MEMORANDUM

TO: The Commission

FROM: Anthony Herman
General Counsel

Lisa Stevenson
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Robert M. Knop
Assistant General Counsel

Theodore M. Lutz
Attorney

SUBJECT: Notice of Availability – Petition for Rulemaking on Electioneering Communications Reporting filed by the Center for Individual Freedom

On October 5, 2012, the Commission received a Petition for Rulemaking ("Petition") from the Center for Individual Freedom. The Petition asks the Commission to revise its regulations regarding the reporting of electioneering communications. See Attachment 1.

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

In keeping with the Commission’s regulations, the Notice does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.
We request that this draft Notice be placed on the agenda for the October 18, 2012, open meeting.

Attachments
October 5, 2012

VIA HAND DELIVERY
Federal Election Commission
c/o Anthony Herman, General Counsel
999 E Street, NW
Washington, D.C. 20463

Re:  Petition for Rulemaking to Update 11 C.F.R.
§ 104.20(c)(8) and (9)

Dear Mr. Herman:

Pursuant to 11 C.F.R. § 200.1 et seq., please find enclosed a petition for
rulemaking submitted on behalf of the Center for Individual Freedom. If you
have any questions, please do not hesitate to contact Jan Baran at (202) 719-7330
or jbaran@wileyrein.com.

Sincerely,

Jan Witold Baran, Esq.
Thomas W. Kirby, Esq.
Caleb P. Burns, Esq.
Andrew G. Woodson, Esq.

Wiley Rein LLP
1776 K Street, NW
Washington, D.C. 20006

CENTER FOR INDIVIDUAL FREEDOM
BEFORE THE FEDERAL ELECTION COMMISSION

The Center for Individual Freedom

Petition for Rulemaking to
Update 11 C.F.R. § 104.20(c)(8) and (9)

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), and 11 C.F.R. § 200.1 et seq., the Center for Individual Freedom ("CFIF") petitions the Federal Election Commission ("Commission") to conduct a narrow and focused rulemaking to update 11 C.F.R. § 104.20(c) subsections (8) and (9) in light of Citizens United v. FEC, 558 U.S. 310 (2010), and CFIF v. Van Hollen, Nos. 12-5117, 12-5118, 2012 WL 4075293 (D.C. Cir. Sept. 18, 2012).

During consideration of the CFIF case, the D.C. Circuit recently expressed puzzlement that the existing rules seem to apply only to some electioneering communications. This petition requests that the Commission address the court’s specific concern. A rulemaking would not impose a significant drain on Commission resources. A targeted proceeding would be very different than the broad exploration of electioneering communication disclosures by corporations and labor unions that, by an evenly divided vote, the Commission declined to initiate on October 4, 2012.

Section 104.20 of the Commission’s regulations implement disclosure provisions added to the Federal Election Campaign Act of 1971 ("FECA") by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 434(f). Subsections (8) and (9) were last revised after FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) ("WRTL I"), to apply the electioneering communication disclosure requirements to corporations and labor unions which had been held constitutionally entitled to engage in electioneering communications that were not the functional equivalent of express candidate advocacy. However, in 2010, Citizens United expanded the
holding to permit corporations and labor unions to engage in any electioneering communications, including those that were the functional equivalent of express candidate advocacy.

Although subsections (8) and (9) were reasonable when adopted, they easily can be updated to account for *Citizens United*. By their terms, subsection (8) refers and subsection (9) applies only to corporate and labor union disclosures of electioneering communications that are not the functional equivalent of express advocacy.\(^1\) No present rule directly addresses disclosure for electioneering communications that are the functional equivalent of express advocacy, and the omission is not supported by any policy consideration. It is merely a product of history. Furthermore, when the district court suspended subsection (9) in the CFIF case, the district court resurrected a 2003 version of the regulation that exacerbated the confusion in the regulatory framework because that regulation did not account for the critical developments in either *WRTL II* or *Citizens United*.

The D.C. Circuit recently concluded that the meaning, proper application and interaction of the regulations can be improved. In particular, during argument the Court expressed its confusion over the limited scope of the existing regulations. The Court’s opinion then invited

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\(^1\) In relevant part, 11 C.F.R. § 104.20(c)(8) & (9) read as follows:

(8) If the disbursements [for electioneering communications] 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.

