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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2008 JAN 22 P 2:33

January 22, 2008

## AGENDA ITEM

For Meeting of: 01-24-08

### MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Ron B. Katwan *RBK*  
Assistant General Counsel

Esa L. Sferra *ES*  
Attorney

Subject: Draft AO 2007-32

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 24, 2008.

Attachment

2 **DRAFT**

3  
4 Bradley A. Smith  
5 Stephen M. Hoersting  
6 Center for Competitive Politics  
7 1800 Diagonal Road  
8 Suite 600  
9 Alexandria, VA 22314

10  
11 William H. "Chip" Mellor  
12 Steven Simpson  
13 Paul M. Sherman  
14 Institute for Justice  
15 901 North Glebe Road  
16 Suite 900  
17 Arlington, VA 22203

18  
19 Dear Messrs. Smith, Hoersting, Mellor, Simpson, and Sherman:

20 We are responding to your advisory opinion request on behalf of SpeechNow.org  
21 ("SpeechNow") concerning the application of the Federal Election Campaign Act of  
22 1971, as amended (the "Act" or "FECA"), and Commission regulations to SpeechNow's  
23 status as a political committee and funds received by SpeechNow.

24 The Commission concludes that once SpeechNow receives in excess of \$1,000 in  
25 contributions or makes in excess of \$1,000 in expenditures in one calendar year, it would  
26 satisfy the statutory definition of "political committee" and would have to register as a  
27 political committee because its major purpose is Federal campaign activity. The  
28 Commission also concludes that funds received by SpeechNow would constitute  
29 contributions, as defined in the Act and Commission regulations, and would be subject to  
30 the Act's amount limitations on individuals' contributions to political committees,  
31 including the individual biennial aggregate contribution limit.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letters received on  
3 November 19, 27, and 29, 2007, and information on SpeechNow's website.<sup>1</sup>

4 SpeechNow is organized under the laws of the District of Columbia as an  
5 unincorporated non-profit association and under Section 527 of the Internal Revenue  
6 Code. SpeechNow is dedicated to "promoting and protecting Americans' First  
7 Amendment right of free speech, association, and assembly." Its "mission and major  
8 purpose is to advocate the election of candidates – in the 2008, 2010, and future federal  
9 election cycles – who favor returning America to the state of political freedom and  
10 advocate the defeat of candidates who favor speech restrictions in the name of campaign  
11 finance reform."

12 SpeechNow was founded by five individuals who are SpeechNow's only  
13 participants. Other individuals may join the organization if elected to join by the current  
14 participants. SpeechNow will operate and conduct its activities wholly independently of  
15 candidates, political party committees, and other political committees. Provisions of its  
16 bylaws ("Bylaws") prohibit SpeechNow and its participants from certain activities that  
17 might compromise the independence of its activities, such as using a vendor that is also  
18 used by a Federal candidate, hiring a former employee of a Federal candidate, or  
19 communicating with candidates about their campaign needs or SpeechNow's activities.  
20 See Bylaws Art. X. SpeechNow will not make any contribution to any candidate or  
21 political committee. See Bylaws Art. VI, Sec. 10.

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<sup>1</sup> [www.SpeechNow.org](http://www.SpeechNow.org) (last viewed on Jan. 9, 2008).

1           SpeechNow will rely solely on funds from individuals to pay for its activities and  
2 administrative costs. Four individuals have already indicated they would like to give  
3 amounts ranging from \$5,500 to \$110,000, and SpeechNow would like to accept these  
4 funds. To date, however, SpeechNow has accepted less than \$1,000 total. SpeechNow  
5 will not accept any funds from candidates, and will not accept, directly or indirectly, any  
6 funds or anything of value from political committees or from corporations, labor  
7 organizations, national banks, Federal government contractors, or foreign nationals.

