



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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COMMISSION
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2013 MAR -4 PM 3: 03

March 4, 2013

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 3-7-13

FROM: Anthony Herman
General Counsel *AH by BJ*

SUBMITTED LATE

Kevin Deeley *DL8*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS by RMK*
Attorney

Neven F. Stipanovic *NFS by RMK*
Attorney

Subject: Center for Individual Freedom Rulemaking Petition

We have been asked to provide this brief memorandum on the status of the petition for rulemaking filed by the Center for Individual Freedom on October 5, 2012. The Commission published a Notice of Availability ("NOA") in the Federal Register on October 26, 2012 seeking public comment. The Internal Revenue Service, the Center for Competitive Politics, and Wyatt Lemmer filed comments.

The Commission is required to decide whether to initiate a rulemaking based on this petition. 11 CFR 200.4(a). Should the Commission decide not to initiate a rulemaking, it must publish a Notice of Disposition in the Federal Register. 11 CFR 200.4(b).

Attached to this memorandum are the petition for rulemaking, the NOA, and the three comments we received on the petition. We have been asked to have this matter placed on the Open Session agenda for March 7, 2013.

Attachments



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October 5, 2012

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

RECEIVED
2012 OCT -5 PM 3:47
FEC MAIL CENTER

**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,

CENTER FOR INDIVIDUAL
FREEDOM

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

RECEIVED
2012 OCT -5 PM 3:47
FEC MAIL CENTER

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 II*”), 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

WRTL II 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

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*.

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.
Andrew G. Woodson, Esq.

Wiley Rein LLP
1776 K Street, NW
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Proposed Rules

Federal Register

Vol. 77, No. 208

Friday, October 26, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Part 104

[NOTICE 2012-07]

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 regarding the reporting of electioneering communications.

DATES: Statements in support of or in opposition to the Petition must be submitted on or before December 26, 2012.

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission's Web site 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, DC 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 Web site at the conclusion of the comment period.

The Petition is available for inspection in the Commission's Public Records Office, on its Web site, <http://www.fec.gov/fosers/> (REG 2012-01 Electioneering Communications Reporting (2012)), and through its Faxline service.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Mr. Theodore M. Lutz, Attorney, 999 E Street NW., Washington, DC 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, DC 20463, Monday through Friday between the hours of 9 a.m. and 5 p.m., and on the Commission's Web site, <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 comment 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**.

Dated: October 18, 2012.

Caroline C. Hunter,

Chair, Federal Election Commission.

[FR Doc. 2012-26116 Filed 10-25-12; 8:45 am]

BILLING CODE 6715-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2012-0966; Airspace Docket No. 12-AWA-5]

RIN 2120-AA66

Proposed Modification of Class B Airspace; Las Vegas, NV

AGENCY: Federal Aviation Administration (FAA), DOT.
ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Las Vegas, NV, Class B airspace area to ensure the containment of large turbine-powered aircraft within Class B airspace, reduce air traffic controller workload, and reduce the potential for midair collision in the Las Vegas terminal area.

DATES: Comments must be received on or before December 26, 2012.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M-30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001; telephone: (202) 366-9826. You must identify FAA Docket No. FAA-2012-0966 and Airspace Docket No. 12-AWA-5, at the beginning of your comments. You may also submit comments through the Internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

From: Blumenfeld Michael B
To: ELynch@fec.gov
Cc: Rosenbaum Monice L
Subject: RE: FEC Notice of Availability: Electioneering Communications Reporting
Date: 12/20/2012 10:06 AM

Dear Mr. Lynch,

Thank you for affording the Internal Revenue Service an opportunity to comment on the Commission's Notice of Availability on Electioneering Communications Reporting. Please be advised that we do not see a possible conflict between the the Commission's Notice and the Internal Revenue Code or regulations. At this time, we have no further comments.

Please give me or Monice Rosenbaum a call at 202-622-6000 if you have any questions.

Michael B. Blumenfeld
Special Counsel
IRS, Office of Chief Counsel
Tax-Exempt & Government Entities
Tel. 202-622-6000

From: ELynch@fec.gov [mailto:ELynch@fec.gov]
Sent: Wednesday, October 31, 2012 11:20 AM
To: Blumenfeld Michael B
Subject: FEC Notice of Availability: Electioneering Communications Reporting

Dear Mr. Blumenfeld,

Please find attached the Commission's Notice of Availability on Electioneering Communications Reporting, which was published in the *Federal Register* on October 26, 2012 (77 FR 65332). Comments are due on or before December 26, 2012.

