MEMORANDUM

TO: The Commission

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SUBJECT: Draft Final Rule on Electioneering Communications

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

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

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

Attachments
Drafts A and B
DRAFT A:

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:

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

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


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

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

* * * * *

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

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

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

(ii) Takes a position on any candidate’s or officeholder’s character, qualifications, or fitness for office.
A communication has a reasonable interpretation other than as an appeal
to vote for or against a clearly identified Federal candidate if it:

(i) Focuses on a public policy issue and either urges a candidate to
take a position on the issue or urges the public to contact the
candidate about the issue; or

(ii) Proposes a commercial transaction, such as purchase of a book,
video or other product or service, or attendance (for a fee) at a film
exhibition or other event; or

(iii) Includes a call to action or other appeal reasonably interpreted in
conjunction with the rest of the communication as urging action
other than voting for or against or contributing to a clearly
identified Federal candidate or political party.

(3) Rules of Interpretation. In interpreting a communication under this
paragraph:

(i) The Commission may only consider external facts that would
qualify for judicial notice, such as whether a named individual is a
candidate for office or whether a communication describes a public
policy issue.

(ii) Ambiguities are to be resolved in favor of the permissibility of an
electioneering communication under this paragraph.

(4) Examples of Communications. A list of examples of communications that
have been determined to be permissible and of communications that have
been determined not to be permissible under this paragraph is available on
DRAFT B:

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:

PART 104 – REPORTS BY POLITICAL COMMITTEES AND OTHER PERSONS

(2 U.S.C. 434)

1. The authority citation for part 104 continues 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 section 104.20, paragraphs (c)(7) and (c)(8) are revised and paragraph (c)(9) is added 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.

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

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

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PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY

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

Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.
4. In section 114.2, the section heading and paragraph (b)(2) are revised and paragraph (b)(3) is 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) Corporations and labor organizations are prohibited from making payments for an electioneering communication to those outside the restricted class unless permissible under 11 CFR 114.10 or 114.15.

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 section 114.4, paragraph (c)(1) is amended by adding the phrase “and (c)(8)” after “(c)(5),” and paragraph (c)(8) is added as follows:

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

* * * *

(c) * * *

(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).

* * * *

6. In section 114.14, paragraphs (a), (b) and (d) are revised to read as follows:

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

(a) (1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an
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.

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 other than a corporation or labor organization 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)(i) 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 is 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 unless the communication is susceptible of no
reasonable interpretation other than as an appeal to vote for or against a clearly
identified Federal candidate. In making this determination, the Commission will
consider whether the communication includes any indicia of express advocacy
and whether the communication has a reasonable interpretation other than as an
appeal to vote for or against a clearly identified Federal candidate.

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

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

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

(2) A communication has a reasonable interpretation other than as an appeal
to vote for or against a clearly identified Federal candidate if it:
Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or

Proposes a commercial transaction, such as purchase of a book, video or other product or service, or attendance (for a fee) at a film exhibition or other event; or

Includes a call to action or other appeal reasonably interpreted in conjunction with the rest of the communication as urging action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

Rules of Interpretation. In interpreting a communication under paragraph (a):

The Commission may only consider external facts that would qualify for judicial notice, such as whether a named individual is a candidate for office or whether a communication describes a public policy issue.

Ambiguities are to be resolved in favor of the permissibility of an electioneering communication under paragraph (a).

Examples of Communications. A list of examples of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) is available on the Commission’s Web site, http://www.fec.gov.

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.