8           SpeechNow plans to solicit individuals using two proposed solicitations  
9 (“Solicitation 1” and “Solicitation 2”) that request that individuals give their “maximum”  
10 amount to SpeechNow and that state that SpeechNow “operate[s] independently of any  
11 candidate and expressly advocate[s] to other people to vote for federal candidates who  
12 support these First Amendment rights and to vote against candidates who oppose such  
13 rights.” The two proposed solicitations are identical, except that Solicitation 2 also states  
14 that SpeechNow plans to oppose the election of two specific Federal candidates,  
15 Representative Dan Burton and Senator Mary Landrieu, in the 2008 election.

16           During the 2008 election, SpeechNow plans to pay for political advertisements  
17 supporting and opposing four specific Federal candidates. It has prepared four political  
18 advertisement scripts, and the company retained to produce the proposed advertisements  
19 and reserve television airtime, The Traz Group, estimates production costs to be \$12,000  
20 and the cost of airing the advertisements to exceed \$150,000.

21           SpeechNow plans to place “disclaimers” on its solicitations and political  
22 advertisements in accordance with 2 U.S.C. 441d(d)(2), and to report its spending for its

1 political advertisements as “independent expenditures” in accordance with 2 U.S.C.  
2 434(c).

3 ***Questions Presented***

- 4 1. *Are funds received and amounts disbursed by SpeechNow “contributions” and*  
5 *“expenditures” under 2 U.S.C. 431(8) and 431(9)?*  
6  
7 2. *Must SpeechNow register as a political committee:*  
8  
9 a. *Before accepting “contributions,” or making “expenditures,” in excess of*  
10 *\$1,000 because its major purpose is to influence the election or defeat of*  
11 *candidates for Federal office?*  
12  
13 b. *After it has received more than \$1,000 from individuals who are informed*  
14 *that the purpose of SpeechNow is to influence elections through advocacy*  
15 *for or against the election of clearly identified candidates, but before it*  
16 *has made “expenditures” in excess of \$1,000?*  
17  
18 c. *After making “expenditures” in excess of \$1,000?*  
19  
20 3. *What amount limitations apply to funds received by SpeechNow from individuals?*  
21

22 ***Legal Analysis and Conclusions***

23 *Question 1: Are funds received and amounts disbursed by SpeechNow “contributions”*  
24 *and “expenditures” under 2 U.S.C. 431(8) and 431(9)?*  
25

26 Yes, funds received by SpeechNow would be contributions and amounts  
27 disbursed by SpeechNow would be expenditures under the Act and Commission  
28 regulations.

29 ***A. Contributions***

30 Under the Act and Commission regulations, a “contribution” is “any gift,  
31 subscription, loan, advance, or deposit of money or anything of value made by any  
32 person for the purpose of influencing any election for Federal office.” *See* 2 U.S.C.  
33 431(8)(A)(i); 11 CFR 100.52(a). The Act does not define the phrase “for the purpose of  
34 influencing any election for Federal office.”

1 Commission regulations provide that funds received in response to solicitations  
2 must be treated as contributions “if the communication indicates that any portion of the  
3 funds received will be used to support or oppose the election of a clearly identified  
4 Federal candidate.”<sup>2</sup> 11 CFR 100.57(a); *see also Political Committee Status, Definition*  
5 *of Contribution and Allocation for Separate Segregated Funds and Nonconnected*  
6 *Committees; Final Rules*, 69 FR 68056, 68057 (Nov. 23, 2004) (“*Political Committee*  
7 *Status Final Rules*”).

8 SpeechNow proposes to solicit funds with two proposed communications,  
9 Solicitation 1 and Solicitation 2, that contain identical language describing SpeechNow  
10 and its purpose as follows:

11 SpeechNow.org is an independent speech group of individuals dedicated to  
12 promoting and protecting our First Amendment rights to free speech and for the  
13 freedom to assemble. We operate independently of any candidate and expressly  
14 advocate to other people to vote for federal candidates who support these First  
15 Amendment rights and to vote against candidates who oppose such rights.  
16