Pursuant to 2 U.S.C. 438(f), the Commission and the Internal Revenue Service are to "consult and work together to promulgate rules, regulations, and forms which are mutually consistent." The Commission invites your agency's comments on this Notice, particularly with respect to any possible conflict between it and the Internal Revenue Code or regulations.

Please contact me at 202/694-1650 if you have any questions about the Notice.

Eugene Lynch
Office of General Counsel, Policy Division
U.S. Federal Election Commission
999 E Street, NW
Washington, DC 20463



sers@nictusa.com
12/20/2012 11:26 AM

To SERS@fec.gov, sersnotify,
cc
bcc
Subject New comment on REG 2012-01 submitted by Dickerson,
Allen

2 attachments



REG_2012_01_Dickerson_Allen_12_20_2012_11_25_59_Petition concerning 11 CFR 104.20 -- CCP Comments.pdf

REG_2012_01_Dickerson_Allen_12_20_2012_11_25_59_CommentText.txt

Please find attached the contents for the new comment submitted on Thu Dec 20 11:25:59 EST 2012.

User uploaded 1 file(s) as attachment to the comment. Please find them attached to this email.

You will also find a Comment.txt file attached, which has the text comments entered by the user.

You may review the comment in FRAPS system. An approval action from FRAPS is required to send this comment event to the CMS. Thanks.

REG_2012_01_Dickerson_Allen_12_20_2012_11_25_59_CommentText.txt

Please see attached.

In the event the Commission accepts testimony on this petition, the Center for Competitive Politics requests the opportunity to testify through counsel.

Comments provided by :
Dickerson, Allen



December 19, 2012

VIA ELECTRONIC DELIVERY

Robert M. Knop
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: Petition of the Center for Individual Freedom concerning 11
C.F.R. § 104.20(c)(8) and (9)**

Dear Mr. Knop:

The Center for Competitive Politics (or CCP) submits these comments in support of the Petition for Rulemaking filed with the Federal Election Commission (“FEC” or “Commission”) on October 5, 2012.

In that petition, the Center for Individual Freedom (“CFIF”) requested that the Commission conduct a “narrow and focused rulemaking” to update 11 C.F.R. § 104.20(c)(8) and (9). Neither provision has been updated to reflect the ruling in *Citizens United v. FEC*,¹ a fact that has drawn the specific attention of the D.C. Circuit.²

**1. These provisions have not been updated to reflect the holding in
Citizens United v. FEC.**

The provisions at issue here impose disclosure requirements for disbursements made by a corporation or labor union “pursuant to 11 C.F.R. § 114.15,”³ which states that corporations and labor unions may make electioneering communications that are not the functional equivalent of express advocacy for a

¹ 558 U.S. 310 (2010).

² *CFIF v. Van Hollen*, 694 F.3d 108, 109 (D.C. Cir. 2012).

³ *Id.*

candidate.⁴ This regulation was promulgated following the Supreme Court's 2007 ruling in *FEC v. Wisconsin Right to Life, Inc.*,⁵ which established that corporations and labor unions have a constitutional right to engage in electioneering communications that are *not* the functional equivalent of express advocacy for or against a candidate.

In *Citizens United*, the Court expanded *WRTL II* to allow corporations and unions to engage in all types of electioneering communications, including electioneering communications which *are* the functional equivalent of express candidate advocacy. Subsections (8) and (9) have not been subsequently revised.

2. The D.C. Circuit has invited the Commission to undertake a rulemaking to clarify 11 C.F.R. § 104.20(c)(8) and (9).

The Commission is the defendant in a lawsuit filed by Representative Christopher Van Hollen, Jr. in the U.S. District Court for the District of Columbia. That suit challenges 11 C.F.R. § 104.20(c)(9) under the Administrative Procedure Act ("APA"). While the district court found that the regulation did not survive review under *Chevron* step one – in that the underlying statute evidenced a non-ambiguous Congressional intent in conflict with the Commission's regulation – the U.S. Court of Appeals reversed.⁶

