AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

REVISED DRAFT B of ADVISORY OPINION 2008-15 is available for public comments under this procedure. It was requested by James Bopp, Jr., Esq., and Clayton J. Callen on behalf of the National Right to Life Committee, Inc.

Revised Draft B of Advisory Opinion 2008-15 is scheduled to be on the Commission's agenda for its public meeting of October 23, 2008.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 9:00am (Eastern Time) on October 23, 2008

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2008-15, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 08-32-A

FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2008 OCT 22 P 3:28

AGENDA ITEM
For Meeting of: 10-23-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Donald F. McGahn II
Chairman

SUBJECT: DRAFT AO 2008-15 (Revised Draft B)

Attached is a revised proposed Draft B of the subject advisory opinion for consideration at the Open Meeting scheduled for October 23, 2008.

Thank you very much for your consideration.

ADVISORY OPINION 2008-15

James Bopp, Jr., Esq. **B DRAFT**
Clayton J. Callen, Esq.
Counsel to the National Right to Life Committee, Inc.
The National Building
1 South Sixth Street
Terre Haute, IN 47807-3510

Dear Mr. Bopp and Mr. Callen:

We are responding to your advisory opinion request on behalf of the National Right to Life Committee, Inc. (the "NRLC" or "requestor"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the NRLC's plan to use general treasury funds to finance the broadcast of two advertisements.

The Commission concludes that neither of the NRLC's advertisements is an impermissible electioneering communication. The Commission further concludes that neither of the advertisements contains express advocacy. Therefore, the requestor may fund their broadcast advertisements with general treasury funds.

Background

The facts presented in this advisory opinion are based on your letter received on September 26, 2008.

The NRLC is a non-stock, not-for-profit corporation, exempt from Federal taxes under 26 U.S.C. 501(c)(4), but it is not a "qualified non-profit corporation" under 11 CFR 114.10. The NRLC has produced two sixty-second radio advertisements that it intends to broadcast immediately and continuously throughout the United States leading up to the

November 2008 general election. The first advertisement, entitled "Waiting for Obama's Apology #1" reads, in pertinent part, as follows:

> **Female 1**: In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, and that he later misrepresented the bill's content. When journalist David Brody asked Obama about National Right to Life's charges, Obama replied:
>
> **Obama [clip]**: ". . . I hate to say that people are lying, but here's a situation where folks are lying."
>
> **Female 1**: We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:
>
> **Female 2**: (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's claims that Obama is misrepresenting the contents of [Senate Bill] 1082."
>
> **Female 1**: Was Obama afraid that the public would learn about his extreme position – that he opposed merely defining every baby born alive after an abortion as deserving of protection? Will Obama now apologize for calling us liars when we were the ones telling the truth?

The second advertisement, entitled "Waiting for Obama's Apology #2" reads, in pertinent part, as follows:

> **Female 1**: In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, and that he later misrepresented the bill's content. When journalist David Brody asked Obama about National Right to Life's charges, Obama replied:
>
> **Obama [clip]**: ". . . I hate to say that people are lying, but here's a situation where folks are lying."
>
> **Female 1**: We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:

Female 2: (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's claims that Obama is misrepresenting the contents of [Senate Bill] 1082."

Female 1: Was Obama afraid that the public would learn about his extreme position – that he opposed merely defining every baby born alive after an abortion as deserving of protection? Will Obama now apologize for calling us liars when we were the ones telling the truth?

Barack Obama: a candidate whose word you can't believe in.

The NRLC wishes to use general treasury funds to finance the broadcast of these advertisements. Until the NRLC receives a response to its request, its registered political committee, National Right to Life Political Action Committee ("NRLPAC"), plans to finance the broadcast of Waiting for Obama's Apology #2. You state that broadcast of the advertisements will not be made in concert or cooperation with, or at the request or suggestion of, any candidate or candidate's agents, or any political party committee or its agents.[1]

Questions Presented

(1) Would the NRLC's broadcast of the advertisements constitute prohibited corporate-funded electioneering communications under 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(3)?

(2) Would the NRLC's use of general treasury funds to finance the broadcast of the advertisements constitute prohibited corporate expenditures under 2 U.S.C. 441b(a) and 11 CFR 114.2(b)(2)(ii)?

[1] You represent that the "broadcast" of the advertisements will be independent and not "in concert or cooperation with, or at the request or suggestion of, any candidate, or their agents, or a political party committee or its agents." Thus, for purposes of this advisory opinion, the Commission proceeds on the presumption that the advertisements in the request would not meet the coordinated communication definition because they would not satisfy any of the six conduct standards in 11 CFR 109.21(d).