17 Solicitation 1 and Solicitation 2 state that “the best way” to achieve SpeechNow’s  
18 purpose is:

19 to speak out when politicians and the voters are most likely to pay attention.  
20 That’s election time. We need to tell our fellow Americans who supports, and  
21 who opposes, free speech and the First Amendment. We need to defeat some  
22 candidates who are against free speech and elect the ones who support the First  
23 Amendment. That will take money. A lot of it.  
24

25 Solicitation 2 contains additional language stating that SpeechNow plans to run  
26 advertisements to defeat two Federal candidates in 2008: Louisiana Senator Mary  
27 Landrieu and Congressman Dan Burton from Indiana. Because Solicitation 2 indicates

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<sup>2</sup> A Federal candidate is “clearly identified” if the candidate’s name, nickname, photograph, or drawing appears in the communication, or if the identity of the candidate is otherwise apparent through an unambiguous reference to the person’s status as a candidate, such as “the Democratic presidential nominee.” *See* 11 CFR 100.17.

1 that funds received will be used to oppose the election of two Federal candidates clearly  
2 identified by name, money received in response would constitute contributions under 11  
3 CFR 100.57(a).

4 Because Solicitation 1 does not include an indication that the funds received in  
5 response will be used to support or oppose the election of a clearly identified Federal  
6 candidate, money received in response to Solicitation 1 would not constitute  
7 contributions under 11 CFR 100.57(a). The Commission has emphasized, however, that  
8 11 CFR 100.57 provides “one example of communications that can generate  
9 contributions; it is not an exhaustive list. The rule addresses communications that  
10 indicate that the funds received in response will be used to support or oppose the election  
11 of a clearly identified Federal candidate. Other communications that do not include such  
12 an indication may also generate contributions under FECA.” *Political Committee Status*  
13 *Final Rules*, 69 FR at 68058. Solicitation 1 asks individuals to give money to  
14 SpeechNow so that SpeechNow can work to elect and defeat Federal candidates. Money  
15 given to work to elect and defeat Federal candidates would be “for the purpose of  
16 influencing any election for Federal office,” and thus would constitute a contribution  
17 under 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a).

18 In addition, any funds received from the four individuals who have indicated they  
19 would like to give amounts ranging from \$5,500 to \$110,000 would also constitute  
20 contributions under the Act and Commission regulations. Each individual acknowledges  
21 in a signed declaration that he understands that funds given to SpeechNow “will be used  
22 to fund speech, including advertisements that will advocate the election or defeat of  
23 candidates to federal office based on their position on freedom of speech and campaign

1 finance laws.” Accordingly, any such funds given to SpeechNow would be made “for the  
2 purpose of influencing any election for Federal office.” 2 U.S.C. 431(8)(A)(i); 11 CFR  
3 100.52(a).

4 *B. Expenditures*

5 Under the Act and Commission regulations, an “expenditure,” is a “purchase,  
6 payment, distribution, loan, advance, deposit, or gift of money or anything of value, made  
7 by any person for the purpose of influencing any election for Federal office.” *See* 2  
8 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a). The Supreme Court has held that the term  
9 “expenditure,” when applied to communications made wholly independently of a  
10 candidate or candidate’s committee, includes only “expenditures for communications that  
11 in express terms advocate the election or defeat of a clearly identified candidate for  
12 federal office.” *Buckley*, 424 U.S. at 44, 80.

13 Under Commission regulations, a communication contains express advocacy  
14 when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or  
15 “Smith for Congress,” or uses campaign slogans or words that in context have no other  
16 reasonable meaning than to urge the election or defeat of one or more clearly identified  
17 candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the  
18 One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” *See* 11 CFR 100.22(a); *see also* *FEC*  
19 *v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (“*MCFL*”) (“[The  
20 publication] provides in effect an explicit directive: vote for these (named) candidates.  
21 The fact that this message is marginally less direct than ‘Vote for Smith’ does not change  
22 its essential nature”). Courts have held that “express advocacy also includes verbs that  
23 exhort one to campaign for, or contribute to, a clearly identified candidate.” *FEC v.*



1 *Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424  
2 U.S. at 44 n.52, included the word “support,” in addition to “vote for” or “elect,” in its  
3 list of examples of express advocacy).