In doing so, the appellate panel held that the relevant portions of BCRA were ambiguous, and that the district court thus erred in resolving the case at *Chevron* step one. But further analysis was hobbled by the FEC's "failure to participate" at the appellate level, which "ma[de] it impossible for the court to fully understand the agency's position on numerous issues."⁷ In particular, "neither the court nor the parties underst[ood] the reference to 11 C.F.R. § 114.15 in § 104.20(c)(9)."⁸

The Commission will need to respond to *Van Hollen* in any event. But it should especially note the confusion currently engendered by 11 C.F.R. § 140.20(c)(8) and (9). Despite *Citizens United*, the Commission has yet to specify any sort of disclosure regime for corporations and labor unions making

⁴ See 11 C.F.R. § 114.15(a).

⁵ 551 U.S. 449, 478-79 (2007) ("WRTL II").

⁶ *Van Hollen*, 694 F.3d at 110.

⁷ *Id.* at 111.

⁸ *Id.*

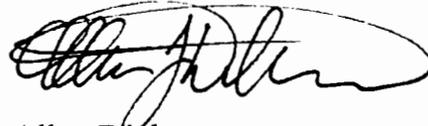
electioneering communications which are the functional equivalent of express advocacy. This gap creates additional uncertainty in the context of a regulatory regime that is already extremely complex and widely-recognized as difficult to navigate.⁹ The inevitable consequence of this confusion is that some parties will simply refrain from speaking. Such chilling of protected speech threatens core First Amendment values.

If the Commission is to properly fulfill its obligation to enforce federal campaign finance laws, then it should ensure that its regulatory paradigm is—at a minimum—comprehensible. A regulation is not comprehensible if it confuses a panel of the U.S. Court of Appeals.

Because this basic rulemaking should be accomplished in a timely manner, the Commission should refrain from expanding any rulemaking to include items which may be favored by some commissioners, but which are unlikely to gain full Commission approval. Nor should the Commission use such rulemaking as a vehicle to mandate unrelated rules, extend its regulations more broadly, or to regulate in areas where Congress has declined to act.

A directed and narrow rulemaking clarifying disclosure requirements for electioneering communications by corporations and unions would serve the Commission's role and the public good.

Respectfully submitted,



Allen Dickerson
David Silvers
Center for Competitive Politics
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Alexandria, VA 22314
(703) 894-6800
adickerson@campaignfreedom.org

⁹ See, e.g., Chair Hunter and Commissioners McGahn and Peterson, Statement on *Van Hollen v. FEC*, (April 27, 2012) available at: http://www.fec.gov/members/statements/Van_Hollen_statement-Hunter_McGahn_Petersen.pdf.



sers@nictusa.com
10/31/2012 04:05 AM

To SERS@fec.gov, sersnotify,
cc
bcc
Subject New comment on REG 2012-01 submitted by Lemmer, Wyatt

1 attachment

REG_2012_01_Lemmer_Wyatt_10_31_2012_04_05_25_CommentText.txt

Please find attached the contents for the new comment submitted on Wed Oct 31 04:05:25 EDT 2012.

User uploaded 0 file(s) as attachment to the comment. Please find them attached to this email.

You will also find a Comment.txt file attached, which has the text comments entered by the user.

You may review the comment in FRAPS system. An approval action from FRAPS is required to send this comment event to the CMS. Thanks.

~1584668.txt

In an ever increasingly competitive political environment, transparency is critical.

This election year has seen unprecedented amounts of money being funneled into campaigns, and into commercials. Just the other day the amount of money said to have been raised or spent was over 2 billion dollars. And a lot of this money is spent on electioneering communications.

With the ruling of the Citizens United, money can now be donated at an even higher rate than it used to. The commercials that are produced are meant to sway voters, but the public has the right to see where the funding for the communication is coming from. Without the full disclosure, the public is not able to see the full picture. Electioneering communication can be a powerful tool and that is why the public has the right to see all the information so they can form an accurate and fully informed opinion about the commercial. Without this, it is possible to not understand the biases and particular agenda.

Now that through the ruling of United Citizen corporations can not have spending limit placed on them, they should be subject to the full disclosure requirements set forth.

The area of election already suffers from a perception of dishonesty, and corruption. This will help slightly to give the election front more credibility in the public eye.

Comments provided by :
Lemmer, Wyatt