

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.

DRAFT 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.

Draft 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 12:00pm noon (Eastern Time) on October 22, 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.

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2008 OCT 20 P 4: 35

AGENDA ITEM
For Meeting of: 10-23-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RES*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

David Adkins *DA*
Attorney

Subject: Draft AO 2008-15

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 23, 2008.

Attachment

1 **ADVISORY OPINION 2008-15**

2

3 **James Bopp, Jr., Esq.**

DRAFT

4 **Clayton J. Callen, Esq.**

5 **Counsel to the National Right to Life Committee, Inc.**

6 **The National Building**

7 **1 South Sixth Street**

8 **Terre Haute, IN 47807-3510**

9

10 **Dear Mr. Bopp and Mr. Callen:**

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

16 **Regarding the NRLC's first proposed radio advertisement, the Commission**
17 **concludes that (1) the advertisement does not contain express advocacy and, therefore,**
18 **the funding of its broadcast would not constitute an expenditure; and (2) the**
19 **advertisement would be a permissible corporate-funded electioneering communication.**
20 **Accordingly, the NRLC may finance the broadcast of the first advertisement with general**
21 **treasury funds. The second NRLC radio advertisement, however, contains express**
22 **advocacy and, therefore, the funds used to finance its broadcast would constitute an**
23 **expenditure. Accordingly, the NRLC may not use general treasury funds to finance its**
24 **broadcast because corporations are banned from expressly advocating the defeat of a**
25 **clearly identified candidate in communications to the general public.**

1 **Background**

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

4 The NRLC is a non-stock, not-for-profit corporation, exempt from Federal taxes
5 under 26 U.S.C. 501(c)(4), but it is not a “qualified non-profit corporation” under
6 11 CFR 114.10. The NRLC has produced two sixty-second radio advertisements that it
7 intends to broadcast immediately and continuously throughout the United States leading
8 up to the November 2008 general election. The first advertisement, entitled “Waiting for
9 Obama’s Apology #1” reads, in pertinent part, as follows:

10 **Female 1:** In August, National Right to Life released documents proving that in
11 2003, Barack Obama was responsible for killing a bill to provide care and
12 protection for babies who are born alive after abortions, and that he later
13 misrepresented the bill’s content. When journalist David Brody asked Obama
14 about National Right to Life’s charges, Obama replied:

15
16 **Obama [clip]:** “. . . I hate to say that people are lying, but here’s a situation where
17 folks are lying.”

18
19 **Female 1:** We challenged Obama to admit that the documents are genuine, and
20 admit to his previous misrepresentations. FactCheck[dot]org then investigated,
21 and concluded:

22
23 **Female 2:** (clinical, detached tone): “Obama’s claim is wrong . . . The documents
24 . . . support the group’s claims that Obama is misrepresenting the contents of
25 [Senate Bill] 1082.”

26
27 **Female 1:** Was Obama afraid that the public would learn about his extreme
28 position – that he opposed merely defining every baby born alive after an abortion
29 as deserving of protection? Will Obama now apologize for calling us liars when
30 we were the ones telling the truth?

31
32 The second advertisement, entitled “Waiting for Obama’s Apology #2” reads, in
33 pertinent part, as follows:

1 **Female 1:** In August, National Right to Life released documents proving that in
2 2003, Barack Obama was responsible for killing a bill to provide care and
3 protection for babies who are born alive after abortions, and that he later
4 misrepresented the bill's content. When journalist David Brody asked Obama
5 about National Right to Life's charges, Obama replied:
6

7 **Obama [clip]:** ". . . I hate to say that people are lying, but here's a situation where
8 folks are lying."
9

10 **Female 1:** We challenged Obama to admit that the documents are genuine, and
11 admit to his previous misrepresentations. FactCheck[dot]org then investigated,
12 and concluded:
13

14 **Female 2:** (clinical, detached tone): "Obama's claim is wrong . . . The documents
15 . . . support the group's claims that Obama is misrepresenting the contents of
16 [Senate Bill] 1082."
17

18 **Female 1:** Was Obama afraid that the public would learn about his extreme
19 position – that he opposed merely defining every baby born alive after an abortion
20 as deserving of protection? Will Obama now apologize for calling us liars when
21 we were the ones telling the truth?
22

23 **Barack Obama:** a candidate whose word you can't believe in.
24

25 The two advertisements are nearly identical. The only difference between them is
26 that "Waiting for Obama's Apology #2" features a concluding sentence that reads:

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

28 The NRLC wishes to use general treasury funds to finance the broadcast of these
29 advertisements. Until the NRLC receives a response to its request, its registered political
30 committee, National Right to Life Political Action Committee ("NRLPAC"), plans to
31 finance the broadcast of Waiting for Obama's Apology #2. The NRLC indicates that
32 broadcast of the advertisements will be independent and not be made in concert or

1 cooperation with, or at the request or suggestion of, any candidate or candidate's agents,
2 or any political party committee or its agents.¹

3 ***Questions Presented***

4 (1) Would the NRLC's use of general treasury funds to finance the broadcast of the
5 advertisements constitute prohibited corporate expenditures under
6 2 U.S.C. 441b(a) and 11 CFR 114.2(b)(2)(ii)?

7 (2) Would the NRLC's broadcast of the advertisements constitute prohibited
8 corporate-funded electioneering communications under 2 U.S.C. 441b(b)(2) and
9 11 CFR 114.2(b)(3)?

10 ***Legal Analysis and Conclusions***

11 Regarding the NRLC's first proposed radio advertisement, the Commission
12 concludes that (1) the advertisement does not contain express advocacy and, therefore,
13 the funding of its broadcast would not constitute an expenditure; and (2) the
14 advertisement would be a permissible corporate-funded electioneering communication.
15 Accordingly, the NRLC may finance the broadcast of the first advertisement with general
16 treasury funds. The second NRLC radio advertisement, however, contains express
17 advocacy and, therefore, the funds used to finance its broadcast would constitute an
18 expenditure. Accordingly, the NRLC may not use general treasury funds to finance its

¹ Under Commission regulations, a communication is not independent, but "coordinated," if it: (1) is paid for by someone other than a candidate, a candidate's authorized committee, a political party committee, or their agents; (2) meets one of four content standards; and (3) meets one of six conduct standards. See 11 CFR 109.21. While it may be possible that a communication which is "broadcast" independently still meets the definition of a coordinated communication, see, e.g., 11 CFR 109.21(d)(4), such a determination is outside the scope of your request. For purposes of this advisory opinion, however, 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).

1 broadcast because corporations are banned from expressly advocating the defeat of a
2 clearly identified candidate in communications to the general public.²

3 1. Corporate Expenditures and Independent Expenditures

4 The Act and Commission regulations define the term “expenditure” to include
5 “any purchase, payment . . . or gift of money or anything of value, made by any person
6 for the purpose of influencing any election for Federal office.” 2 U.S.C. 431(9)(A)(i);
7 11 CFR 100.111(a). Funds used for communications that expressly advocate the election
8 or defeat of a clearly identified Federal candidate are “expenditures.” *See McConnell v.*
9 *FEC*, 540 U.S. 93, 190-92 (2003); *see also Buckley v. Valeo*, 424 U.S. 1, 77-80 (1976).
10 The Act and Commission regulations similarly define the term “independent
11 expenditure” to include an expenditure that “expressly advocate[es] the election or defeat
12 of a clearly identified federal candidate.” 2 U.S.C. 431(17)(A); 11 CFR 100.16(a). The
13 Act prohibits corporations, including corporations organized under 26 U.S.C. 501(c)(4),
14 from making expenditures in connection with any election for Federal office. As such,
15 corporations may not fund communications to those outside their restricted class that
16 expressly advocate the election or defeat of a clearly identified candidate.
17 2 U.S.C. 441b(a), 11 CFR 114.2(b)(2)(ii); *see also McConnell v. FEC*, 540 U.S. 93, 203
18 (2003) (holding that it is a “firmly embedded” principle of First Amendment
19 jurisprudence that corporations may constitutionally be prohibited from using their
20 general treasuries to fund advertisements “expressly advocating” for or against the
21 election of a candidate).

² The Commission’s analysis and conclusions are limited to the two radio scripts presented in the request. Advertisements that communicate information visually, such as those on television or the Internet, are outside of the scope of this advisory opinion.

1 A communication expressly advocates the election or defeat of a clearly identified
2 candidate if it uses so-called “magic words” – phrases such as “vote for the President,”
3 “re-elect your Congressman,” or “Smith for Congress” – or uses campaign slogans or
4 words that, in context, have no other reasonable meaning than to urge the election or
5 defeat of one or more clearly identified candidates, such as posters, bumper stickers, or
6 advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!”
7 *See* 11 CFR 100.22(a).

