

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2012-11 is now available for comment. It was requested by Benjamin T. Barr, Esq. and Stephen R. Klein, Esq., on behalf of Free Speech, and is scheduled to be considered by the Commission at its public meeting on April 12, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT ADVISORY OPINION 2012-11, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on April 17, 2012.
- 4) The Commission will generally not accept comments received after the deadline. 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.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fee.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-11, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2012 APR 11 P 6:01

April 11, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

Erin R. Chlopak *ER for ERC*
Attorney

Allison T. Steinle *AT for ATS*
Attorney

Subject: Draft AO 2012-11 (Free Speech)

For Meeting of 4-12-12

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. Additional Drafts may be forthcoming. We have been asked to have this draft placed on the Open Session agenda for April 12, 2012.

Attachment

1 ADVISORY OPINION 2012-11

2
3
4
5
6
7
8

Benjamin T. Barr Esq.
Stephen R. Klein, Esq.
Wyoming Liberty Group
1740 H Dell Range Blvd. #459
Cheyenne, WY 82009

DRAFT

9 Dear Messrs. Barr and Klein:

10 We are responding to your advisory opinion request on behalf of Free Speech,
11 concerning the application of the Federal Election Campaign Act, as amended (the
12 “Act”), and Commission regulations to Free Speech’s proposed plan to finance certain
13 advertisements and ask for donations to fund its activities.

14 The Commission concludes that: none of Free Speech’s eleven proposed
15 advertisements would expressly advocate the election or defeat of a clearly identified
16 Federal candidate; (2) none of the proposed donation requests would be solicitations of
17 “contributions”; and (3) Free Speech’s proposed activities would not require it to register
18 and report with the Commission as a political committee.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 February 29, 2012, and your email received on March 9, 2012.

22 Free Speech describes itself as “an independent group of individuals which
23 promotes and protects free speech, limited government, and constitutional
24 accountability.” Bylaws, Art. II. It is an unincorporated nonprofit association formed
25 under the Wyoming Unincorporated Nonprofit Association Act, WYO. STAT. ANN.

1 17-22-101 to 115 (2012), and a “political organization” under 26 U.S.C. 527 of the
2 Internal Revenue Code.¹ It currently has three individual members.

3 Free Speech will not make any contributions to Federal candidates, political
4 parties, or political committees that make contributions to Federal candidates or political
5 parties. Nor is Free Speech affiliated with any group that makes contributions. Free
6 Speech also will not make any coordinated expenditures.²

7 Free Speech plans to run 11 advertisements, which it describes as “discuss[ing]
8 issues concerning limited government, public policy, the dangers of the current
9 administration, and their connection with candidates for federal office.” Free Speech will
10 run these advertisements in various media, including radio, television, the Internet, and
11 newspapers. Free Speech currently plans to run the following ads, which are described
12 more fully in response to question 1 below.

13 **Radio Advertisements**

14 Free Speech plans to spend \$1,000 on three advertisements to be aired on local
15 radio station KGAB AM in Cheyenne, Wyoming. These advertisements, which Free
16 Speech calls “Environmental Policy,” “Financial Reform,” and “Health Care Crisis,” will

¹ The Internal Revenue Code defines a political organization as “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for [the tax-]exempt function” of “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization,” or the election or selection of presidential or vice presidential electors. 26 U.S.C. 527(e).

² Free Speech’s bylaws prohibit its members, officers, employees, and agents from engaging in activities that could result in coordination with a Federal candidate or political party. Bylaws, Art. VI. And members, officers, employees and agents have a duty to “ensure the independence of all speech by the Association about any candidate or political party . . . in order to avoid coordination.” Bylaws, Art. VI, Sec. 3.

1 be aired 60 times between April 1 and November 3, 2012. Free Speech currently plans to
2 allocate its budget evenly among the three advertisements, spending \$333.33 for each.

3 **Newspaper Advertisements**

4 Free Speech plans to spend \$500 on two advertisements that will appear in the
5 *Wyoming Tribune Eagle* on May 12 and May 27, 2012. Free Speech plans to spend \$250
6 on each advertisement. The advertisements – “Financial Reform” and “Health Care
7 Crisis” – will include pictures as well as text.

8 **Internet Advertisements**

9 Free Speech plans to spend \$500 on two advertisements that will appear on
10 Facebook. The advertisements will appear for a total of “200,000 impressions on
11 Facebook within Wyoming network” between April 1 and April 30, 2012. Free Speech
12 plans to spend \$250 on each advertisement. The two advertisements, entitled “Gun
13 Control” and “Environmental Policy,” will include pictures as well as text.

14 **Television Advertisements**

15 Free Speech plans to spend \$8,000 on four advertisements that will appear on the
16 local television network KCWY in Cheyenne, Wyoming. The advertisements will appear
17 approximately 30 times between May 1 and November 3, 2012. Free Speech plans to
18 spend \$2,000 on each of the four advertisements. The advertisements are entitled “Gun
19 Control,” “Ethics,” “Budget Reform,” and “An Educated Voter Votes on Principle.”

20 In total, Free Speech plans to spend \$10,000 to run the advertisements described
21 above. Free Speech “would like to speak out in similar ways in the future.”

22 Free Speech has identified one individual donor willing to give it \$2,000 or more,
23 and would like to ask other individuals to donate more than \$1,000 “to help support its

1 speech.” Free Speech would also draw upon funds from its three members to pay for
2 advertisements costing more than \$2,000. Free Speech, however, will not accept
3 donations from individuals who are foreign nationals or Federal contractors. Free Speech
4 plans to ask for donations from individuals through four separate donation requests,
5 which are described in response to question 2 below.

6 ***Questions Presented***

7 1. *Will Free Speech’s proposed advertisements be “express advocacy”?*

8 2. *Will Free Speech’s proposed donation requests be solioitations of*
9 *contributions?*

10 3. *Will the activities described in this advisory opinion request require Free*
11 *Speech to register and report to the Commission as a political committee?*

12
13 ***Legal Analysis and Conclusions***

14
15 ***Question 1. Will Free Speech’s proposed advertisements be “express advocacy”?***

16 No. For the reasons stated below, none of Free Speech’s proposed advertisements
17 constitute “express advocacy.”

18 The concept of “express advocacy” originated in *Buckley v. Valeo*, 424 U.S. 1
19 (1976). There, the Court held the Act’s definition of expenditure to be vague and
20 overbroad.³ As the Court explained, “[i]n its efforts to be all-inclusive, . . . the provision
21 raises serious problems of vagueness, particularly treacherous where, as here, the
22 violation of its terms carries criminal penalties and fear of incurring those sanctions may
23 deter those who seek to exercise protected First Amendment rights.” *Id.*, 424 U.S. at 76-

³ The Act’s original disclosure provisions for independent expenditures were originally written more broadly, to cover any expenditure made “for the purpose of . . . influencing” the nomination or election of candidates for federal office.

1 77. To cure these defects, the Supreme Court construed “expenditure” to reach only
2 funds used for communications that “expressly advocate the election or defeat of a
3 clearly identified candidate.” It explained that “expressly advocate” required “*explicit*
4 words of advocacy of election or defeat of a candidate.” *Id.* at 43 (emphasis added). The
5 Court explained that this “explicit words of advocacy” construction means
6 “communications containing express words of advocacy of election or defeat, such as
7 ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’
8 ‘defeat,’ ‘reject.’” *Id.* at 44, n.52.

9 In direct response to the Court’s decision in *Buckley*, Congress amended the Act
10 in 1976 to define “independent expenditure” as “an expenditure by a person advocating
11 the election or defeat of a clearly identified candidate” 2 U.S.C. § 431(17) (1976).
12 This was in turn defined to mean communications that included “express advocacy.”
13 This change “reflect[ed] the Court’s opinion in the *Buckley* case,”⁴ and specifically
14 “define[d] ‘independent expenditure’ to reflect the definition of that term in the Supreme
15 Court’s decision in *Buckley v. Valeo*.”⁵

16 The post-*Buckley* congressional amendments happened before the Supreme Court
17 ruled in *FEC v. Massachusetts Citizens For Life (“MCFL”)*, 479 U.S. 238 (1986). In

⁴ Federal Election Campaign Act Amendments of 1976, Report to Accompany H.R. 12406 (Report No. 94-917), 94th Cong., 2d Session, at 82 (Minority Views).

⁵ Federal Election Campaign Act Amendments of 1976, Report to Accompany S. 3065 (Report No. 94-677), 94th Cong., 2d Session (Mar 2, 1976) at 5. Congress changed the independent expenditure reporting requirements “to conform to the independent expenditure reporting requirements of the Constitution set forth in *Buckley v. Valeo* with respect to the express advocacy of election or defeat of clearly identified candidates.” Joint Explanatory Statement of the Committee of Conference on the 1976 amendments to the FECA at 40. See also Congressional Record (Senate), S 6364 (May 3, 1976) (Sen. Cannon explained that the legislation was “codifying a number of the Court’s interpretations of the campaign finance laws....”).

1 *MCFL*, the Court relied on *Buckley*, and explained that “in order to avoid problems of
2 overbreadth, the Court held that the statutory language encompassed ‘only funds used for
3 communications that expressly advocate the election or defeat of a clearly identified
4 candidate,’” *Id.* at 248-49 (citing *Buckley*, 44 U.S. at 80, *id.* at 42) and reiterated footnote
5 52 of *Buckley*, which defined express advocacy to mean words such as “vote for,”
6 “elect,” and “support,” “cast your ballot for,” “Smith for Congress,” “vote against,”
7 “defeat,” “reject.” *Id.* at 238, 248-49 (citing *Buckley*, 44 U.S. at 44, n.52). The Court
8 then maintained the construction of the statutory language it had used in *Buckley*: “[T]he
9 definition of an expenditure under § 441b necessarily incorporates the requirement that a
10 communication ‘expressly advocate’ the election of candidates.” *Id.* at 248.

11 Factually, *MCFL* concerned a newsletter distributed by an incorporated non-profit
12 issue group, that stated “Vote Pro Life,” and next to which was a list of candidates and
13 indications as to whether those candidates were pro-life. Specifically, in September 1978
14 (prior to the September primary elections), *MCFL* distributed a “Special Edition”
15 newsletter. The front page of the newsletter stated “EVERYTHING YOU NEED TO
16 KNOW TO VOTE PRO-LIFE” followed by a statement to the reader that “[n]o pro-life
17 candidate can win in November without your vote in September.” *MCFL*, 479 U.S. at
18 243. “‘VOTE PRO-LIFE’ was printed in large bold-faced letters on the back page, and a
19 coupon was provided to be clipped and taken to the poll to remind voters of the name of
20 the ‘pro-life’ candidates.” *Id.* The newsletter also included a disclaimer that stated “this
21 special election edition does not represent an endorsement of any particular candidate.”
22 The newsletter included a listing of all the state and federal candidates that would be on
23 the Massachusetts primary ballot, “and identified each one as either supporting or

1 opposing what MCFL regarded as the correct position on three issues.” *Id.* Candidates
2 with a “y” next to their names were those who supported MCFL’s issues; candidates with
3 a “n” by their names opposed MCFL’s issues; and an asterisk was placed next to the
4 names of “incumbents who had made a ‘special contribution to the unborn in maintaining
5 a 100% pro-life voting record in the state house by actively supporting MCFL
6 legislation.” *Id.* at 243-44. Thirteen candidates’ pictures were included in the newsletter
7 and all “13 had received a triple ‘y’ rating, or were identified either as having a 100%
8 favorable voting record or as having stated a position consistent with that of MCFL. No
9 candidate whose photograph was featured had even one ‘n’ rating.” *Id.* at 244.