4 SpeechNow plans to fund the creation of four proposed political advertisements  
5 (the “Burton Ad,” the “Alternative Burton Ad,” the “Landrieu Ad,” and the “Alternative  
6 Landrieu Ad”) and pay to air them on television, independently of a candidate or a  
7 candidate’s committee. All four advertisements contain audio and video content. The  
8 audio portions of the advertisements are as follows:

9 *Burton Ad:*

10 Free speech is so important, it’s the First Amendment to the Constitution. But  
11 politicians like Dan Burton don’t like free speech. Burton voted for a bill to  
12 restrict the speech of many public interest groups. Under this bill you could go to  
13 jail for criticizing politicians. Hey Dan Burton. This is America, not Russia. But  
14 we still have the right to vote. Say no to Burton for Congress. Say no to  
15 censorship.

16

17 *Alternative Burton Ad:*

18 We’ve all seen the fight for free speech around the world. Lately, free speech has  
19 come under attack right here in America. Thanks to politicians like Dan Burton.  
20 Burton voted for a bill to restrict the speech of many public interest groups.  
21 Under this bill you could go to jail for criticizing politicians. Our founding  
22 fathers made free speech the First Amendment to the Constitution. Dan Burton  
23 voted to restrict our rights. Don’t let him do it again.

24

25 *Landrieu Ad:*

26 Free speech is so important, it’s the First Amendment to the Constitution. But  
27 politicians like Mary Landrieu don’t like free speech. Landrieu voted for the law  
28 restricting the speech of public interest groups. People can now go to jail for  
29 violating her law that protects politicians from criticism. Hey Mary Landrieu.  
30 This is America, not Russia. But we still have the right to vote. Say no to  
31 Landrieu for Senate. Say no to censorship.

32

33 *Alternative Landrieu Ad:*

34 We’ve all seen the fight for free speech around the world. Lately, free speech has  
35 come under attack right here in America. Thanks to politicians like Mary  
36 Landrieu. Landrieu helped pass the law restricting the speech of many public  
37 interest groups. Under this law you could go to jail for criticizing politicians.

1           Our founding fathers made free speech the First Amendment to the Constitution.  
2           Mary Landrieu is taking that right away. Don't let her do it again.

3  
4           The video portions of the Burton Ad and the Alternative Burton Ad both show a  
5 picture of Congressman Burton and include text that states "Say no to Burton for  
6 Congress." The video portions of the Landrieu Ad and the Alternative Landrieu Ad both  
7 show a picture of Senator Landrieu and include text that states "Say no to Landrieu for  
8 Senate."

9           The phrases "Say no to Burton for Congress" and "Say no to Landrieu for Senate"  
10 constitute express advocacy under the Commission regulations because they have no  
11 other reasonable meaning than to urge the defeat of the candidate clearly identified by  
12 name and by picture. *See* 11 CFR 100.22(a). Accordingly, all four advertisements  
13 contain express advocacy, and funds spent on these advertisements would constitute  
14 expenditures under the Act and Commission regulations.

15 *Question 2: Must SpeechNow register as a political committee:*

16  
17           a. *Before accepting "contributions," or making "expenditures," in excess of*  
18           *\$1,000 because its major purpose is to influence the election or defeat of*  
19           *candidates for Federal office?*

20  
21           b. *After it has received more than \$1,000 from individuals who are informed*  
22           *that the purpose of SpeechNow is to influence elections through advocacy*  
23           *for or against the election of clearly identified candidates, but before it*  
24           *has made "expenditures" in excess of \$1,000?*

25  
26           c. *After making "expenditures" in excess of \$1,000?*

27  
28           SpeechNow would have to register as a political committee once it has either  
29 received contributions in excess of \$1,000 or made expenditures in excess of \$1,000, in a  
30 calendar year, because it would satisfy the statutory definition of "political committee"  
31 and its major purpose is Federal campaign activity. SpeechNow need not, however,

1 register as a political committee before receiving contributions or making expenditures  
2 exceeding either of these thresholds solely because its major purpose is Federal campaign  
3 activity.

