



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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2012 OCT 17 PM 2:19

October 17, 2012

MEMORANDUM

**AGENDA ITEM**

TO: The Commission

FROM: Anthony Herman  
General Counsel *AH/lys*

Lisa Stevenson *lys*  
Deputy General Counsel – Law

Kevin Deeley *KD*  
Acting Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Theodore M. Lutz *TML*  
Attorney

For Meeting of 10-18-12

**SUBMITTED LATE**

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



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WASHINGTON, DC 20006  
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7925 JONES BRANCH DRIVE  
MCLEAN, VA 22102  
PHONE 703.905.2800  
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www.wileyrein.com

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](mailto: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

ATTACHMENT 1

**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.<sup>1</sup> 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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<sup>1</sup> 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  
Washington, D.C. 20006

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 104**

3 **[NOTICE 2012-XX]**

4 **Rulemaking Petition: Electioneering Communications Reporting**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Rulemaking petition: Notice of Availability.

7 **SUMMARY:** On October 5, 2012, the Commission received a Petition for  
8 Rulemaking from the Center for Individual Freedom. *See* REG  
9 2012-01 Electioneering Communications Reporting (2012).  
10 The Petition urges the Commission to revise the regulations at  
11 11 CFR 104.20(c)(8) and (9) regarding the reporting of  
12 electioneering communications. The Petition is available for  
13 inspection in the Commission's Public Records Office, on its  
14 website, <http://www.fec.gov/fosers/> (REG 2012-01  
15 Electioneering Communications Reporting (2012)), and through  
16 its Faxline service.

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

20 **ADDRESSES:** All comments must be in writing. Comments may be submitted  
21 electronically via the Commission's website at  
22 <http://www.fec.gov/fosers/> (REG 2012-01 Electioneering  
23 Communications Reporting (2012)). Commenters are



1 encouraged to submit comments electronically to ensure timely  
 2 receipt and consideration. Alternatively, comments may be  
 3 submitted in paper form. Paper comments must be sent to the  
 4 Federal Election Commission, Attn.: Robert M. Knop, Assistant  
 5 General Counsel, 999 E Street, NW., Washington, D.C. 20463.  
 6 All comments must include the full name and postal service  
 7 address of a commenter, and of each commenter if filed jointly,  
 8 or they will not be considered. The Commission will post  
 9 comments on its website at the conclusion of the comment  
 10 period.

11 **FOR FURTHER**  
 12 **INFORMATION**  
 13 **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.

16 **SUPPLEMENTARY**  
 17 **INFORMATION:**

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

24 Copies of the Petition for Rulemaking are available for public inspection at the  
 25 Commission’s Public Records Office, 999 E Street, NW., Washington, D.C. 20463,

1 Monday through Friday between the hours of 9 a.m. and 5 p.m., and on the  
2 Commission's website, <http://www.fec.gov/fosers/> (REG 2012-01 Electioneering  
3 Communications Reporting (2012)). Interested persons may also obtain a copy of the  
4 Petition by dialing the Commission's Faxline service at (202) 501-3413 and following its  
5 instructions, at any time of the day and week. Request document # 273.

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

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Caroline C. Hunter  
Chair  
Federal Election Commission

DATED: \_\_\_\_\_