10 In holding that the newsletter contained express advocacy, the Court noted that
11 “*Buckley* adopted the ‘express advocacy’ requirement to distinguish discussion of issues
12 and candidates from more pointed exhortations to vote for particular persons... Just such
13 an exhortation appears in the ‘Special Edition.’” *Id.* at 249. The Court noted that the
14 newsletter “urges voters to vote for ‘pro-life’ candidates” and “also identifies and
15 provides photographs of specific candidates fitting that description.” *Id.* The Court
16 concluded that the newsletter “provides an explicit directive: vote for these (named)
17 candidates. The fact that the message is marginally less direct than ‘Vote for Smith’ does
18 not change its essential nature. The Edition goes beyond issues discussion to express
19 electoral advocacy.” *Id.*

20 Subsequent to *MCFL*, the Ninth Circuit ruled in *FEC v. Furgatch*, 807 F.2d 857
21 (9th Cir. 1987). There, the Court held that “[s]peech may only be termed ‘advocacy’ if it
22 presents a clear plea for action, and . . . it must be clear what action is advocated [*i.e.*] . .
23 . a vote for or against a candidate . . .” *Id.* at 864. Factually, *Furgatch* concerned anti-

1 Carter newspaper ads that ran about a week before the 1980 election. The advertisement
2 was captioned “DON’T LET HIM DO IT.” It made a number of specific references to
3 the upcoming election and the election process (e.g., “The President of the United States
4 continues to degrade the electoral process”; “He [the President] continues to cultivate the
5 fears, not the hopes of the voting public”; “If he succeeds the country will be burdened
6 with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of
7 low-level campaigning”). The advertisement specifically mentioned current and former
8 opponents of the President (e.g., “[The President’s] running mate outrageously suggested
9 Ted Kennedy was unpatriotic”; “[T]he President himself accused Ronald Reagan of
10 being unpatriotic”). After criticizing Carter for his campaign tactics, the advertisement
11 stated: “If he succeeds the country will be burdened with four more years of
12 incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.
13 DON’T LET HIM DO IT!”

14 In analyzing the advertisement at issue, the Ninth Circuit held that the express
15 advocacy threshold will be met only if a communication “when read as a whole, and with
16 limited reference to external events, [is] susceptible of no other reasonable interpretation
17 but as an exhortation to vote for or against a specific candidate.” *Furgatch*, 807 F.2d at
18 864. The court further held that “[t]his standard can be broken into three main
19 components”:

- 20 • “[S]peech is ‘express’ . . . if its message is unmistakable and
21 unambiguous, suggestive of only one plausible meaning”;
- 22 • “[S]peech may only be termed ‘advocacy’ if it presents a clear plea for
23 action”; and

- 1 • “[Speech] must be clear what action is advocated. Speech cannot be
2 ‘express advocacy of the election or defeat of a clearly identified
3 candidate’ when reasonable minds could differ as to whether it encourages
4 a vote for or against a candidate”

5 *Id.* The court then emphasized that “if any reasonable alternative reading of speech can
6 be suggested, it cannot be express advocacy.” *Id.*

7 In analyzing the advertisement, the court said that “the words we focus on are
8 ‘don’t let him.’ They are simple and direct. ‘Don’t let him’ is a command the only
9 way to not let him do it was to give the election to someone else.” *Id.* at 865. The Ninth
10 Circuit held that the action urged was thus a vote against a candidate, and the
11 advertisement constituted express advocacy.⁶ That this clear plea for action requirement
12 was central to the holding of *Furgatch* was made clear by the Ninth Circuit in *California*
13 *Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003): “*Furgatch* . . . presumed
14 express advocacy must contain some explicit *words* of advocacy.” *Id.* at 1098 (emphasis
15 in original).

16 In the wake of *MCFL*, *Furgatch*, and other cases, the Commission amended its
17 regulatory definition of “express advocacy.” As the Commission explained at the time,
18 the reworking of its regulations was done for clarity, and that the modifications simply

⁶ In *Furgatch*, the court set out a three-part standard for express advocacy, the second part of which is absent from section 100.22(b). *Furgatch*, 807 F.2d at 864 (“First, even if it is not presented in the clearest, most explicit language, speech is ‘express’ for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed ‘advocacy’ if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be ‘express advocacy of the election or defeat of a clearly identified candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.”) (emphasis added).

1 “reworded” the prior regulation “to provide further guidance on what constitutes express
2 advocacy of clearly identified candidates,” and added “a somewhat fuller list of
3 examples” of the “examples set forth in *Buckley*.” See Explanation and Justification for
4 Final Rules on Express Advocacy (“Express Advocacy E&J”), 60 Fed. Reg. 35291,
5 352935 (July 6, 1995). Section 100.22(a) defines “expressly advocating” as any
6 communication that:

7 Uses phrases such as ‘vote for the President,’ ‘re-elect your Congressman,’
8 ‘support the Democratic nominee,’ ‘cast your ballot for the Republican challenger
9 for U.S. Senate in Georgia,’ ‘Smith for Congress,’ ‘Bill McKay in ’94,’ ‘vote Pro-
10 Life’ or ‘vote Pro-Choice’ accompanied by a listing of clearly identified
11 candidates described as Pro-Life or Pro-Choice,’ ‘vote against Old Hickory,’
12 ‘defeat’ accompanied by a picture of one or more candidate(s), ‘reject the
13 incumbent,’ or communications of campaign slogan(s) or individual word(s)
14 which in context can have no other reasonable meaning that to urge the election or
15 defeat of one or more clearly identified candidate(s), such as posters, bumper
16 stickers, advertisements, etc. which say ‘Nixon’s the One,’ ‘Carter ’76,’
17 ‘Reagan/Bush’ or ‘Mondale!’

18
19 The Commission also added a new section to define “express advocacy.” At the
20 time, the Commission made clear that the new section was not an expansive test, but
21 instead was merely providing “clarity” to reflect the Ninth Circuit’s decision in *FEC v.*
22 *Furgatch*. The Commission did not adopt a standard that would have included
23 “suggestions to take actions to affect the result of an election,” *id.* at 35294, but instead
24 adopted section 100.22(b), which defines “expressly advocating” as any communication
25 that:

26 When taken as a whole and with limited reference to external events, such as the
27 proximity to the election, could only be interpreted by a reasonable person as
28 containing advocacy of the election or defeat of one or more clearly identified
29 candidate(s) because: (1) the electoral portion of the communication is
30 unmistakable, unambiguous, and suggestive of only one meaning; and (2)
31 reasonable minds could not differ as to whether it encourages actions to elect or

1 defeat one or more clearly identified candidate(s) or encourages some other kind
2 of action.

3

4 The Explanation & Justification (“E&J”) for the regulation does not elaborate on
5 what sort of “external events” are to be considered, only that they ought to be “pertinent.”
6 *Id.* at 35294. The E&J does say that such contextual considerations will be done on a
7 “case by case” basis. *Id.* at 35295. It also explains that the Commission declined to
8 adopt a specified number of days before an election within which a communication could
9 be deemed express advocacy. *Id.* The E&J also said that the rules of 100.22(b) “do not
10 affect pure issue advocacy, such as attempts to create support for specific legislation, or
11 purely educational messages.” *Id.* Moreover, “the subjective intent of the speaker is not
12 a relevant consideration because *Furgatch* focuses the inquiry on the audience’s
13 reasonable interpretation of the message.” *Id.* Finally, the E&J said that
14 “[c]ommunications discussing or commenting on a candidate’s character, qualifications,
15 or accomplishments are considered express advocacy . . . if, in context, they have no
16 other reasonable meaning than to encourage actions to elect or defeat the candidate in
17 question.” *Id.* The Commission did “not establish a time frame in which these
18 communications are treated as express advocacy. Thus, the timing of the communication
19 would be considered on a case-by-case basis.” *Id.*

20 Section 100.22(b) has been deemed unenforceable by a number of courts.
21 *See Va. Soc’y for Human Life v. FEC*, 263 F.3d 379, 392 (“*VSHL*”) (holding that
22 100.22(b) “violates the First Amendment” because “[t]he regulation goes to far because it
23 shifts the determination of what is ‘express advocacy’ away from the words ‘in and of
24 themselves’ to “the unpredictability of audience interpretation” (quoting *FEC v.*

1 *Christian Action Network, Inc.*; 110 F.3d 1049, 1051, 1057 (4th Cir. 1997)); *Maine*
2 *Right to Life Comm., Inc. v. FEC* (“MRLC”), 914 F. Supp. 8, 13 (D. Maine), *aff’d per*
3 *curiam*, 98 F.3d 1 (1st Cir.1996), *cert. denied*, 522 U.S. 810 (1997) (section 100.22(b)
4 held “contrary to the statute as the United States Supreme Court and the First Circuit
5 Court of Appeals have interpreted it and thus beyond the power of the FEC”); *Right to*
6 *Life of Dutchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (finding “that 11
7 C.F.R. § 100.22(b)’s definition of ‘express advocacy’ is not authorized by FECA, 2
8 U.S.C. § 441b, as that statute has been interpreted by the United States Supreme Court in
9 *MCFL* and *Buckley v. Valeo.*”). Thereafter, the Commission stated publicly that it would
10 not enforce section 100.22(b) in either the First or Fourth Circuits.⁷

11 Similarly, several courts rejected the FEC’s view of what constituted express
12 advocacy. For example, in *Federal Election Commission v. Survival Education Fund,*
13 *Inc.*, 1994 WL 9658 (S.D.N.Y. 1994) (unreported), *aff’d in part, rev’d in part*, 65 F.3d
14 285 (2d Cir. 1995), the district court determined that a mailer which included a two-page
15 letter criticizing the Reagan Administration’s policies in Central America, called for
16 protests outside of the Republican National Convention, and provided an “Anti-War
17 Ballot” which listed a check-box next to the word “no” and several purported
18 administration policies did not constitute express advocacy.

19 Likewise, in *FEC v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999), the
20 D.C. District Court rejected the FEC’s view that a number of election-related speech

⁷ On September 22, 1999, the Commission decided by a vote of 6-0 to “formally confirm the Commission’s position that because 11 C.F.R. 100.22(b) has been found invalid by the United States Court of Appeals for the First Circuit, and has in effect been found invalid in the United States Court of Appeals for the Fourth Circuit, it cannot and will not be enforced in those circuits, unless and until the law of those circuits changed or overruled.”

1 contained express advocacy.⁸ For example, a mailer entitled “Reclaim America” was not
2 express advocacy. The mailer stated that “the 1994 elections for Congress . . . will give
3 Americans their first opportunity to deliver their verdict on the Clinton Presidency. If
4 America’s 40 million eligible Christian voters are going to make our voices heard in the
5 elections this November . . . we must stand together, we must get organized, and we must
6 start now,” that “America’s 40 MILLION Christian voters have the potential to make
7 sweeping changes in our government . . . IF Christians get to the ballot box and IF
8 Christians have accurate information about how their elected representatives are voting,”
9 and that the mailing was intended to give Christians a “chance to make the politicians in
10 Washington feel the power of the Christian vote.” *Id.* at 57.

11 The court also concluded that a “Congressional Scorecard” produced by the
12 Christian Coalition which listed how federal office holders voted on several issues,
13 indicated the organization’s preferred position on those issues, and provided an overall
14 score measuring that Congressman’s level of agreement with the Christian Coalition did
15 not constitute express advocacy where the scorecard indicated that it was “designed to
16 give Christian voters the facts they need to hold their Congressmen accountable.” *Id.* at
17 57-58.