#### 4 *Definition of Political Committee*

5         The Act and Commission regulations, with certain exceptions, define a “political  
6 committee” as “any committee, club, association, or other group of persons which  
7 receives contributions aggregating in excess of \$1,000 during a calendar year or which  
8 makes expenditures aggregating in excess of \$1,000 during a calendar year.” *See* 2  
9 U.S.C. 431(4)(A); 11 CFR 100.5(a). Under the Act and Commission regulations,  
10 political committees are subject to certain registration and reporting requirements, as well  
11 as limitations and prohibitions on contributions received and made. Once an organization  
12 receives more than \$1,000 in contributions or makes more than \$1,000 in expenditures, in  
13 a calendar year, it satisfies the statutory definition of “political committee.”

14         The Supreme Court has held that “[t]o fulfill the purposes of the Act” and avoid  
15 “reach[ing] groups engaged purely in issue discussion,” only organizations whose major  
16 purpose is Federal campaign activity can be considered political committees under the  
17 Act. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for*  
18 *Life, Inc.*, 479 U.S. 238, 262 (1986).

19         Accordingly, SpeechNow would have to register as a political committee if it  
20 satisfies the statutory definition of “political committee” and its major purpose is Federal  
21 campaign activity.

#### 22         A. *Statutory Definition of “Political Committee”*

23                 1. *Receiving contributions in excess of \$1,000 in a calendar year*

1           As explained above in response to *Question 1*, funds received in response to  
2 Solicitation 1 and Solicitation 2, and funds from the four individuals who would like to  
3 give amounts ranging from \$5,500 to \$110,000, would constitute contributions under the  
4 Act and Commission regulations. Thus, once SpeechNow receives more than \$1,000 in a  
5 calendar year in response to these solicitations, or from the four individuals, it would  
6 meet the statutory definition of a “political committee.”

7           2. *Making expenditures in excess of \$1,000 in a calendar year*

8           As explained above in response to *Question 1*, SpeechNow’s proposed political  
9 advertisements contain express advocacy and funds spent on these advertisements would  
10 be expenditures under the Act and Commission regulations. Thus, once SpeechNow  
11 spends more than \$1,000 in a calendar year on these advertisements, it would meet the  
12 statutory definition of a “political committee.”

13           B. *Major Purpose*

14           An organization’s “major purpose” may be established through public statements  
15 of purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004)  
16 (finding that the organization evidenced its “major purpose” through its own materials  
17 which stated the organization’s goal of supporting the election of Republican Party  
18 candidates for federal office and through efforts to get prospective donors to consider  
19 supporting federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C.  
20 1996) (“organization’s [major] purpose may be evidenced by its public statements of its  
21 purpose or by other means”); Advisory Opinion 2006-20 (Unity 08) (organization  
22 evidenced its major purpose through organizational statements of purpose on Web site).

1           SpeechNow’s major purpose is Federal campaign activity. SpeechNow makes  
2 clear in its advisory opinion request, and through its proposed solicitations and other  
3 proposed communications, that its “mission and major purpose is to advocate the election  
4 of candidates . . . and advocating the defeat of candidates.” Advocating the election and  
5 defeat of candidates constitutes campaign activity.<sup>3</sup> In its Internal Revenue Service Form  
6 8871 (Political Organization Notice of Section 527 Status), its bylaws, and its articles of  
7 organization, SpeechNow clearly states this purpose: “We operate independently of any  
8 candidate and expressly advocate to other people to vote for federal candidates who  
9 support these First Amendment rights and vote against candidates who oppose such  
10 rights.” In addition, SpeechNow plans to continue making similar statements of its  
11 purpose in its proposed solicitations, discussed above, which confirms that its major  
12 purpose is Federal campaign activity.