Legal Analysis and Conclusions

Question 1: Would the NRLC's broadcast of the advertisements constitute prohibited corporate-funded electioneering communications under 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(3)?

No. For the reasons stated below the NRLC's advertisements are not subject to the ban on corporate-funded electioneering communications.

In the context of a presidential election, the Bipartisan Campaign Reform Act of 2002 ("BCRA") defined an "electioneering communication" to include any broadcast, cable, or satellite communication that (1) refers to a clearly identified Presidential candidate, and (2) is publicly distributed within 60 days before a general election or 30 days before a primary election or convention. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a).[2] In considering a facial challenge to this statutory language, the Supreme Court upheld its constitutionality to the extent the speech in question was the 'functional equivalent' of express campaign speech, *see McConnell v. FEC*, 540 U.S. 93, 205-06 (2003), but the Court limited the reach of the statute in a subsequent as-applied challenge. *See FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 127 S. Ct. 2652 (2007). Specifically, the Court limited the reach of the electioneering communication ban to certain communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667. Subsequently, the Commission promulgated 11 CFR 114.15.

[2] Communications that constitute expenditures or independent expenditures (*i.e.*, communications that expressly advocate the election or defeat of a clearly identified candidate) are excluded from the statutory definition of electioneering communications. *See* 2 U.S.C. 434(f)(3)(B)(ii); 11 CFR 100.29(c)(3).

Regarding the question of whether the advertisements would be prohibited electioneering communications, the result is the same under both *WRTL* and the Commission's section 114.15, because under either approach, the central inquiry is whether the advertisements can be reasonably interpreted as something other than as an appeal to vote for or against a clearly identified candidate. Several such readings are possible with regard to both ads, for example:

- Regardless of whatever requestor may want to say about Senator Obama, the ad can be read as an effort to bring to the public's attention and comment on the need for legislation that, in the words of the ad, would "provide care and protection for babies who are born alive after abortions." The reference to Senator Obama is merely a vehicle to assist in the delivery of this message. This illustrates the Court's observation in *Buckley* "that campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 43.
- The ads can be read as commentary on what requestor believes to have been then-State Senator Obama's efforts to "kill a bill" related to abortion, State Senate Bill 1082. Read this way, the ad claims that while in the Illinois legislature "Barack Obama was responsible for killing [that] bill." It then goes on to explain what requestor believed the bill did, and then cites to FactCheck.org in support of their characterization.
- The ads can be read as commentary on the accuracy of Senator Obama's defense of his past actions as an officeholder. In requestor's view, Senator Obama has offered several reasons as justification for his action (explained in great detail in

the requestor's white paper attached to its request), and, again in the view of the requestor, none of Senator Obama's justifications are accurate.

- A third way to read the ads is as a response to Senator Obama's statements regarding the requestor. According to the requestor, Senator Obama publicly stated that the requestor is "lying." Requestor has chosen to respond to this charge by way of advertisement, essentially claiming that it is Senator Obama, and not the requestor, who is not being truthful.[3]
- The ads can be seen as an effort to persuade Senator Obama to alter his behavior. First, the requestor could be informing Senator Obama that when attacked, they will respond swiftly and bluntly. Second, the ads also suggest that Senator Obama ought to take a specific action, namely, to "apologize for calling [the requestor] liars . . . ."

Thus, regardless of whether the ads focus on a public policy issue (a vote that Senator Obama cast while serving in the Illinois senate), highlight a dispute between the requestor and Senator Obama over the meaning of that vote, or urge Senator Obama to alter his own conduct (whether to avoid calling people liars in the future, or to apologize to the requestor for having already done so), or have other reasonable readings along those lines, the result is the same: these ads can be read in a variety of ways other than as an appeal to vote.[4]

---

[3] This reading is supported by at least one commenter, who asserts that the ads "serve no communicative purpose beyond attacking Sen. Obama's character by challenging his truthfulness." Comments of Democracy 21 and Campaign Legal Center at 5. Such purpose is something other than an appeal to vote.

[4] Even if this were a close case (and it is not), the Commission is mindful of the Supreme Court's instruction that the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. *WRTL*, 127 S. Ct. at 2667 ("In short, it must give the benefit of any doubt to protection rather than stifling speech.").