18 Subsequently, Congress passed the Bipartisan Campaign Reform Act of 2002,
19 colloquially called McCain-Feingold. Senators McCain and Feingold first introduced
20 legislation in 1997 to block the use of corporate and union general treasury funds for
21 “unregulated electioneering disguised as ‘issue ads.’” *See* 143 Cong. Rec. S159 (Jan. 21,

⁸ The court used the standard announced by the Ninth Circuit in *FEC v. Furgatch*, the case upon which 100.22(b) is based.

1 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997). This early version of the McCain-
2 Feingold bill “addressed electioneering issue advocacy by redefining ‘expenditures’
3 subject to FECA’s strictures to include public communications at any time of year, and in
4 any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person
5 would understand as advocating the election or defeat of a candidate for federal office.”
6 *See* 143 Cong. Rec. S10107,10108.

7 Eventually, McCain-Feingold’s sponsors abandoned their effort to redefine
8 “expenditure” and instead proposed the regulation of “electioneering communications,”
9 “in contrast to the earlier provisions of the . . . bill.” *See McConnell*, No. 02-0582,
10 Opposition Brief of Defendants at 50 (*quoting* 144 Cong. Rec. H3801, H3802 (June 28,
11 2001). In part to respond to concerns raised by the bill’s opponents about its
12 constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-
13 Feingold to draw a bright line between so-called “genuine” issue advocacy and a
14 narrowly defined category of television and radio advertisements, broadcast in proximity
15 to federal elections, “that constitute the most blatant form of [unregulated]
16 electioneering.” 144 Cong. Rec. S906, S912 (Feb. 12, 1998). The earlier provisions of
17 the McCain-Feingold bill that sought to tinker with the meaning of “express advocacy”
18 were dropped.⁹

19 Senator Snowe explained that this approach had been developed in consultation
20 with constitutional experts, to come up with ‘clear and narrowing wording’ which strictly

⁹ Congress is currently considering legislation that would, *inter alia*, modify the definition of “independent expenditure” to include both express advocacy and the functional equivalent of express advocacy. Disclose of Information on Spending in Campaigns Leads to Open and Secure Elections Act or DISCLOSE Act, H.R. 4010, 112th Cong. § 2.

1 limited the reach of the legislation to TV and radio advertisements that mention a
2 candidate within 60 days of a general election, or 30 days of a primary, so as specifically
3 to avoid the pitfalls of vagueness identified in *Buckley* and *MCFL*. Senator Snowe
4 explained that the provision specifically did not alter prior law regarding express
5 advocacy, and that the bill specifically did not apply a “no other reasonable meaning,”
6 test of the sort found in *Furgatch* or section 100.22(b) because it was too ambiguous and
7 vague:

8 We are concerned about being substantially too broad and too overreaching. The
9 concern that I have is it may have a chilling effect. The idea is that people are
10 designing ads, and they need to know with some certainty without inviting the
11 constitutional question that we have been discussing today as to whether or not
12 that language would affect them as whether or not they air those ads. That is why
13 we became cautious and prudent in the Senate language that we included and did
14 not include *Furgatch* [the case upon which 100.22(b) is based] for that reason
15 because it invites ambiguity and vagueness as to whether or not these ads
16 ultimately would be aired or whether somebody would be willing to air them
17 because they are not sure how it would be viewed in terms of being unmistakable
18 and unambiguous. That is the concern that I have. 147 Cong. Rec. S2711 (March
19 22, 2001).¹⁰

20
21 This legislative history shows that Congress did not alter the construction given
22 the Act in *Buckley* and *MCFL*. Moreover, when Congress revises a statute, its decision to
23 leave certain sections unamended (as it did in McCain-Feingold) constitutes at least
24 acceptance, if not explicit endorsement, of the preexisting construction and application of
25 the unamended terms. See *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991).

¹⁰ Senator McCain, the principle sponsor of the entire bill, was of the view that both *Buckley* and *MCFL* limited the pertinent parts of the Act to express advocacy: “With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, federal election law contribution limits and disclosure requirements should apply only if the ads contain ‘express advocacy.’” 148 Cong. Rec. S2141 (March 20, 2002). McCain-Feingold itself makes clear that independent expenditures and electioneering communications cannot be the same thing. See 2 U.S.C. § 434(f)(3)(B)(ii) (“The term ‘electioneering communication’ does not include—a communication which constitutes an expenditure or an independent expenditure under this Act.”).

1 A number of plaintiffs, including Senator Mitch McConnell, challenged McCain-
2 Feingold, and argued that the new electioneering communication provisions were
3 unconstitutional because the statute went beyond *Buckley's* "express advocacy"
4 limitation. In its initial response, the FEC said:

5 It is plain to see from [*Buckley*] that the freedom claimed by plaintiffs "to spend
6 as much as they want to promote candidate[s] and [their] view[s]" so long as they
7 "eschew expenditures that in express terms advocate the election or defeat" of
8 those candidates, arose from *Buckley's* "exacting interpretation of the statutory
9 language" in FECA "necessary to avoid unconstitutional vagueness," and not as
10 an absolute guarantee that emanates directly from the First Amendment itself.

11
12 *See McConnell*, No. 02-0582, Opposition Brief of Defendants at 59. The FEC also made
13 clear *MCFL* imposed the *Buckley* construction on the post-*Buckley* legislative
14 amendments:

15 [A]s the Court explained [in *MCFL*], *MCFL* merely applied the same rationale
16 relied upon in *Buckley* – namely, curing vagueness in statutory language that
17 defined "expenditures" in terms of a speaker's "purpose to influence an election"
18 – and placed a "similar" express advocacy construction on FECA § 441b.

19
20 *Id.* at 60.

21
22 And finally, the FEC was unequivocal that the First Circuit's decision in *MRLC*
23 turned on the reach of the statute, not on constitutional abstract:

24 [T]he lower courts have repeatedly and accurately described *Buckley's* express
25 advocacy test as a saving construction of a potentially unconstitutional statute, not
26 itself a standard of constitutional law. . . . In *Right to Life of Duchess Cty., Inc. v.*
27 *FEC*, and *Maine Right to Life, Inc. v. FEC*, the courts rejected the FEC's
28 regulatory definition of express advocacy insofar as it includes communications
29 that "[w]hen taken as a whole . . . could only be interpreted by a reasonable
30 person as containing advocacy of the election or defeat of one or more clearly
31 identified candidates(s)." They based their decision on the conclusion that this
32 definition of express advocacy "is not authorized by FECA . . . as that statute has
33 been interpreted" by the Supreme Court.

34
35 *Id.* at 61-62.

36

1 One member of the three judge panel agreed with the FEC. She reviewed the
2 cases that held section 100.22(b) unenforceable, and endorsed the result in those cases
3 because the FEC had no authority to redefine a statutory test that only Congress or the
4 Supreme Court could redefine. She said section 100.22(b) was “plagued with vague
5 terms” that place the speaker at the “mercy of the subjective intent of the listener.”
6 *McConnell v. FEC*, Civ. No. 02-582, Kollar-Kotelly, J., memorandum op. at 377 (D.C.
7 Cir. Filed May 1, 2003).

8 On appeal, the Supreme Court agreed. The Court confirmed that “[t]he narrowing
9 construction adopted in *Buckley* limited the Act’s disclosure requirement to
10 communications expressly advocating the election or defeat of particular candidates.”
11 *McConnell v. FEC*, 540 U.S. 93, 102 (2003). The Court described *Buckley*’s limiting
12 construction of the otherwise vague and thus overbroad statute as “strict,” and noted that
13 “the use or omission of ‘magic words’ . . . marked a bright statutory line separating
14 ‘express advocacy’ from ‘issue advocacy.’” *Id.* at 126 (emphasis added). Agreeing with
15 the FEC’s arguments, the Court repeatedly emphasized that *Buckley* was “the product of
16 statutory interpretation rather than a constitutional command.” *Id.* at 191-92 (emphasis
17 added) (noting that the Court in *MCFL* had previously “confirmed the understanding that
18 *Buckley*’s express advocacy category was a product of statutory construction.”). As the
19 Court explained:

20 We concluded that the vagueness deficiencies could “be avoided only by reading
21 [the Act] as limited to communications that include explicit words of advocacy of
22 election or defeat of a candidate. We provided examples of words of express
23 advocacy, such as “vote for,” “elect,” “support,” . . . “defeat,” [and] “reject,” and
24 those examples eventually gave rise to what is now known as the “magic words”
25 requirement.
26

1 *Id.* at 191. The Court characterized *Buckley* and *MCFL* as having drawn a “strict” line,
2 *id.* at 126, that was “an endpoint of statutory interpretation, not a first principle of
3 constitutional law” *Id.* at 190. In fact, the Court noted that “advertisers [can] easily
4 evade the line by eschewing the use of magic words.” *Id.* at 193. And *McConnell* made
5 clear that the statutory endpoint remained unchanged: there are at least thirteen instances
6 where *McConnell* equated the term “express advocacy” with the so-called “magic words”
7 test.¹¹ Turning to the challenged electioneering communication provision, the Court
8 noted “that a statute that was neither vague nor overbroad would be required to toe the
9 same express advocacy line.” *Id.* at 191. The Court found that it did not suffer from the
10 same vagueness that had plagued the definition of “expenditure,” and upheld the
11 electioneering communication ban on its face, “to the extent it was the functional
12 equivalent of express advocacy.” *Id.* at 206.

13 Although it upheld the new McCain-Feingold provisions, *McConnell* did not alter
14 the statutory “express advocacy” language; on the contrary, the Court maintained the
15 statutory construction of *Buckley* and *MCFL*.¹² Nonetheless, the Commission began to
16 enforce section 100.22(b) nationally, for the following reasons. First, since *McConnell*
17 said that *Buckley*’s so-called “magic word” construction did not represent
18 “constitutionally-mandated line beyond which no regulation was possible,” *McConnell*
19 was believed to have “essentially overruled past decisions invalidating section 100.22(b)

¹¹ *McConnell*, 540 U.S. at 126 (2 references), 127 (2 references), 190 (2 references), 192, 193 (2 references), 193-94, 216-17, 219. The *McConnell* dissenting opinion similarly used “express advocacy” to mean communications that contain the “magic words” of footnote 52 of *Buckley*. See 540 U.S. at 281, 322.

¹² The Commission’s Office of General Counsel has in the past made this point. See MUR 5634 (Sierra Club), GCR #2 at 10 (“*McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than it did in *Buckley*.”)

1 on constitutional grounds.” Second, since the Court upheld the statutory definition of
2 “electioneering communication” “to the extent that the issue ads broadcast during the 30-
3 and 60-day periods preceding federal primary and general elections are the functional
4 equivalent of express advocacy,” the Commission determined that section 100.22(b) was
5 a regulation that “fills the gaps” between where *Buckley*’s “magic words” ends and
6 *McConnell*’s “functional equivalent” begins. MUR 5024R (Council for Responsible
7 Government, Inc., *et al.*), General Counsel’s Report #2 at 7-8.

8 A number of circuit courts by contrast have held that the express advocacy
9 requirement was not altered by *McConnell*, and remained a viable way to cure an
10 otherwise vague statute.¹³ See *New Mexico Youth Organized v. Herrera*, 611 F.3d 669
11 (10th Cir. 2010); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir.
12 2008); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *cert.*
13 *denied*, 549 U.S. 1112 (2007); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert.*
14 *denied*, *Stumbo v. Anderson*, 543 U.S. 956 (2004); *Am. Civil Liberties Union of Nev. v.*
15 *Heller*, 378 F.3d 979, 985 (9th Cir. 2004).¹⁴

¹³ The Commission itself acknowledged that *McConnell* did not concern the express advocacy standard announced in *Buckley*: “*McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than did the Court in *Buckley*” MUR 5024R (Council for Responsible Government), Factual & Legal Analysis at 3.

