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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

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,

J Baran /CPB

CENTER FOR INDIVIDUAL FREEDOM

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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

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[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.

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