Memorandum

To: The Commission
Through: Patrina M. Clark
          Staff Director

From: Lawrence H. Norton
       General Counsel

       Rosemary C. Smith
       Associate General Counsel

       Amy L. Rothstein
       Acting Assistant General Counsel

       Ron B. Katwan
       Attorney

Subject: Petition for Rulemaking to Exempt “Grassroots Lobbying” from
Electioneering Communications: Notice of Disposition

On February 16, 2006, the Commission received a petition for rulemaking (the
“Petition”) from the AFL-CIO, the Alliance for Justice, the Chamber of Commerce of the
United States, the National Education Association, and OMB Watch (the “Petitioners”).
The Petition asked the Commission to revise its regulations by exempting from the
definition of “electioneering communication” certain “grassroots lobbying”
communications.

The Office of General Counsel was asked to prepare for Commission
consideration a draft Notice of Disposition (the “Notice”) in response to the Petition. See
Attachment 1. The Notice states that the Commission has decided not to initiate a
rulemaking at this time, although the Commission recognizes that it may consider
initiating a rulemaking on this subject in the future.

The Office of General Counsel has also prepared for Commission consideration a
draft letter to the Petitioners, informing them of the Commission’s decision on this
matter. See Attachment 2.

Attachments
FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2006 - ]

Exception for Certain “Grassroots Lobbying” Communications from the Definition of

“Electioneering Communication”

AGENCY: Federal Election Commission.

ACTION: Notice of disposition of Petition for Rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking (“Petition”) filed on February 16, 2006, by the AFL-CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the National Education Association, and OMB Watch. The Petition asks the Commission to revise its regulations by exempting from the definition of “electioneering communication” certain communications consisting of “grassroots lobbying.” The Commission has decided not to initiate a rulemaking in response to the Petition at this time. The Petition is available for inspection in the Commission’s Public Records Office and on its website, <www.fec.gov>. Further information is provided in the supplementary information that follows.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Acting Assistant General Counsel, or Mr. Ron B. Katwan, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.
SUPPLEMENTARY INFORMATION:

The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Public Law 107-55, 116 Stat. 81 (2002), added provisions regarding "electioneering communications" to the Federal Election Campaign Act of 1971, as amended. See 2 U.S.C. 434(f)(3). Electioneering communications are television and radio communications that refer to a clearly identified candidate for Federal office, are publicly distributed within 60 days before a general election or 30 days before a primary election, and are targeted to the relevant electorate. See 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a). BCRA exempts certain communications from the definition of "electioneering communication," 2 U.S.C. 434(f)(3)(B)(i) through (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 Federal candidate, 2 U.S.C. 434(f)(3)(B)(iv), citing 2 U.S.C. 431(20)(A)(iii). Section 100.29(c) of the Commission’s regulations contains the regulatory exemptions to the definition of "electioneering communication."

On February 16, 2006, the Commission received a Petition for Rulemaking ("Petition") from the AFL-CIO, the Alliance for Justice, the Chamber of Commerce of the United States, the National Education Association, and OMB Watch (collectively, "Petitioners"). The Petitioners asked the Commission to revise 11 CFR 100.29(c) to exempt from the definition of "electioneering communication" certain "grassroots lobbying" communications that reflect all of the following six principles: (1) "The ‘clearly identified federal candidate’ is an incumbent public officeholder;" (2) "The communication exclusively discusses a particular current legislative or executive branch matter;" (3) "The communication either (a) calls upon the
candidate to take a particular position or action with respect to the matter in his or her incumbent
capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to
do so;” (4) “If the communication discusses the candidate’s position or record on the matter, it
does so only by quoting the candidate’s own public statements or reciting the candidate’s official
action, such as a vote, on the matter;” (5) “The communication does not refer to an election, the
candidate’s candidacy, or a political party;” and (6) “The communication does not refer to the
candidate’s character, qualifications or fitness for office.”