¹⁴ Likewise, in *Shays v. FEC (Shays III)*, 528 F.3d 914 (D.C. Cir. 2008) the D.C. Circuit repeatedly equated express advocacy with a so-called “magic words” requirement. For example, the court said:

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court, invoking constitutional avoidance, construed FECA’s limitation on expenditures to apply only to funding of communications that “express[ly] . . . advocate the election or defeat of a clearly identified candidate for federal office,” i.e., those that contain phrases such as “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject.’” Thus, by avoiding these “magic words,” organizations unable to make “expenditures”—such as corporations and unions—could fund so-called “issue ads” that were “functionally identical” to campaign ads and just as effective.

1 In 2004, a suit was brought by Wisconsin Right to Life, challenging McCain-
2 Feingold's electioneering communication ban, and specifically alleging that certain ads it
3 wished to run that concerned judicial nominations were not the functional equivalent of
4 express advocacy. Several years later, the Court agreed that McCain-Feingold could not
5 constitutionally prohibit the advertisements at issue regarding judicial nominations. *FEC*
6 *v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). According to the Court, although
7 this statute was not vague, it was still overbroad, as it captured non-campaign
8 advertisements. As explained by Chief Justice Roberts, *McConnell* had limited the reach
9 of the statutory ban to the functional equivalent of express advocacy. The Chief Justice
10 further explained that in addition to the statutory criteria defining electioneering
11 communication, an advertisement came within the reach of the statute "only if the ad is
12 susceptible of no reasonable interpretation other than as an appeal to vote for or against a
13 specific candidate." *Id.* at 452.

14 In *WRTL*, the Court rejected the Commission's reading of *McConnell*. In
15 considering the matter, a number of Justices made clear that express advocacy still meant
16 express words of advocacy, a standard left unchanged by *McConnell*. For example, in his
17 concurring opinion, Justice Scalia stated this directly when describing what the Court did

Id. (citing *Buckley*, 424 U.S. at 43-44 n.52; *McConnell*, 540 U.S. at 126; and *MCFL*, 479 U.S. at 249) (internal citations omitted) (emphasis added). See also, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (upholding the requirement that SpeechNow.org file as a political committee, but making clear that the reporting regime was triggered by *Buckley's* "magic words" standard, stating:

'Express advocacy' is regulated more strictly by the FEC than so-called 'issue ads' or other political advocacy that is not related to a specific campaign. In order to preserve the FEC's regulations from invalidation for being too vague, the Supreme Court has defined express advocacy as communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.')

Id. at 689, n.1.

1 in *Buckley*, and he further added that he does not believe the Constitution allows a
2 broader interpretation: “If a permissible test short of the magic-words test existed,
3 *Buckley* would surely have adopted it.” *Id.* at 495 (Scalia, J. concurring in part and
4 concurring the judgment). Chief Justice Roberts, in response to Justice Scalia, agreed
5 with Justice Scalia’s premise that *Buckley* established a bright line express magic words
6 test, but instead explained that his appeal to vote test is not in conflict with *Buckley*.
7 According to the Chief Justice, the appeal to vote test serves a different purpose than the
8 express advocacy test, and because *Buckley*’s so-called magic words requirement was a
9 product of statutory construction, not a constitutional limit on regulation. *Id.* at 474, n.7.
10 Even Justice Souter, writing in dissent, characterized the express advocacy test as a
11 magic words standard by acknowledging that *MCFL* “held that the prohibition [on
12 corporate and union expenditures] applied ‘only to expenditures for communications that
13 in express terms advocate the election or defeat of a clearly identified candidate for
14 federal office’” and that “[E]xpress terms,’ in turn, meant what had already become
15 known as ‘magic words,’ such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’
16 ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 513 (internal citations
17 omitted) (Souter, J. dissenting).

18 Although *WRTL* had rejected the Commission’s expansive reading of *McConnell*
19 that had revived section 100.22(b), the Commission did not revisit its decision to enforce
20 the regulation. Instead, the Commission promulgated section 114.15, a two-part, eleven
21 factor balancing test that defined when an electioneering communication was
22 permissible. See Explanation and Justification for Electioneering Communications
23 (“Electioneering Communications E&J”), 72 Fed. Reg. 72899 (Dec. 26, 2007). This was

1 to establish a safe harbor for certain speech, while subjecting other speech to a “multi-
2 step analysis for determining whether [electioneering communications] that do not
3 qualify for the safe harbor nevertheless qualify for the general exemption.” *Id.* at 72902.
4 To avail oneself of the safe harbor, one’s speech could not mention “any election,
5 candidacy, political party, opposing candidate, or voting by the general public,” nor could
6 it take a position on the candidate’s “character, qualifications, or fitness for office.” *Id.* at
7 72903; *see also* 11 CFR § 114.15(b)(1)-(3). Moreover, the advertisement could only
8 reference certain topics: “a legislative, executive, or judicial matter or issue,” or propose
9 a “commercial transaction.” *Id.* at 72903. In addition to only talking about the
10 government-approved subject matter, the advertisement had to “urge the public to take a
11 position and contact the candidate.” *Id.*

12 For communications outside the safe harbor, the FEC created a multi-step analysis
13 to consider “whether the communication includes any *indicia* of express advocacy and
14 whether the communication has an interpretation other than as an appeal-to-vote for or
15 against a clearly identified [f]ederal candidate in order to determine whether, on balance,
16 the communication is susceptible of no reasonable interpretation other than as an appeal-
17 to-vote for or against a clearly identified [f]ederal candidate.” 11 C.F.R.
18 §114.15(c)(emphasis added).

19 The Commission did not revise section 100.22(b), because section 100.22(b) was
20 “informed by” its reading of *WRTL* as codified in section 114.15. The Commission
21 continued to treat section 100.22(b) as the same sort of multi-factor balancing test now
22 found in section 114.15. In applying 100.22(b), the Commission considered dozens and
23 dozens of factors, including, that an ad “lacks specific legislative focus;” that the ad is

1 “candidate centered;” touting or attacking a candidate’s character, qualifications, and
2 accomplishments; failing to urge a specific action be taken by the elected official; asking
3 the viewer to “ask [the candidate] about his plans to bring our children back to [the state];
4 failing to include a phone number or contact information; questing a public official’s
5 leadership potential; considering how the viewer would “reasonably interpret” the
6 advertisement; the proximity to the election; and “on balance.” *See generally* MUR
7 5024R (Council for Responsible Government); MUR 5440 (The Media Fund); MURs
8 5511 & 5525 (Swift Boat Veterans and POWs for Truth); MUR 5631 (Sierra Club);
9 MURs 5910 & 5694 (Americans for Job Security); MUR 5988 (American Future Fund);
10 MUR 5842 (Economic Freedom Fund); MURs 5831 & 5854 (Softer Voices/Lantern
11 Project); MUR 6346 (Cornerstone Action).

12 Subsequently, Citizens United, a non-profit corporation organized under section
13 501(c) of the Internal Revenue Code, sued the Commission. It had produced a movie,
14 entitled “Hillary – The Movie,” and wished to air the movie on pay-for-view cable
15 television. The Commission took the position that the movie was banned under its two-
16 part, eleven factor balancing test. The Court rejected section 114.15’s two part, eleven
17 factor balancing test, and explained that:

18 “[t]his regulatory scheme may not be a prior re-strait on speech in the
19 strict sense of that term, for prospective speakers are not compelled by law
20 to seek an advisory opinion from the FEC before the speech takes place.
21 As a practical matter, however, given the complexity of the regulations
22 and the deference courts show to administrative determinations, a speaker
23 who wants to avoid threats of criminal liability and the heavy costs of
24 defending against FEC enforcement must ask a governmental agency for
25 prior permission to speak. These onerous restrictions thus function as the
26 equivalent of prior restraint by giving the FEC power analogous to
27 licensing laws implemented in 16th- and 17th-century England, laws and

1 governmental practices of the sort that the First Amendment was drawn to
2 prohibit.”

3

4 *Id.* at 895-96 (internal citations omitted).

5

6 The Court determined that the movie was an electioneering communication that was the

7 functional equivalent of express advocacy, since it “referred to Senator Clinton as

8 ‘Machiavellian,’ asks whether she is ‘the most qualified to hit the ground running if

9 elected President,’ and the narrator reminds viewers that ‘a vote for Hillary is a vote to

10 continue 20 years of a Bush or a Clinton in the White House.” *Id.* at 890. Nonetheless,

11 the Court held that the movie could not be banned. The Court turned back an as-applied

12 challenge to the McCain-Feingold electioneering communication reporting obligations.

13 *Id.* at 916.

14 Most recently, the United States District Court for the Eastern District of Virginia

15 held that two ads were the functional equivalent of express advocacy, and thus could

16 come within 11 CFR § 100.22(b). This case is on appeal before the United States Court

17 of Appeals for the Fourth Circuit. *See The Real Truth About Obama, Inc., v. FEC, Real*

18 *Truth About Obama v. FEC*, 796 F. Supp. 2d 736, 749-50 (E.D. Va. 2011) *appeal*

19 *docketed*, No. 11-1760 (4th Cir. argued Mar. 21, 2012).

20

21

The “Environmental Policy” Radio Advertisement

22

President Obama opposes the Government Litigation
Savings Act. This is a tragedy for Wyoming ranchers and a
boon to Obama’s environmentalist cronies. Obama cannot
be counted on to represent Wyoming values and voices as
President. This November, call your neighbors. Call your
friends. Talk about ranching.

23

24

25

26

27

28

1 The “Environmental Policy” radio advertisement does not constitute express
2 advocacy. The advertisement does not contain the sort of words of express advocacy
3 listed in section 100.22(a). With respect to section 100.22(b), on its face, the regulation
4 requires that “[t]he electoral portion of the communication [be] unmistakable,
5 unambiguous, and suggestive of only one meaning,” *i.e.*, “advocacy of the election or
6 defeat of one or more clearly identified candidate(s).” The advertisement does not
7 contain an “electoral portion,” that is “unmistakable, unambiguous, and suggestive of
8 only one meaning.”

9 While the communication does include a reference to November, that does not
10 constitute an electoral portion. Although most know that there is an election this
11 November, the regulation does not permit looking to external context and events of the
12 day when ascertaining the electoral portion. As the Ninth Circuit explained, “context
13 cannot supply a meaning that is incompatible with, or simply unrelated to, the clear
14 import of the words.” *Furgatch*, 807 F.2d at 864. Instead, it must be “unmistakable,
15 unambiguous, and suggestive of only one meaning.” Also, the communication explicitly
16 instructs the listener to “call your neighbors” and “[c]all your friends,” and “[t]alk about
17 ranching.” It does not urge the listener to vote, nor is there any other language that
18 causes “this November” to be an electoral portion that is unmistakable, unambiguous, and
19 suggestive of only one meaning. Thus, it is beyond the reach of 100.22(b).