8 Further, a communication contains express advocacy if it has an “electoral
9 portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and if
10 “[r]easonable minds could not differ as to whether it encourages actions to elect or defeat
11 [a candidate] or encourages some other kind of action.” 11 CFR 100.22(b);
12 *see also* *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). For example,
13 “[c]ommunications discussing or commenting on a candidate’s character, qualifications,
14 or accomplishments are considered express advocacy . . . if, in context, they have no
15 other reasonable meaning than to encourage actions to elect or defeat the candidate in
16 question.” *See Final Rule, Express Advocacy; Independent Expenditures; Corporate and*
17 *Labor Organization Expenditures*, 60 Fed. Reg. 35292, 35295 (July 6, 1995).

18 *Waiting for Obama’s Apology #1*

19 Waiting for Obama’s Apology #1 involves a dispute between the NRLC and
20 Senator Obama over a vote that Senator Obama cast as a member of the Illinois
21 legislature. The advertisement details a series of claims and accusations by and between
22 the NRLC and Senator Obama. According to the advertisement, the dispute originated
23 when the NRLC claimed that Senator Obama mischaracterized his vote on a bill. The

1 advertisement challenges Senator Obama's statement that the NRLC's claim is a lie and
2 concludes by asking whether Senator Obama will "now apologize for calling us liars
3 when we were the ones telling the truth?"

4 The advertisement exhibits some indicia of express advocacy by raising questions
5 regarding Senator Obama's character. The advertisement's reference to
6 "misrepresentations" made by Senator Obama, coupled with its intimation that Senator
7 Obama needs to apologize for calling the NRLC liars when it was "telling the truth,"
8 casts doubt on Senator Obama's trustworthiness and truthfulness. As noted above,
9 though, a communication that discusses or comments on a candidate's character will be
10 considered express advocacy only if "in context, [the advertisement has] no other
11 reasonable meaning than to encourage actions to elect or defeat the candidate in
12 question." *See Final Rule, Express Advocacy; Independent Expenditures; Corporate and*
13 *Labor Organization Expenditures*, 60 Fed. Reg. at 35295.

14 Here, the advertisement could reasonably be interpreted as having a meaning
15 other than to encourage the defeat of Senator Obama. The advertisement focuses on a
16 dispute over a vote Senator Obama cast as an Illinois State Senator and exhorts Senator
17 Obama to take a specific action, namely, to "apologize for calling [the NRLC] liars."
18 Furthermore, the advertisement lacks other usual markers of express advocacy: it does
19 not reference, explicitly or implicitly, Senator Obama's candidacy for president and it
20 does not compare Senator Obama to other presidential candidates.

21 Given the advertisement's devotion to speech regarding the dispute between the
22 NRLC and Senator Obama, the advertisement, when taken as a whole and with limited
23 reference to external events, could reasonably be interpreted as encouraging action other

1 than the defeat of Senator Obama in his bid for the presidency. Accordingly, the
2 Commission concludes that the advertisement is not express advocacy under
3 11 CFR 100.22(b). Therefore, the corporate expenditure prohibitions at 2 U.S.C. 441b(a)
4 and 11 CFR 114.2(b)(2)(ii) do not ban the NRLC from using its general treasury funds to
5 finance the broadcast of the advertisement.

6 *Waiting for Obama's Apology #2*

7 As noted above, the only difference between "Waiting for Obama's Apology #1,"
8 and "Waiting for Obama's Apology #2" is that the latter advertisement features a
9 concluding sentence which reads: "Barack Obama: a candidate whose word you can't
10 believe in." As such, Waiting for Obama's Apology #2 raises questions about Senator
11 Obama's character in the same way as Waiting for Obama's Apology #1 and, therefore,
12 contains the same indicia of express advocacy

13 Furthermore, the inclusion of the concluding sentence in Waiting for Obama's
14 Apology #2 gives the advertisement an "unmistakable, unambiguous" electoral portion.
15 Its reference to Senator Obama as a "candidate" significantly alters the tone of the
16 advertisement, focusing it as much on Senator Obama's bid for the presidency as his
17 actions as a State legislator. Additionally, the advertisement manipulates Senator
18 Obama's campaign slogan – "Change we can believe in" – to attack his character and call
19 into question his trustworthiness as "a candidate whose word you can't believe in."