On March 16, 2006, the Commission published a Notice of Availability (“NOA”) seeking
comment on whether to initiate a rulemaking on this proposed exception to the definition of
“electioneering communication.” Notice of Availability on Rulemaking Petition: Exception for
Certain “Grassroots Lobbying” Communications From the Definition of “Electioneering
Communication.” 71 FR 13557 (Mar. 16, 2006). The Commission received nine timely
comments and two late comments in response to the NOA. In addition to these comments, the
Commission received 180 form letter comments. Most of the commenters supported the Petition
primarily on the grounds that the current electioneering communication rules limit the ability of
organizations to run ads whose purpose is not to influence Federal elections, but to support or
defeat legislation at the most critical time (i.e., when the legislation is before Congress,
regardless of the election cycle). These commenters argued that such “grassroots lobbying” ads
are entitled to First Amendment protection and should therefore be exempt from the
electioneering communication rules. However, one group of commenters opposed the Petition,
arguing that the Commission had already considered this question in the 2002 rulemaking that
adopted the current electioneering communication rules and had concluded correctly that it
lacked statutory authority to promulgate a “grassroots lobbying” exemption.\(^1\) These commenters further asserted that “there are no changed circumstances that warrant reconsideration of that decision.” Copies of the comments are available on the Commission’s website at http://www.fec.gov/law/law_rulemakings.shtml#lobbying.

On August 29, 2006, the Commission voted to decline to initiate a rulemaking at this time on the proposed exception for certain “grassroots lobbying” communications from the definition of “electioneering communication,” given the Commission’s other administrative priorities. The Commission recognized, however, that it has the statutory authority to create exemptions to the electioneering communication rules (provided the exemptions do not permit PASO communications) and that it may consider initiating a rulemaking on this subject in the future.

Initiating a rulemaking at this time would not be an efficient or effective use of the Commission’s resources. See 11 CFR 200.5(e). The Commission is currently defending the constitutionality of BCRA’s electioneering communication provisions against two as-applied challenges to the statute involving communications that the plaintiffs claim are “grassroots lobbying” communications. See Wisconsin Right to Life v. FEC, Civ. No. 04-1260 (D.D.C.); Christian Civic League of Maine v. FEC, Civ. No. 06-614 (D.D.C.). Even if the Commission were to grant the Petitioners’ request to begin a rulemaking to create a “grassroots lobbying” exemption, the plaintiffs in these cases may well continue to pursue litigation or to initiate new litigation, particularly if the Commission were to craft an exemption narrower than that contemplated by the plaintiffs. Moreover, any eventual court decisions in these lawsuits may provide the Commission with guidance on whether and how the Commission should exercise its discretion in this area. Judicial guidance may well necessitate a reevaluation of any rules the

---

\(^1\) The Commission considered several proposals for “grassroots lobbying” exemptions in the 2002 rulemaking but did not adopt any of them. See Notice of Proposed Rulemaking on Electioneering Communications, 67 FR 51131, 51136, 51145 (Aug. 7, 2002); Final Rules on Electioneering Communications, 67 FR 65190, 65201 (Oct. 23, 2002).
Commission were to propose now. Therefore, in light of the pending as-applied challenges to
the constitutionality of the electioneering communication provisions, the Commission believes
that initiating a rulemaking at this time would not be an effective use of its resources or an
appropriate way to proceed.

________________________
Michael E. Toner
Chairman
Federal Election Commission

DATED: ____________________
BILLING CODE: 6715-01-U
Re: Notice of Disposition of Petition for Rulemaking

Dear Ms. McCormick and Messrs. Gold, Pomeranz, Baran, and Bauer:

On August 29, 2006, the Commission decided not to initiate a rulemaking at this time to exempt certain “grassroots lobbying” communications from regulation as “electioneering communications,” as proposed in the Petition for Rulemaking that you filed on February 16, 2006.

Enclosed for your information is the Notice of Disposition approved by the Commission.

Sincerely,

Rosemary C. Smith
Associate General Counsel

Enclosure