20

21 *The Financial Reform Radio and Newspaper Advertisements*

22 Script: President Obama supported the financial bailout of Fannie Mae and
23 Freddie Mac, permitting himself to become a puppet of the banking and bailout
24 industries. What kind of person supports bailouts at the expense of average

1 Americans? Not any kind we would vote for and neither should you. Call
2 President Obama and put his antics to an end.¹⁵

3
4 The “Financial Reform” advertisements, which Free Speech proposes to air on the
5 radio and run in newspapers, do not constitute express advocacy under 100.22(a). The
6 advertisement does not expressly say to vote against Obama. However, it does instruct
7 the listener or reader that a person who “supports bailouts at the expense of average
8 Americans” is “[n]ot any kind of person [Free Speech] would vote for and neither should
9 you.” The advertisement claims that President Obama supported some financial bailouts,
10 which made him “a puppet of the banking and bailout industries.” This sort of language
11 is similar to what the Supreme Court in *MCFL* deemed to be express advocacy.

12 However, there are some differences. First, the materials in *MCFL* included
13 language such as “EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE,”
14 included an exhortation to “VOTE PRO- LIFE,” after identifying the candidates who
15 were the pro-life candidates. The Free Speech ad is not quite as explicit. It lacks some
16 of the language present in *MCFL* (such as “everything you need to know to vote pro-
17 life”), and it contains a non-electoral call to action (“Call President Obama and put his
18 antics to an end.”). The language proposed by Free Speech is not as direct as the
19 language considered in *MCFL*. Here, the ad certainly says that the listener or reader
20 should not vote for anyone who “supports bailouts at the expense of average Americans.”
21 But nowhere does the advertisement say that Obama’s support of bailouts was at the
22 expense of average Americans. Instead, his support caused him to be a puppet of the

¹⁵ The script for the radio version of the Financial Reform advertisement is the same as the text of the print version. The only difference between the two, besides the format, is the newspaper advertisement’s inclusion of a full-page picture of President Obama.

1 banking and bailout industries. Although it can be inferred that “at the expense of
2 average Americans” and “a puppet of the banking and bailout industries” are the same
3 thing, 100.22(a) demands more. Per *MCFL*, it must be “in effect an explicit directive.”
4 *MCFL*, 479 U.S. at 249. The advertisement is a step beyond that which was deemed
5 express advocacy in *MCFL*.

6 Assuming section 100.22(b) is enforceable, the application of that regulation
7 presents a closer call. The phrase “What kind of person supports bailouts at the expense
8 of average Americans? Not any kind we would vote for and neither should you” is an
9 electoral portion that is unambiguous, unmistakable, and suggestive of only one meaning:
10 vote against whoever supports bailouts at the expense of average Americans. Reasonable
11 minds could not differ as to the action urged: it certainly does not encourage any sort of
12 action other than voting. Given that Obama is the only person referenced by name in the
13 advertisement, a reasonable mind could assume or infer that Obama is the target, despite
14 the fact that Obama is never expressly identified as a candidate.

15 However, the regulation then requires that the communication be read “as a
16 whole” and “with limited reference to external events, such as proximity to the election,”
17 and that it “could only be interpreted by a reasonable person as containing advocacy of
18 the election or defeat of one or more clearly identified candidates.” When read as a
19 whole, there is language that is consistent with non-electoral issue advocacy, specifically
20 the last sentence: “Call President Obama and put his antics to an end.”

21 Similarly, the regulation also instructs that timing and proximity to an election are
22 to be considered. If, for example, this same advertisement was aired last year in
23 connection with the Virginia legislative races, no reasonable person would say that the ad

1 constitutes express advocacy of the defeat of President Obama. The electoral portion
2 would be referencing state candidates only. Per the request, Free Speech intended to run
3 the advertisement beginning April 1 through November 6 of this year. Although April 1
4 has passed, we assume Free Speech will begin to the proposed advertisement once this
5 Advisory Opinion has issued, as the request says they wish to speak “as soon as
6 possible.” Certainly, given that the advertisement will run through November 6, it will
7 air near the general election. Equally clear, though, is that it will also run well before an
8 election, due to its expansive run in excess of six months. This expanded run supports
9 the conclusion that the advertisement is not express advocacy; otherwise, Free Speech
10 will endure the odd result of running an advertisement in the near future, just before the
11 Wyoming Democratic caucus (which might make it express advocacy), continuing to run
12 it after the caucus (which might make it not express advocacy), and through the general
13 election (which might make it express advocacy again). Since the Commission declined
14 to adopt any sort of bright-line timing requirement for section 100.22(b), it cannot now
15 say this advertisement constitutes express advocacy due to timing or proximity to an
16 election.

17 *The ““Health Care Crisis” Radio and Newspaper Advertisements*

18
19 **Script: President Obama supports socialized medicine, but**
20 **socialized medicine kills millions of people worldwide.**
21 **Even as Americans disapproved of ObamaCare, he pushed**
22 **ahead to make socialized medicine a reality. Put an end to**
23 **the brutality and say no to socialized medicine in the**
24 **United States.¹⁶**

¹⁶ Like the script for the radio and print versions of the “Financial Reform” advertisements, the script for the two versions of the “Health Care Crisis” advertisements is the same. The only difference between the two advertisements, besides the format, is the newspaper advertisement’s inclusion of a “[f]ull picture of a family picture torn in half.”

1

2

3

4

5

6

7

8

9

The “Health Care Crisis” advertisements, which Free Speech proposes to air on the radio and run in newspapers, do not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy listed in section 100.22(a). Nor does the advertisement contain an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning.” Instead, the advertisements criticize President Obama regarding health care policy, provide Free Speech’s views on the issue (“socialized medicine kills millions of people worldwide”), and conclude with a policy-related call to action. It is beyond the reach of 100.22(b).

10

11

The “Gun Control” Facebook Advertisement

12

(Picture of handgun, 110 pixels wide by 80 pixels tall)

13

(Title: Stand Against Gun Control)

14

Obama supports gun control. Don’t trust him. Support

15

Wyoming state candidates who will protect your gun rights.

16

17

The “Gun Control” advertisements, which Free Speech proposes to publicize on Facebook, do not constitute express advocacy. The advertisement does not contain the sort of words of express advocacy listed in section 100.22(a). Instead, it criticizes President Obama’s support of gun control and exhorts viewers to “[s]upport Wyoming state candidates.” Since this advertisement will be publicized on Facebook, it can be viewed by people in jurisdictions where 100.22(b) has been declared unenforceable. Even if the Commission were to attempt to enforce section 100.22(b) in such circumstances, this advertisement lacks an electoral portion, and thus is beyond the reach of 100.22(b).

26

1 *The “Environmental Policy” Facebook Advertisement*

2 (Picture of a Wyoming ranch, 110 pixels wide by 80 pixels
3 tall)

4 (Title: Learn About Ranching)

5 Obama’s policies are a tragedy for Wyoming ranchers, and
6 he does not represent our values. This November, learn
7 about ranching.
8

9 The “Environmental Policy” Facebook advertisement does not constitute express
10 advocacy. The advertisement does not contain the sort of words of express advocacy
11 listed in section 100.22(a). Nor does the advertisement contain an “electoral portion” that
12 is “unmistakable, unambiguous, and suggestive of only one meaning.” While the
13 communication does include a reference to November, that does not constitute an
14 electoral portion. Certainly, there is an election this November. But the regulation does
15 not permit looking to external context and events of the day when ascertaining the
16 electoral portion. Instead, it must “unmistakable, unambiguous, and suggestive of only
17 one meaning.” 11 C.F.R. §100.22(b) (emphasis added). Regardless, the communication
18 explicitly instructs the listener to “learn about ranching.” It does not urge the listener to
19 vote. Thus, it is beyond the reach of 100.22(b).
20

21 A. *The Gun Control Television Advertisement*

| | |
|--|--|
| <p>Audio:</p> <p>Guns save lives.</p> <p>That’s why all Americans should seriously doubt the qualifications of Obama, an</p> | <p>Video:</p> <p>Newspaper clippings with headlines describing self-defense with firearms fade in, piling up one atop another.</p> <p>Clippings dissolve to a picture of President Obama, and one newspaper headline below</p> |
|--|--|

| | |
|--|---|
| <p>ardent supporter of gun control.</p> <p>This fall, get enraged, get engaged, and get educated. And support Wyoming state candidates who will protect your gun rights.</p> | <p>him: "President Obama defends attorney general regarding ATF tactics (LA Times, Oct. 6, 2011)"</p> <p>Dissolves to a picture of the Wyoming state flag, panning down to the Wyoming Capitol Building</p> |
|--|---|

1

2 The "Gun Control" television advertisement does not constitute express advocacy.

3 The advertisement does not contain the sort of words of express advocacy of a federal
4 candidate listed in section 100.22(a). Although the urges the viewer to "support
5 Wyoming state candidates," the only person specifically named is President Obama, who
6 is not a Wyoming state candidate. The advertisement does contain an electoral portion
7 that is unmistakable, unambiguous, and suggestive of only one meaning: support
8 Wyoming state candidates who will protect gun rights. That the accompanying video
9 includes the Wyoming state flag and the Wyoming Capitol Building leaves the meaning
10 free of doubt. But reasonable minds could differ as to whether it encourages actions to
11 elect or defeat one or more clearly identified candidates. Although the advertisement
12 references President Obama, he is never identified as a candidate, but instead is criticized
13 for his views of gun rights, and his qualifications regarding his defense of the Attorney
14 General regarding ATF tactics. Thus, the advertisement is beyond the reach of
15 100.22(b).

16

1

The "Ethics" Television Advertisement

| Audio: | Video: |
|--|--|
| <p>Who is President Obama?</p> | <p>Picture of President Obama shaking hands with Hugo Chavez.</p> |
| <p>He preaches the importance of high taxes to balance the budget, but nominates political elites who haven't paid theirs.</p> | <p>Fade to another picture of Obama giving State of the Union, superimposed "Obama Aims \$1.4 Trillion Tax Increase at Highest Earners (San Francisco Chronicle, Feb. 14, 2011)"</p> |
| <p>He talks about budget and tax priorities, but passes a blind eye to nominees who don't contribute their fair share.</p> | <p>Cut to picture on left side of screen of Secretary of Treasury Timothy Geithner giving testimony, superimposed "Geithner apologizes for not paying taxes (CBS News, Feb. 18, 2009)"</p> |
| <p>Call President Obama and tell him you don't approve of his taxing behavior.</p> | <p>Picture fades in on right side of screen of Tom Daschle, superimposed "Tax Woes Derail Daschle's Bid for Health Chief (NPR, Feb. 3, 2009)"</p> |
| | <p>Fade to picture of President Obama and Michelle Obama enjoying themselves in Hawaii.</p> |

2

3

The "Ethics" television advertisement does not constitute express advocacy.

4

The advertisement does not contain the sort of words of express advocacy listed in

5

section 100.22(a). Nor does the advertisement contain an "electoral portion" that is

6

"unmistakable, unambiguous, and suggestive of only one meaning." Instead, the

7

advertisement criticizes President Obama based on statements about his "budget and tax

1 priorities” and his nominees’ asserted lack of compliance with their tax obligations. The
2 advertisement then exhorts viewers to “[c]all President Obama and tell him you don’t
3 approve of his taxing behavior.” It is beyond the reach of 100.22(b).