20 Given these factors, the advertisement, when taken as a whole and with limited
21 reference to external events, could only be interpreted by a reasonable person as
22 advocating the defeat of Senator Obama. The electoral portion of the advertisement is
23 unambiguous, unmistakable, and suggestive of only one meaning, and reasonable minds

1 could not differ about the actions the advertisement is encouraging listeners to take.
2 Accordingly, the Commission concludes that the advertisement contains express
3 advocacy under 11 CFR 100.22(b). As such, the use by the NRLC of general treasury
4 funds to finance the advertisement's broadcast would be a prohibited corporate
5 expenditure under 2 U.S.C. 441b(a) and 11 CFR 114.2(b)(2)(ii).³

6 **2. Corporate-Funded Electioneering Communications**

7 In the context of a Presidential election, an "electioneering communication" is
8 defined as any broadcast, cable, or satellite communication that (1) refers to a clearly
9 identified presidential candidate, and (2) is publicly distributed within 60 days before a
10 general election or 30 days before a primary election or convention.

11 See 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a).⁴

12 Under 2 U.S.C. 441b(a) and 11 CFR 114.2(b)(3), corporations are generally
13 prohibited from financing "electioneering communications" that contain the "functional
14 equivalent of express advocacy" if the communications are directed at those outside the
15 restricted class. See *McConnell v. FEC*, 540 U.S. 93, 205-06 (2003). An electioneering
16 communication contains the functional equivalent of express advocacy if it is
17 "susceptible of no reasonable interpretation other than as an appeal to vote for or against
18 a clearly identified Federal candidate." 11 CFR 114.15(a).

³ This conclusion does not preclude the NRLC's registered political committee, NRLPAC, from financing the broadcast of *Waiting for Obama's Apology #2*.

⁴ Importantly, communications that constitute expenditures or independent expenditures (*i.e.*, communications that expressly advocate the election or defeat of a clearly identified candidate) are, by definition, not electioneering communications. See 2 U.S.C. 434(f)(3)(B)(ii); 11 CFR 100.29(c)(3). As noted above, corporations are prohibited from making expenditures or independent expenditures.

1 Under Commission regulations, electioneering communications not containing the
2 functional equivalent of express advocacy are exempt from the general ban on corporate-
3 funded electioneering communications. Certain electioneering communications, like, for
4 example, lobbying messages or commercial advertisements, are exempt under a safe
5 harbor provision in the Commission's regulations. See 11 CFR 114.15(b). An
6 electioneering communication not qualifying for the safe harbor is still eligible for the
7 exemption if, under Commission rules of interpretation, the communication is susceptible
8 of a reasonable interpretation other than as an appeal to vote for or against a clearly
9 identified Federal candidate. See 11 CFR 114.15(c). In instances where there is doubt
10 about an electioneering communication's meaning, Commission regulations mandate that
11 it "will be resolved in favor of permitting the communication." 11 CFR 114.15(c)(3).

12 *Waiting for Obama's Apology #1*

13 As a threshold matter, the Commission agrees with the NRLC that Waiting for
14 Obama's Apology #1 would constitute an electioneering communication if broadcast as
15 planned. The advertisement qualifies because it references Senator Obama, a candidate
16 for President, by name, and the NRLC intends to broadcast it "throughout the United
17 States" during the 60 days prior to the general election. See 2 U.S.C. 434(f)(3);
18 11 CFR 100.29(a). Accordingly, the Commission must assess whether the advertisement
19 contains the functional equivalent of express advocacy, and, thus, is subject to the ban on
20 corporate-funded electioneering communications, or whether the advertisement is
21 covered by the exemption for permissible corporate electioneering communications at
22 11 CFR 114.15. Although the advertisement does not qualify for the safe harbor at

1 11 CFR 114.15(b), the Commission, nonetheless, concludes that Waiting for Obama's
2 Apology #1 is an exempt corporate-funded electioneering communication.

3 To qualify for the safe harbor, an electioneering communication must meet three
4 criteria: (1) It must not mention an election, candidacy, political party, opposing
5 candidate, or voting by the general public; (2) It must not take a position on the character,
6 qualifications, or fitness for office of a Federal candidate; and (3) It must focus on a
7 legislative, executive, or judicial issue and urge either a candidate or the public to take
8 some action on the matter discussed. *See* 11 CFR 114.15(b).