(Emphasis added.) The citations to 11 C.F.R. § 114.15 refer to the Commission’s regulation permitting corporate and labor union electioneering communications that are not the functional equivalent of express advocacy pursuant to *WRTL II*. 

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ATACHMENGES
the Commission, as the body "that knows more about the issue," *CFIF*, 2012 WL 4075293 at *4, to update the regulations and their rationales before they are subjected to review for reasonableness under Step Two of *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984).

Petitioner does not question that the post-*WRTL II* regulations were validly issued. Indeed, the Commission agrees that subsection (9):

- Is a “reasonable rule that reconciles the Federal Election Campaign Act with recent Supreme Court precedent;”
- Is “grounded in the administrative record;” and
- “[B]alances the interest in disclosure with the potential First Amendment burdens on corporations and unions.”

Def. FEC’s Memo. of Points and Authorities in Support of Its Mot. for Summary Judgment at 1, *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012). The Commission also agrees that “*Citizens United* held that corporations had a constitutional right to finance such communications with their general treasury funds, and the FEC’s regulation now applies to [that] conduct.” *Id.* at 42.

However, the regulations can be improved and updated by a *narrowly focused* rulemaking. Accordingly, Petitioner requests that the FEC initiate a rulemaking and invite comments on revising subsections (8) and (9) by deleting the phrase “pursuant to 11 CFR 114.15,” thereby explicitly applying the electioneering communication disclosure obligations of corporations and labor unions to any form of electioneering communication.
CENTER FOR INDIVIDUAL FREEDOM

Jan Witold Baran, Esq.
Thomas W. Kirby, Esq.
Caleb P. Burns, Esq.
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1776 K Street, NW
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FEDERAL ELECTION COMMISSION

11 CFR Part 104

[NOTICE 2012-XX]

Rulemaking Petition: Electioneering Communications Reporting

AGENCY: Federal Election Commission.

ACTION: Rulemaking petition: Notice of Availability.

SUMMARY: On October 5, 2012, the Commission received a Petition for Rulemaking from the Center for Individual Freedom. See REG 2012-01 Electioneering Communications Reporting (2012).

The Petition urges the Commission to revise the regulations at 11 CFR 104.20(c)(8) and (9) regarding the reporting of electioneering communications. The Petition is available for inspection in the Commission’s Public Records Office, on its website, http://www.fec.gov/fosers/ (REG 2012-01 Electioneering Communications Reporting (2012)), and through its Faxline service.

DATES: Statements in support of or in opposition to the Petition must be submitted on or before [insert date 60 days after the date of publication in the Federal Register].

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission’s website at http://www.fec.gov/fosers/ (REG 2012-01 Electioneering Communications Reporting (2012)). Commenters are
encouraged to submit comments electronically to ensure timely
receipt and consideration. Alternatively, comments may be
submitted in paper form. Paper comments must be sent to the
Federal Election Commission, Attn.: Robert M. Knop, Assistant
General Counsel, 999 E Street, NW., Washington, D.C. 20463.
All comments must include the full name and postal service
address of a commenter, and of each commenter if filed jointly,
or they will not be considered. The Commission will post
comments on its website at the conclusion of the comment
period.

FOR FURTHER
INFORMATION
CONTACT:
Mr. Robert M. Knop, Assistant General Counsel, or Mr.
Theodore M. Lutz, Attorney, 999 E Street, NW., Washington,
D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY
INFORMATION:

The Federal Election Commission ("Commission") has received a Petition for
Rulemaking from the Center for Individual Freedom. The petitioner asks that the
Commission revise 11 CFR 104.20(c)(8) and (9) "by deleting the phrase 'pursuant to 11
CFR 114.15,' thereby explicitly applying the electioneering communication disclosure
obligations of corporations and labor unions to any form of electioneering
communication." The Commission seeks comments on the petition.

Copies of the Petition for Rulemaking are available for public inspection at the
Commission’s Public Records Office, 999 E Street, NW., Washington, D.C. 20463,
Monday through Friday between the hours of 9 a.m. and 5 p.m., and on the
Commission’s website, http://www.fec.gov/fosers/ (REG 2012-01 Electioneering
Communications Reporting (2012)). Interested persons may also obtain a copy of the
Petition by dialing the Commission’s Faxline service at (202) 501-3413 and following its
instructions, at any time of the day and week. Request document # 273.

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

Caroline C. Hunter
Chair
Federal Election Commission

DATED: __________________