4

5

The Budget Reform Television Advertisement

| AUDIO: | Video: |
|---|---|
| Congresswoman Lummis supported the Repeal Amendment, which would have restored fiscal sanity to our federal debt. | Picture of Representative Lummis, superimposed “Tea Party Pushes Amendment to Veto Congress (AOL News, Dec. 1, 2010)” |
| Congresswoman Lummis is brave in standing against the political elite and deserves your support. Make your voice heard. | Small videos of Representative Lummis fade in, speaking on news programs, meeting with people, etc. |
| Do everything you can to support Congresswoman Lummis this fall and work toward fiscal sanity. | Wyoming flag fades in the background, returning to original picture of Rep. Lummis. |

6

7

The “Budget Reform” television advertisement does not constitute express
8 advocacy. Although the advertisement does state “support Congresswoman Lummis,”
9 the advertisement does not come within the reach of section 100.22(a), since the support
10 sought is policy-driven, not electoral (*i.e.*, support her “this fall and work toward fiscal
11 sanity”). No election is explicitly referenced, nor is Lummis ever identified as a
12 candidate. Similarly, the advertisement lacks an electoral portion that is unmistakable,
13 unambiguous, and suggestive of only one meaning. Even if “supporting Congresswoman
14 Lummis in the fall” can somehow be deemed an electoral portion (because elections

1 happen in the fall), reasonable minds could differ as to “whether it encourages actions to
2 elect or defeat one or more clearly identified candidate(s) or encourages some other kind
3 of action.” The arguable electoral portion could also be read to encourage support for
4 Lummis’ legislative agenda. After all, the advertisement claims she supported the Repeal
5 Amendment, which it claims “would have restored fiscal sanity to our federal debt.” This
6 ties into the final line of the advertisement, which also references financial sanity.

7

8

The Educated Voter Votes on Principle Television Advertisement

| Audio: | Video: |
|---|--|
| <p>Across America, millions of citizens remain uninformed about the truth of President Obama.</p> | <p>Picture of President Obama shaking hands with Hugo Chavez.</p> |
| <p>Obama, a President who palled around with Bill Ayers.</p> | <p>Picture of Bill Ayers in Weather Underground days, superimposed “Bill Ayers Dishes on Hosting a Fundraiser for Barack Obama (Big Government, Nov. 29, 2011).”</p> |
| <p>Obama, a President who was cozy with ACORN.</p> | <p>“House votes to Strip Funding for ACORN (Fox News, Sept. 17, 2009)”</p> |
| <p>Obama, a President destructive of our natural rights.</p> | <p>Video of an ATF raid, fade to a video of TSA scanning individuals in line for airport.</p> |
| <p>Real voters vote on principle. Remember this nation’s principles.</p> | <p>Fades to still shot of the Bill of Rights, superimposed “Remember this nation’s principles.”</p> |

1

2

The “Educated Voter Votes on Principle” advertisement does not constitute express advocacy. Although the advertisement mentions “real voters,” that “vote on principle,” the advertisement does not expressly state which candidate such voters ought to vote for. Thus, it is beyond the reach of 100.22(a). The advertisement does have an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning: “Real voters vote on principle.” But reasonable minds could differ as to whether this electoral portion “encourages actions to elect or defeat one or more clearly identified candidate(s)” or “encourages some other kind of action.” On one hand, the advertisement infers that since the advertisement could be read as attacking Obama, real voters ought to vote against Obama. But this is far from clear. It is not unreasonable to think that Bill Ayers and ACORN would not see their association with President Obama as something bad. On the contrary, from that perspective, real voters might infer a message to vote for Obama. Both perspectives require inference, reference to context, and reliance on subjective intent and effect, which is not permitted by the regulation when ascertaining the clarity of the electoral portion. Thus, the advertisement is beyond the reach of 100.22(b).

18

Question 2. Will Free Speech's proposed donation requests be solicitations of contributions?

21

No. For the reasons stated below, none of the proposed donation requests will constitute solicitations of contributions.

22

1 The Act defines the term “contribution” to include “any gift, subscription, loan,
2 advance, or deposit of money or anything of value made by any person for the purpose of
3 influencing any election for Federal office.” 2 U.S.C. 431(8)(A)(i); *see also* 11 CFR
4 100.52(a). The Act requires “any person” who “solicits any contribution through any
5 broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any
6 other type of general public political advertising” to include a specified disclaimer in the
7 solicitation. 2 U.S.C. 441d(a); *see also* 11 CFR 110.11(a)(3).

8 In *Buckley*, the Court narrowed the statutory term “contribution” to encompass
9 only (1) donations to candidates, political parties, or campaign committees; (2)
10 expenditures made in coordination with a candidate or campaign committee; (3)
11 donations given to other persons or organizations but “earmarked for political purposes.”
12 *Buckley* at 24, nt. 24, 78. In order to avoid the “hazards of uncertainty” regarding the
13 meaning of “earmarked for political purposes,” the United States Court of Appeals for the
14 Second Circuit interpreted the phrase to include only donations “that will be converted to
15 expenditures subject to regulation under FECA.” *FEC v. Survival Education Fund, Inc.*,
16 65 F.3d 285, 295 (2d Cir. 1995).

17 The pertinent issue in *Survival Education Fund* concerned a pre-McCain-Feingold
18 law, which required persons, including political committees, to include certain
19 disclaimers on (1) communications that contained express advocacy, and (2) solicitations.
20 Although the Second Circuit rejected much of the Commission’s case, it did hold that a
21 request for funds constituted a solicitation, and thus required a disclaimer. *Id.* at 298.
22 Specifically, the court said that a written solicitation indicating that money received in
23 response to a solicitation will be spent to elect or defeat a Federal candidate must carry

1 disclaimers informing the public of whether the organization is coordinating with a
2 candidate or his agents. *Id.* at 295. Although the court did not limit its determination to a
3 finding of express advocacy, it stated that a solicitation “may still fall within the reach of
4 441d(a) if it contains solicitations clearly indicating that the contributions will be targeted
5 to the election or defeat of a clearly identified candidate for federal office.” *Id.* In
6 addressing Survival Education Fund’s concerns that “[b]ecause [they] in some sense use
7 all contributions ‘for political purposes, they contend that they will be at a loss to know
8 when a solicitation triggers FECA disclosure requirements and subjects them to a
9 potential civil penalty,” the court stated that “[t]he only contributions ‘earmarked for
10 political purposes’ with which the *Buckley* Court appears to have been concerned are
11 those that will be converted to expenditures subject to regulation under FECA. Thus,
12 Buckley’s definition of independent expenditures that are properly within the purview of
13 FECA provides a limiting principle for the definition of contributions in § 431(8)(A)(i),
14 as applied to groups acting independently of any candidate or his agents and which are
15 not ‘political committees’ under FECA.” *Id.* at 294-95. The court also said a request for
16 funds is a “solicitation” if it “leaves no doubt that the funds contributed would be used to
17 advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies
18 during the election year.” *Id.* at 295.

19 The material at issue in *SEF* was overwhelmingly electoral in nature. It included
20 numerous electoral statements (*e.g.*, “Vote for Peace in ‘84”); allusions to the
21 consequences of the 1984 presidential election (*e.g.*, “Americans who will be voting in
22 November need to know the facts about how four more years of Reagan leadership will
23 affect our nation and the world.”); and the group’s intended use of the money received in

1 response to the communication (*e.g.*, “your special election year contribution will help us
2 communicate your views to hundreds of thousands of members of the voting public,
3 letting them know why Ronald Reagan and his anti-people policies must be stopped.”).
4 *Id.* at 288-89. The court held that these types of statements left “no doubt that the funds
5 contributed would be used to advocate President Reagan’s defeat at the polls, not simply
6 to criticize his policies during the election year.” *Id.* at 295.

7 McCain-Feingold changed the law regarding disclaimers. No longer were they
8 required only on solicitations and express advocacy; political committees were now
9 required to place certain disclaimers on virtually all public communications. Thus, the
10 significance of *SEF*’s holding – which determined when a request for funds constituted a
11 solicitation and thus required a disclaimer – ought to have diminished. But almost ten
12 years after it was decided, the Commission elected to use *SEF* as a basis to require groups
13 to register and report as political committees, thus limiting what such groups could raise
14 and spend, and requiring them to undertake the reporting requirements attendant to being
15 a political committee. The Supreme Court has described such obligations as burdensome.
16 *See Citizens United*, 130 S. Ct. at 897 (“PACs are burdensome alternatives; they are
17 expensive to administer and subject to extensive regulations.”).

18 The Commission codified this view *via* rulemaking, and promulgated 11 C.F.R. §
19 100.57. Under that rule (which merely codified the Commission’s reading of *SEF*), a
20 covered non-profit had to treat as “contributions” (meaning funds subject to limits,
21 prohibitions, and reporting requirements of the Act, including filing as a political
22 committee) *all* funds given in response to solicitations indicating that “*any* portion” of the
23 funds received will be used to support or oppose the election of a federal candidate. 11

1 C.F.R. §§ 100.57(a)-(b)(1) (emphasis added). If the communication indicated that the
2 funds will support or oppose both a federal and non-federal candidate, then at least 50%
3 of those funds had to be treated as federally-regulated funds. *See id.* § 100.57(b)(2).
4 The D.C. Circuit held that this rule was both unconstitutional and beyond the statute, as it
5 required covered non-profits to treat certain donations as federal money subject to the Act
6 limitations, prohibitions, and reporting requirements even if those donations are not
7 actually made “for the purpose of influencing” federal elections. *EMILY’s List v. FEC*
8 581 F.3d 1, 17-18 (D.C. Cir. 2009). The Commission has since repealed section 100.57,
9 *see Funds Received in Response to Solicitations; Allocation of Expenses by Separate*
10 *Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (2010), and has
11 not announced any desire to revisit the issue. *See* Brief for the Respondents at 5, *The*
12 *Real Truth About Obama, Inc., v. FEC*, 130 S. Ct. 2371 (U.S. 2010) (No. 09-724) (“On
13 September 18, 2009, the D.C. Circuit declared that regulation [100.57] unlawful.
14 *EMILY’s List v. FEC*, 581 F.3d 1, 17-18 (D.C.Cir. 2009). The Commission has
15 accordingly announced that the regulation ‘will not be enforced.’”).

16

17

18

A. *The “War Chest” Donation Request*

19

20

21

22

23

24

25

26

27

Friends of freedom celebrated when the Supreme Court decided *Citizens United*. Now, more than ever, we can make the most effective use of your donations this coming fall. Donations given to Free Speech are funds spent on beating back the Obama agenda. Beating back Obama in the newspapers, on the airways, and against his \$1 billion war chest.

1 This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The
2 donation request indicates that the funds requested will be “spent on beating back the
3 Obama agenda. Beating back Obama in the newspapers, on the airwaves, and against his
4 \$1 billion war chest.” While the request does mention “this coming fall,” “[b]eating back
5 Obama,” and “his \$1 billion war chest,” such language does not “clearly indicat[e] that
6 the contributions will be targeted to the election or defeat of a clearly identified candidate
7 for federal office.” *SEF*, 65 F.3d at 295. First, “this coming fall” is not inherently
8 electoral. In fact, the request itself provides the meaning for this phrase: that Free Speech
9 will use the donations raised this fall to beat back the Obama agenda. The other language
10 appears in a sentence fragment that expands upon the previous sentence regarding
11 “beating back the Obama agenda.” Moreover, Obama is never identified as a candidate,
12 and the phrase “his \$1 billion war chest” is not inherently electoral, as it presumably
13 includes funds raised by the Democratic Party generally, funds that can be spend in a
14 variety of ways. Such language is a far cry from the language present in *Survival*
15 *Education Fund*, such as: “Vote for Peace in ’84”; “Americans who will be voting in
16 November need to know the facts about how four more years of Reagan leadership will
17 affect our nation and the world”; “your special election year contribution will help us
18 communicate your views to hundreds of thousands of members of the voting public,
19 letting them know why Ronald Reagan and his anti-people policies must be stopped.”