13           Therefore, because its major purpose is Federal campaign activity, SpeechNow  
14 would have to register as a political committee once it either (1) receives more than  
15 \$1,000 in a calendar year in response to its proposed solicitations or from the four  
16 individuals who pledged donations, or (2) spends more than \$1,000 in a calendar year on  
17 its proposed advertisements. SpeechNow would have to file a statement of organization  
18 within 10 days of becoming a political committee, *see* 11 CFR 102.1(d) and 102.2, and it  
19 would be subject to all provisions of the Act and Commission regulations applicable to  
20 political committees.

21 *Question 3: What amount limitations apply to funds received by SpeechNow from*  
22 *individuals?*

23

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<sup>3</sup> *See Buckley v. Valeo*, 424 U.S. 1, 79 (the term “political committee” encompasses organizations “the major purpose of which is the nomination or election of a candidate”).

1           Because amounts given to SpeechNow would be contributions, as explained  
2 above in response to *Question 1*, they would count towards the contribution limitations in  
3 the Act and Commission regulations, including the individual biennial aggregate  
4 contribution limit.

5           The Act and Commission regulations prohibit a person from making a  
6 contribution in excess of \$5,000 to a political committee that is not an authorized  
7 committee, a political committee of a national political party, or a political committee of  
8 a State political party. *See* 2 U.S.C. 441a(a)(1); 11 CFR 110.1(d). The Act and  
9 Commission regulations also limit the total amount of contributions an individual may  
10 make to candidates and political committees within a two-year period, known as the  
11 individual aggregate biennial contribution limit. *See* 2 U.S.C. 441a(a)(3); 11 CFR  
12 110.5(b)(1). Under the individual aggregate biennial contribution limit for the 2007-2008  
13 election cycle, an individual may make no more than \$108,200 in total contributions to  
14 candidates and political committees, including up to \$42,700 in contributions to political  
15 committees that are not authorized committees and are not political committees of the  
16 national political parties.<sup>4</sup> *See id.*; *Price Index Increases of Expenditure and*  
17 *Contribution Limitations: Notice of Expenditure and Contribution Limitation Increases*,  
18 72 FR 5294, 5295 (Feb. 2007).

19           Once SpeechNow becomes a political committee, it would not be an authorized  
20 committee or a political committee of a national or State political party. *See* 2  
21 U.S.C. 431(6) (definition of authorized committee); 11 CFR 100.5(e)(4) and (f)(1)  
22 (definitions of authorized committee and party committee). Therefore, contributions to it

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<sup>4</sup> These figures reflect the statutory figures adjusted to account for increases in the consumer price index. *See* 2 U.S.C. 441a(c)(1); 11 CFR 110.5(b)(3) and 110.17.

1 would be subject to the \$5,000 amount limitation in 2 U.S.C. 441a(a)(1)(C) and 11 CFR  
2 110.1(d) and would count towards the \$42,700 in total contributions that each individual  
3 may make to political committees that are not authorized committees and are not political  
4 committees of the national political parties and the \$108,200 in total contributions to all  
5 candidates and political committees. *See* 2 U.S.C. 441a(a)(3); 11 CFR 110.5(b)(1).

6 Commission regulations prohibit a political committee from knowingly accepting  
7 any contribution in excess of the Act's amount limitations, including the individual  
8 biennial aggregate contribution limit. *See* 11 CFR 110.9. Accordingly, SpeechNow may  
9 not accept any contribution that would cause an individual to exceed \$5,000 in total  
10 contributions to SpeechNow, \$42,700 in total contributions to political committees that  
11 are not authorized committees and are not political committees of the national political  
12 parties, or \$108,200 in total contributions to all candidates and political committees.

13 This response constitutes an advisory opinion concerning the application of the  
14 Act and Commission regulations to the specific transaction or activity set forth in your  
15 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
16 of the facts or assumptions presented and such facts or assumptions are material to a  
17 conclusion presented in this advisory opinion, then the requester may not rely on that  
18 conclusion as support for its proposed activity. The cited advisory opinion is available on  
19 the Commission's website at <http://saos.nictusa.com/saos/searchao>.

20 Sincerely,

21  
22  
23 David M. Mason  
24 Chairman