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

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

\* \* \* \* \*

5. In § 114.4, paragraph (c)(1) would be amended by adding the phrase “and (c)(8)” after “(c)(5),” and paragraph (c)(8) would be added as follows:

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

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

6. In § 114.14, paragraphs (a), (b) and (d) would be revised to read as follows:

**§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.**

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication that is not permissible under 11 CFR 114.15, to any other person.

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

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

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

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

\* \* \* \* \*

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

(2)(i) Any person who wishes to pay for electioneering communications permissible under 11 CFR 114.15 may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided for the purpose of paying for such electioneering communications as described in 11 CFR part 104. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication permissible under 11 CFR 114.15 shall be required to only report the names and addresses of those persons who donated or otherwise provided an amount aggregating \$1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(ii) Any person, other than corporations and labor organizations, who wishes to pay for electioneering

communications not permissible under 11 CFR 114.15 may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals as described in 11 CFR part 104. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication shall be required to only report the names and addresses of those persons who donated or otherwise provided an amount aggregating \$1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

7. Section 114.15 would be added to read as follows:

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

(a) *Permissible electioneering communications.* Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class without violating the prohibition contained in 11 CFR 114.2(b)(3) if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) *Safe Harbors for certain types of electioneering communications.* An electioneering communication shall satisfy paragraph (a) of this section if it meets the requirements of either paragraph (b)(1) or (b)(2) of this section:

(1) *Grassroots lobbying communications.* Any communication that:

(i) Exclusively discusses a pending legislative or executive matter or issue;

(ii) Urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue;

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

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

(2) *Commercial and business advertisements.* Any communication that:

(i) Exclusively advertises a Federal candidate's or officeholder's business or

professional practice or any other product or service;

(ii) Is made in the ordinary course of business of the entity paying for the communication;

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

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

(c) *Reporting requirement.*

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

**End of Alternative 1**

**Alternative 2**

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

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

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

9. Section 100.29 would be amended by adding new paragraph (c)(6) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(6) Is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. A communication shall satisfy this section if it meets the requirements of either paragraph (c)(6)(i) or (ii) of this section:

(i) *Grassroots lobbying communications.* Any communication that:

(A) Exclusively discusses a pending legislative or executive matter or issue;

(B) Urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue;

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

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

(ii) *Commercial and business advertisements.* Any communication that:

(A) Exclusively advertises a Federal candidate's or officeholder's business or professional practice or any other product or service;

(B) Is made in the ordinary course of business of the entity paying for the communication;

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

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

**End of Alternative 2**

Dated: August 24, 2007.

**Ellen L. Weintraub,**

*Commissioner, Federal Election Commission.*

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**BILLING CODE 6715-01-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA-2007-29064; Directorate Identifier 2007-NM-128-AD]

**RIN 2120-AA64**

**Airworthiness Directives; Fokker Model F.28 Mark 0070 and 0100 Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

One Fokker 100 (F28 Mark 0100) operator reported that during maintenance in the APU (auxiliary power unit) compartment, a disconnected nut was discovered on one of the shuttle valves in the deployment lines of the engine fire-extinguishing system. An additional check by the operator revealed that on more aircraft in its fleet, the nuts of the shuttle valves were incorrectly tightened. This condition, if not corrected, could result in failure or deteriorated functioning of the engine fire-extinguishing system in case of an engine fire.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by October 1, 2007.

**ADDRESSES:** You may send comments by any of the following methods:

- DOT Docket Web Site: Go to <http://dms.dot.gov> and follow the