20 Since this donation request does not solicit contributions under the Act, and Free
21 Speech does not propose spending any funds on “expenditures” under the Act, funds

1 raised will not be subject to the limitations, prohibitions or reporting requirements of the
2 Act.¹⁷

3 *B. The “Strategic Speech” Donation Request*

4 This fall, 23 Democrat incumbents are up for election in the
5 U.S. Senate. Seven have already decided to retire, but
6 some, like John Tester of Montana, haven’t gotten the
7 message. With your donation, we’ll strategically speak out
8 against the expansion of government-run healthcare and so-
9 called ‘clean energy’ boondoggles like Solyndra, which
10 Senators like Tester fully support. It’s time to retire failed
11 socialist policies.
12

13 This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The
14 donation request clearly indicates how the funds requested will be spent: by “strategically
15 speak[ing] out against the expansion of government-run healthcare an so-called ‘clean
16 energy’ boondoggles like Solyndra,” which the request claims Senators like Tester
17 support. This point is emphasized by the concluding line, which makes clear it is
18 discussing policy: “It’s time to retire failed socialist policies.” The donation request lacks
19 language “clearly indicating that the contributions will be targeted to the election or
20 defeat of a clearly identified candidate for federal office.” *SEF*, 65 F.3d at 295. The
21 language used in this donation request is not at all like that present in *Survival Education*

¹⁷ In the past, the Commission may have considered this sort of donation request to not only require a disclaimer, but to presumptively require that all funds raised in response to the request to be subject to the limitations, prohibitions and reporting requirements of the Act. *See, e.g.*, MUR 5487 (Progress for America Voter Fund), Conciliation Agreement ¶¶ 22, 26 (concluding that direct mail pieces using the phrase “help us promote President Bush’s agenda in Pennsylvania with the greatest possible strength between now and November 1st” solicited contributions because they supposedly “clearly indicate that the funds received would be targeted to the election of President Bush”). The legal theory upon which such determinations were based was rejected in *EMILY’s List v. FEC*, as being unconstitutional and beyond the Commission’s statutory authority. Per the holding of the D.C. Circuit, which the Commission has already accepted as having nation-wide effect, such matters are no longer good law. *See, i.e.*, MUR 5365 (Club for Growth); MUR 5403 (Americans Coming Together); MUR 5440 (The Media Fund); MUR 5487 (Progress for America Voter Fund); MUR 5511 (Swiftboat Veterans and POWs for Truth); MUR 5542 (Texans for Truth); MUR 5568 (Empower Illinois Media Fund); MUR 5753 (League of Conservation Voters 527); MUR 5754 (MoveOn.org Voter Fund).

1 ***Fund:*** “Vote for Peace in ’84”; “Americans who will be voting in November need to
2 know the facts about how four more years of Reagan leadership will affect our nation and
3 the world”; “your special election year contribution will help us communicate your views
4 to hundreds of thousands of members of the voting public, letting them know why
5 Ronald Reagan and his anti-people policies must be stopped.”

6 Since this donation request does not solicit contributions under the Act, and Free
7 Speech does not propose spending any funds on “expenditures” under the Act, funds
8 raised will not be subject to the limitations, prohibitions or reporting requirements of the
9 Act.

10 ***C. The “Checking Boxes” Donation Request***

11
12 ‘Leading from behind,’ President Obama takes advice from
13 socialist staffers, usually choosing from a checklist of
14 oppressive, debt-driven policies without even considering
15 freedom-based and fiscally-conscious alternatives.
16 Checking the right box on the November ballot is
17 important, but like Obama’s memos it’s just not enough.
18 Take the lead in making the message of Free Speech heard:
19 your donation will inform real American leadership.
20

21 This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The
22 donation request clearly indicates how the funds requested will be spent: “making the
23 message of Free Speech heard” by “inform[ing] real American leadership.” Although the
24 donation request includes the phrase “[c]hecking the right box on the November ballot is
25 important,” neither that phrase nor the sentence of which it is a part, solicits funds. It
26 does not in any way indicate that funds will be used to target the election or defeat of a
27 clearly identified candidate; on the contrary, it can be read as stating that funds will be
28 spent on things unrelated to “checking the right box on the November ballot,” such as

1 Free Speech's "message" to "inform real American leadership." Other language in the
2 donation request criticizes Obama's policy choices. The donation request lacks language
3 "clearly indicating that the contributions will be targeted to the election or defeat of a
4 clearly identified candidate for federal office." *SEF*, 65 F.3d at 295. The language used
5 in this donation request is not at all like that present in *Survival Education Fund*: "Vote
6 for Peace in '84"; "Americans who will be voting in November need to know the facts
7 about how four more years of Reagan leadership will affect our nation and the world";
8 "your special election year contribution will help us communicate your views to hundreds
9 of thousands of members of the voting public, letting them know why Ronald Reagan
10 and his anti-people policies must be stopped."

11 Since this donation request does not solicit contributions under the Act, and Free
12 Speech does not propose spending any funds on "expenditures" under the Act, funds
13 raised will not be subject to the limitations, prohibitions or reporting requirements of the
14 Act.

15 *D. The "Make Them Listen" Donation Request*

16
17 In 2010, the Tea Party movement ushered in an historic
18 number of liberty-friendly legislators. But President
19 Obama and his pals in Congress didn't get the message:
20 Stop the bailouts. No socialized healthcare. End
21 oppressive taxes. But we won't be silenced. Let's win big
22 this fall. Donate to Free Speech today.

23
24 This donation request does not require a disclaimer under 2 U.S.C. 441d(a). The
25 request arguably references an election, since it claims that the 2010 election elected a
26 "number of liberty-friendly legislators." But the request does not clearly reference a
27 future election. Although it does state, "[l]et's win big this fall," this is not clearly a

1 reference to an upcoming election, let alone a clear statement that any funds raised would
2 be used to target the election or defeat of a clearly identified candidate. Even when read
3 in the context of the rest of the donation request, winning in the fall is not “clearly
4 indicating that the contributions will be targeted to the election or defeat of a clearly
5 identified candidate for federal office.” *SEF*, 65 F.3d at 295.

6 The request states that neither Obama nor “his pals” in Congress got the message
7 the people sent in 2010: that “bailouts” need to stop, “socialized healthcare” is
8 unacceptable, and “oppressive taxes” need to come to an end. The request can be read as
9 then saying that although Obama and “his pals” in Congress still have not heard this
10 message, Free Speech “will not be silenced,” and they will continue to advocate in favor
11 of these policy choices. They will continue to do so “this fall,” and they hope to “win
12 big” then – which could be read to mean legislative votes in the Congress regarding
13 ending “bailouts,” “socialized healthcare” and “oppressive taxes.” Ultimately, the
14 donation request is not sufficiently clear.¹⁸

15 But even if one were to presume that the donation request solicits contributions
16 under the Act (*e.g.*, “win big this fall” references the fall election, and that somehow
17 makes clear that funds raised were to be spent on “expenditures”), the donation request
18 would, at most, require a disclaimer under 2 U.S.C. 441d. That determination would not
19 mean that all funds raised in response to the request would be subject to the limitations,
20 prohibitions, or reporting obligations of the Act. On the contrary, the request asks for

¹⁸ For example, if the donation request said “let’s win big this fall at the ballot box,” or “let’s win big this fall on election day,” that would bring the request much closer to coming within the reach of the Act as it was construed by the Second Circuit in *SEF*.

1 funds to support Free Speech’s effort to “not be silenced” and to send “ a message”
2 regarding bailouts, healthcare and taxes. In light of that non-electoral language, it cannot
3 be simply presumed that all funds raised by the donation request would be subject to the
4 Act’s limitations, prohibitions, or reporting obligations. The Commission lacks the
5 statutory authority to employ such a presumption, or to presume that a certain amount of
6 the funds received would be subject to the limitations, prohibitions and reporting
7 obligations of the Act. *See EMILY’s List*, 581 F.3d at 21 (holding that the statute does
8 not permit the FEC to “treat as hard-money ‘contributions’ all funds given in response to
9 solicitations indicating that ‘any portion’ of the funds received will be used to support or
10 oppose the election of a federal candidate...[t]he statutory defect in the rule is that,
11 depending on the particular solicitation at issue, it requires covered non-profits to treat as
12 hard money certain donations that are not actually made ‘for the purpose of influencing’
13 federal elections.”); *see also Funds Received in Response to Solicitations; Allocation of*
14 *Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg.
15 13,223 (2010).¹⁹

16 Similarly, even assuming that the Commission read the donation request as
17 “clearly indicating that the contributions will be targeted to the election or defeat of a
18 clearly identified candidate,” the Commission lacks any sort of regulation or other public
19 guidance on how Free Speech should determine what portion of funds received would be
20 subject to the limitations, prohibitions or reporting obligations of the Act. The
21 Commission declines to impose a new rule by way of the advisory opinion process. *See*

¹⁹ All prior Commission matters that relied upon such a theory were invalidated by *EMILY’s List*, and abandoned by the Commission when it removed section 100.57 from its regulations, and chose to give *EMILY’s List* nationwide effect.

1 2 U.S.C. § 437f(b) (“Any rule of law which is not stated in this Act or in chapter 95 or
2 chapter 96 of title 26 may be initially proposed by the Commission only as a rule or
3 regulation pursuant to procedures established in section 438(d) of this title. No opinion
4 of an advisory nature may be issued by the Commission or any of its employees except in
5 accordance with the provisions of this section.”); *see also U.S. v. Magnesium Corp. of*
6 *Am. LLC*, 616 F.3d 1129, 1139 (10th Cir. 2010) (“[E]ven if Congress repealed the
7 [Administrative Procedures Act] tomorrow, the Due Process clause of the Fifth and
8 Fourteenth Amendments would still prohibit the imposition of penalties without fair
9 notice And it pertains when an agency advances a novel interpretation of its own
10 regulations in the course of a civil enforcement action. If an agency could punish a
11 regulated party for following the agency’s own interpretation of its own ambiguous
12 regulation, after all, ‘the practice of administrative law would come to resemble ‘Russian
13 Roulette.’”) (internal citations omitted).

14

15 *Question 3. Will the activities described in this advisory opinion request require Free*
16 *Speech to register and report to the Commission as a political committee?*

17 No, the activities described in this advisory opinion request will not require Free
18 Speech to register and report to the Commission as a political committee.

19 The Act and Commission regulations define a “political committee” as “any
20 committee, club, association or other group of persons which receives contributions
21 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
22 aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A); 11 CFR
23 100.5. The Supreme Court construed the term “political committee” to encompass only

1 organizations that are “under the control of a candidate or the major purpose of which is
2 the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).
3 Some courts have held that the *Buckley* major purpose test was the product of statutory
4 interpretation, *see National Organization for Marriage v. McKee*, 649 F.3d 34, 65 (1st
5 Cir. 2011), *cert. denied* (Feb. 27, 2012); *Human Life of Washington, Inc., v. Brumsickle*,
6 624 F.3d 990 (9th Cir. 2010), *cert. denied* (Feb. 22, 2011), and thus would constitute the
7 end-point of the Commission’s statutory authority. *See Political Committee Status*,
8 Supplemental Explanation and Justification (“2007 Political Committee Status
9 Supplemental E&J”), 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) (“The major purpose
10 doctrine did not supplant the statutory ‘contribution’ and ‘expenditure’ triggers for
11 political committee status, rather it operates to limit the reach of the statute in certain
12 circumstances.”) (emphasis added).