9 As required by Commission regulations, Waiting for Obama's Apology #1 does
10 not "mention any election, candidacy, political party, opposing candidate, or voting by
11 the general public." *See* 11 CFR 114.15(b)(1). As noted above, though, the
12 advertisement does "take a position on [Senator Obama's] character, qualifications, or
13 fitness for office." Under 11 CFR 114.15(b)(2), by alleging that Senator Obama made
14 "misrepresentations" about a vote he cast and intimating that Senator Obama was not
15 being truthful in calling the NRLC liars, the advertisement does not qualify for the safe
16 harbor, and therefore must be evaluated under the rules of interpretation in
17 11 CFR 114.15(c).

18 To qualify for the exemption, an electioneering communication must, on balance,
19 be susceptible of a reasonable interpretation other than as an appeal to vote for or against
20 a clearly identified Federal candidate. In making this determination, the Commission will
21 consider "whether the communication includes any indicia of express advocacy" and
22 "whether the communication has an interpretation other than as an appeal to vote for or
23 against a clearly identified Federal candidate." 11 CFR 114.15(c).

1 A communication includes indicia of express advocacy if it mentions any
2 election, candidacy, political party, opposing candidate, or voting by the general public;
3 or takes a position on any candidate's or officeholder's character, qualifications, or fitness
4 for office. *See* 11 CFR 114.15(c)(1). By contrast, a communication may be found to
5 have an interpretation other than as an appeal to vote for or against a clearly identified
6 Federal candidate if it includes content that: (1) focuses on a public policy issue and
7 either urges a candidate to take a position on that issue or urges the public to contact the
8 candidate about the issue; (2) proposes a commercial transaction; or (3) includes a call to
9 action or other appeal that urges an action other than voting for or against contributing to
10 a clearly identified Federal candidate or political party. *See* 11 CFR 114.15(c)(2). Other
11 types of content not specifically included in this list may also lead to a determination that
12 a communication has an interpretation as something other than an appeal to vote for or
13 against a clearly identified candidate. *See Final Rule, Electioneering Communications,*
14 *72 Fed. Reg. 72899, 72905 (Dec. 26, 2007).*

15 As discussed above, *Waiting for Obama's Apology #1* does include indicia of
16 express advocacy; namely it "take[s] a position on [Senator Obama's] character,
17 qualifications, or fitness for office," 11 CFR 114.15(c)(1)(ii), by alleging that Senator
18 Obama made "misrepresentations" about a vote he cast in the Illinois Senate and
19 intimating that Senator Obama was not being truthful in calling the NRLC liars.

20 However, the advertisement also contains content that supports an interpretation
21 of the advertisement other than as an appeal to vote against Senator Obama. Specifically,
22 the advertisement focuses predominantly on a public policy issue – a vote Senator Obama
23 cast while serving in the Illinois Senate. *See Final Rule, Electioneering*

1 *Communications*, 72 Fed. Reg. at 72905 (stating that an electioneering communication's
2 content "may support a determination that it has an interpretation other than as an appeal
3 to vote if it discusses any matter of public importance"). Furthermore, the advertisement
4 urges Senator Obama to take a particular action with respect to that issue, namely, to
5 apologize for calling the NRLC liars. Indeed, the advertisement's focus on a public
6 policy issue, and the way in which it urges Senator Obama to take an action regarding
7 that issue, is substantially similar to the type of content described at
8 11 CFR 114.15(c)(2)(i).

9 Accordingly, in applying the rules of interpretation, the Commission concludes
10 that *Waiting for Obama's Apology #1* could reasonably be interpreted as an appeal for
11 Obama to apologize to the NRLC rather than an appeal to vote against Senator Obama in
12 the presidential election. As such, the advertisement is a permissible electioneering
13 communication not subject to the ban on corporate-funded electioneering
14 communications at 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(3). Therefore, the NRLC
15 may use general treasury funds to finance its broadcast.

16 *Waiting for Obama's Apology #2*

17 The conclusion above, that the broadcast of *Waiting for Obama's Apology #2*
18 would constitute an expenditure, renders moot the NRLC's second question regarding
19 whether the advertisement is a prohibited corporate-funded electioneering
20 communication. A communication that constitutes an expenditure or an independent
21 expenditure is, by definition, not an electioneering communication.

22 *See* 2 U.S.C. 434(f)(3)(B)(ii); 11 CFR 100.29(c)(3).

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

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On behalf of the Commission,

Donald F. McGahn II
Chairman