And merely because one of the two ads refers to Senator Obama as a "candidate" does not convert that ad into an appeal to vote.[5] Referencing that someone is a candidate merely begins the analysis, not ends it, because to even come within the potential reach of the electioneering communication statute, an advertisement must at a minimum refer to a "clearly identified candidate for federal office," 2 U.S.C. 434(f)(3)(A)(i)(I). In other words, simply identifying someone as a "candidate" without more cannot convert a communication into an impermissible "electioneering communication."[6] To do so in this case would ignore the actual ad presented in the request. In this ad, neither the upcoming election nor Senator Obama's candidacy is the central focus. The overwhelming majority of the ad is dedicated to issue discussion – its focus is not on candidacy, let alone on an appeal to vote. It does not comment on his fitness or qualifications for office – on the contrary, it takes issue with Senator Obama's candor with respect to statements supposedly made by the Senator about requestor. Hence, the ad does not say that Senator Obama is a "candidate you can't believe in," but instead remains focused on what he

[5] Even assuming *arguendo* that merely referring to Senator Obama as a candidate constitutes an "indicia of express advocacy" under section 114.15, such "indicia" is not enough to convert the ad into a prohibited electioneering communication. After all, the Supreme Court in *WRTL* held that only communications that are the functional equivalent of express advocacy are subject to the electioneering communication ban, and we cannot construe either the statute or our regulation to reach activity beyond this. *See DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) (invalidating the NLRB's construction of a statute to forbid certain union hand billing practices due to First Amendment concerns). Furthermore, the determination of whether or not something is an impermissible electioneering communication is a question of law, not fact. *See WRTL*, 127 S. Ct. at 2666 ("And [the analysis] must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal.").

[6] As the Supreme Court has made clear, the ability to discuss a candidate's position on issues is protected by the First Amendment. *Buckley* at 43 ("For the distinction between the discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."). *See also FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 249 (1986) (noting that the "express advocacy" requirement is intended to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons").

supposedly said, thus stating that he is a "candidate whose word you can't believe in" with respect to what he had said about requestor.

Therefore, because the requestor's advertisements are susceptible of several reasonable interpretations other than as an appeal to vote against Senator Obama, the advertisements are not prohibited electioneering communications under 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(3), and thus the requestor may use general treasury funds to finance their broadcast.

Question 2: Would the NRLC's use of general treasury funds to finance the broadcast of the advertisements constitute prohibited corporate expenditures under 2 U.S.C. 441b(a) and 11 CFR 114.2(b)(2)(ii)?

No. For the reasons stated below the NRLC may use general treasury funds to finance the broadcast of its advertisements.

The Act prohibits corporations, including corporations organized under 26 U.S.C. 501(c)(4), from making expenditures in connection with any election for Federal office.[7] Funds used for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are "expenditures." *See Buckley v. Valeo*, 424 U.S. at 77-80; *see also McConnell*, 540 U.S. at 190-92. As such, corporations may not fund communications to those outside their restricted class that *expressly advocate* the election or defeat of a clearly identified candidate. 2 U.S.C. 441b(a), 11 CFR 114.2(b)(2)(ii); *but see generally MCFL* (regarding certain types of corporations which are beyond the scope of the Act.).

[7] Issue oriented non-profit corporations are excluded from this ban. *See generally MCFL*; *see also* 11 CFR 114.10.

Under the Commission's regulations, a communication expressly advocates the election or defeat of a clearly identified candidate if it uses so-called "magic words" – phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress" – or uses campaign slogans or words that, in context, have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" 11 CFR 100.22(a). A communication contains express advocacy under the Commission's regulations if it has an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and if "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat [a candidate] or encourages some other kind of action." 11 CFR 100.22(b).

The NRLC's advertisements do not use any of the so-called "magic words" or campaign slogans that, in context, have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, and thus do not constitute express advocacy under 11 CRF 100.22(a). Moreover, as discussed more fully above, the ads cannot, when taken as a whole and with limited reference to external events, only be interpreted by a reasonable person as containing advocacy of the defeat of Senator Obama. Thus, the ads do not constitute express advocacy under 11 CFR 100.22(b). *See also* Final Rule, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35295 (July 6, 1995).

Accordingly, since the advertisements do not contain express advocacy under either 11 CFR 100.22(a) or (b), the corporate expenditure prohibitions at 2 U.S.C.

441b(a) and 11 CFR 114.2(b)(2)(ii) do not ban the NRLC from using its general treasury funds to finance the broadcast of the advertisements.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

On behalf of the Commission,

Donald F. McGahn II
Chairman