13 The Commission has not defined or clarified the major purpose test through
14 rulemaking, and instead has opted to consider it on a case-by-case basis. *Id.* at 5596. In
15 the past, the Commission has claimed that a group needed to file as a political committee
16 if its major purpose was merely “partisan politics” or “electoral activity.” Such
17 arguments were rejected in court. *See FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861
18 (1996) (“the terms ‘partisan electoral politics’ and ‘electioneering’ raise virtually the
19 same vagueness concerns as the language ‘influencing any election for Federal office,’
20 the raw application of which the *Buckley* Court determined would impermissibly impinge
21 on First Amendment values.”). Despite the rejection of such arguments, the Commission
22 nonetheless continued to use such tests, and other variants of the major purpose test that
23 go beyond that articulated in *Buckley*, such as “influencing elections.” And the

1 Commission has at times claimed that *dicta* from *MCFL* is a separate, more expansive
2 test than was articulated in *Buckley* (if a group's "independent spending become[s] so
3 extensive that the organization would be classified as a political committee."). *MCFL*,
4 479 U.S. at 262.²⁰ See MUR 5753 (League of Conservation Voters), FGCR at 5 and
5 MUR 5754 (MoveOn.org Voter Fund), FGCR at 5 ("influence the outcome of the 2004
6 elections"); MUR 5751 (Leadership Forum), FGCR at 4 ("a focus on influencing the
7 2004 presidential elections"); MUR MURs 5910 & 5694 (Americans for Job Security),
8 FGCR at 15 ("influence a federal election"); MURs 5977 & 6005 (American Leadership
9 Project), FGCR at 11 ("influence the election of the 2008 presidential primary election");
10 and MUR 6082 (Majority Action), FGCR at 13 ("influence the 2006 mid-term
11 elections"). In other cases, some declared that the proper test was "campaign activity," a
12 significantly broader test than that one articulated in *Buckley* (*i.e.*, nomination or election
13 or of a federal candidate). MUR 5365 (Club for Growth), GCR #2 at 3, 5 ("the vast
14 majority of CFG's disbursements are for federal campaign activity" and concluding CFG
15 "has the major purpose of campaign activity."); MUR 5403 (Americans Coming
16 Together), FGCR at 8 ("sufficient spending on campaign activity"); MURs 5511 & 5525
17 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement at ¶6 ("only
18 organizations whose major purpose is campaign activity can be considered political
19 committees under the Act."); MUR 5753 (League of Conservation Voters 527), FGCR at
20 7 ("only organizations whose major purpose is campaign activity can be considered

²⁰ *MCFL* can be read to impose an additional limitation on the statute, even narrower than the *Buckley* construction, since *MCFL* speaks of spending that must be "so extensive." *MCFL*, 479 U.S. at 262. The word "extensive" is defined as "covering or affecting a large area;" "large in amount or scale." See OxfordDictionaries.com <http://oxforddictionaries.com/definition/extensive?region=us&q=extensive>.

1 political committees under the Act,”); MUR 6082 (Majority Action), FGCR at 12 (“the
2 main purpose of MA [Majority Action] was campaign activity during 2006”).

3 When necessary, the Commission claims it uses the test as it was formulated by
4 the Court in *Buckley*. For example, as the *GOPAC* court observed, although the
5 Commission argued there that sufficient major purpose could be shown merely by
6 “partisan politics” or “electoral activity,” it was “noteworthy that in its opposition to the
7 petition for rehearing en banc in *Akins v. FEC*, the Commission supports the formulation
8 of the *Buckley* test.” *GOPAC*, 917 F. Supp. at 859 n.1. More recently, the Commission
9 invoked *Buckley*’s formulation of the test. *See* 2007 Political Committee Status
10 Supplemental E&J, 72 Fed. Reg. at 5597 (the Supreme Court mandated that an additional
11 hurdle was necessary to avoid Constitutional vagueness concerns; only organizations
12 whose “major purpose” is the nomination or election of a Federal candidate can be
13 considered “political committees” under the Act” (citing *Buckley*, 424 U.S. at 79.)).
14 Subsequent to this pronouncement, however, the Commission continued to consider the
15 more amorphous “campaign activity” test. *See, e.g.*, MUR 5988 (American Future
16 Fund), FGCR at 11 (“sufficient spending on campaign activity.”); MURs 5910 & 5694
17 (Americans for Job Security), FGCR at 6 (“The Commission has long applied the Court’s
18 major purpose test in determining whether an organization is a “political committee”
19 under the Act, and it interprets that test as limited to organizations whose major purpose
20 is federal campaign activity”); MUR 5977 & 6005 (American Leadership Project), FGCR
21 at 8 (the Commission “interprets [the political committee] test as limited to organizations
22 whose major purpose is federal campaign activity.”); MUR 5842 (Economic Freedom
23 Fund), FGCR at 11 (“only organizations whose major purpose is campaign activity can

1 potentially qualify as political committees under the Act.”) Nor has the Commission
2 explained how its loss in *Unity '08 v. FEC*, 596 F.3d 861 (2010) (where the
3 Commission’s claim that Unity ’08 was a political committee was rejected by the D.C.
4 Circuit) affects its case-by-case approach.

5 More recently, and although the Commission continues to consider the test that
6 was rejected in *GOPAC*, the Commission has represented to Federal courts that it uses
7 the *Buckley* formulation of the test. See Brief for the Respondents at 5, *The Real Truth*
8 *About Obama, Inc., v. FEC* (“*RTAO*”), 130 S. Ct. 2371 (U.S. 2010) (No. 09-724)
9 (“Under the major purpose test, an organization will not be regulated as a political
10 committee unless its ‘major purpose . . . is the nomination or election of a candidate’”
11 (citing *Buckley*, 424 U.S. at 79)); Brief of Appellees Federal Election Commission and
12 United States Department of Justice at 9, *RTAO*, 575 F.3d 342 (4th Cir. 2011) (No. 11-
13 1760) (“Under the statute as thus limited, as organization that is not controlled by a
14 candidate must register as a political committee only if (1) the entity crosses the \$1,000
15 threshold of contributions or expenditures, and (2) its ‘major purpose’ is the nomination
16 or election of federal candidates.”); Brief of Appellees Federal Election Commission and
17 United States Department of Justice at 5, *RTAO*, 2008 WL 4416282 (4th Cir. 2008) (No.
18 08-1977) (“Under the statute as thus limited, a non-candidate-controlled entity must
19 register as a political committee—thereby becoming subject to limits on the sources and
20 amounts of its contributions received—only if the entity crosses the \$1,000 threshold of
21 contributions or expenditures and its ‘major purpose’ is the nomination or election of
22 federal candidates.”); Federal Election Commission’s Opposition to Appellant’s Motion
23 for Injunction Pending Appeal, *RTAO*, 2008 WL 4416282 (4th Cir. 2008) (No. 08-1977)

1 (“Under the statute as thus limited, a non-candidate organization must register as a
2 political committee and be subject to contribution limits only if the entity crosses the
3 \$1,000 threshold of contributions or expenditures and its ‘major purpose’ is the
4 nomination or election of federal candidates.”); Federal Election Commission’s
5 Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction, *RTAO*, No.
6 3:08-cv-00483-JRS at 4 (E.D. Va. 2008) (“Under the statute as thus limited, a non-
7 candidate organization must register as a political committee and be subject to
8 contribution limits only if the entity crosses the \$1,000 threshold of contributions or
9 expenditures and its ‘major purpose’ is the nomination or election of federal
10 candidates.”); Defendant Federal Election Commission’s Memorandum in Support of
11 Motion for Summary Judgment and Opposition to Plaintiff’s Motion for Preliminary
12 Injunction and Summary Judgment, *RTAO*, No. 3:08-cv-00483-JRS at 10 (E.D. VA.
13 2010) (“Under the statute as thus limited, a non-candidate-controlled entity must register
14 as a political committee only if it crosses one of the \$1,000 statutory thresholds and its
15 ‘major purpose’ is the nomination or election of federal candidates.”); Defendant Federal
16 Election Commission’s Reply in Support of the Commission’s Motion for Summary
17 Judgment, *RTAO*, No. 3:08-cv-00483-JRS at 25 (E.D. VA. 2010) (“In *Buckley*, the
18 Supreme Court established the ‘major purpose’ test to limit the definition of ‘political
19 committee’ to organizations controlled by a candidate or whose major purpose is the
20 nomination or election of a candidate.”).

21 In reviewing an analogous state law, the 10th Circuit articulated the major purpose
22 test of *Buckley* as follows: “There are two methods to determine an organization’s ‘major
23 purpose’: (1) examination of the organization’s central organizational purpose; or (2)

1 comparison of the organization's electioneering spending with overall spending to
2 determine whether the preponderance of expenditures is for express advocacy or
3 contributions to candidates." *New Mexico Youth Organized v. Herrera*, 611 F.3d 669,
4 678 (10th Cir. 2010).²¹

5

6

7 Even if Free Speech's proposed advertisement "Financial Reform" constitutes
8 express advocacy, Free Speech need not file as a political committee. According to its
9 request, it plans on spending \$250 to run "Financial Reform" as a newspaper
10 advertisement, and \$333.33 to run it as a radio advertisement, for a total of \$583.33.
11 Thus, even if the advertisement is express advocacy, Free Speech will not spend more
12 than \$1,000 on "expenditures." Since none of Free Speech's donation requests will result
13 in contributions, it will not receive in excess of \$1,000 in "contributions." Because it will

²¹ Although other Circuits have articulated different versions of the major purpose test, those decisions were reviewing laws that differed significantly from the Act as construed by *Buckley*. For example, the Ninth Circuit reviewed a state statute that imposed political committee status on groups with "a" major purpose of electing or nominating a candidate. *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010). By way of comparison, the federal law looks to "the" major purpose, a distinction that the Fourth Circuit has already deemed critical. See *N.C. Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008). See also *McKee*, 723 F. Supp.2d 245 (D. Me. 2010), *aff'd* 649 F.3d 34 (1st Cir. 2011), No. 11-599, *cert. denied* (Feb. 27, 2012) (upholding state statute, but making clear that the major purpose test of *Buckley* was a result of statutory construction). Moreover, the Commission has already publicly confirmed that major purpose is determined by a comparison of a group's campaign spending to the remainder of its spending. See Brief of Appellees Federal Election Commission and United States Department of Justice, *RTAO*, No. 11-1760 at 71 (4th Cir. 2011) ("As *Coffman* notes, *MCFL* 'suggested two methods to determine an organization's 'major purpose': (1) the examination of the organization's central organizational purpose; or (2) comparison of the organization's independent [express advocacy] spending with overall spending."). In other words, the Commission does not subdivide non-campaign spending. Cf. *Brumsickle*, 624 F.3d 1011 (in dicta, explained that where one group spends 40% of its time and resources on political advocacy, 30% of its time and resources producing merchandise, and 30% of its time and resources on research whereas an otherwise identical group that spends 45% of its time and resources on political advocacy, 45% of its time and resources on producing merchandise, and 10% of its time and resources on research, "[p]olitical advocacy is 'the' major purpose for the former group (because political advocacy commands the largest share of the group's time and resources), but it is just 'a' major purpose of the latter (because the group expends equal time and resources on political activity and merchandise production).").

1 not make in excess of \$1000 in expenditures or receive in excess of \$1000 in
2 contributions, Free Speech does not have to register and report as a political committee.

3

4

5

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

17 The cited advisory opinions are available on the Commission's Web site,
18 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database
19 at <http://www.fec.gov/searchao>.

20

21

22

23

24

25

26

On behalf of the Commission,

Caroline C. Hunter
Chair

