PANEL DECISION ISSUED JANUARY 21, 2016

Nos. 15-5016 & 15-5017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER VAN HOLLEN, JR.
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

CENTER FOR INDIVIDUAL FREEDOM,
Intervenor for Defendant-Appellant in No. 15-5016,

and

HISPANIC LEADERSHIP FUND,
Intervenor for Defendant-Appellant in No. 15-5017.

On Appeal from the United States District Court
for the District of Columbia

APPELLEE VAN HOLLEN'S PETITION FOR REHEARING EN BANC

ROGER M. WITTEN
FIONA J. KAYE
STEPHANIE SIMON
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8800

CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

March 4, 2016

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Avenue NW
Washington, DC 20036
(202) 355-9610

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

DONALD J. SIMON
SONOSKY CHAMBERS SACHSE
ENDRESON & PERRY, LLP
1425 K Street NW, Suite 600
Washington, DC 20005
(202) 682-0240

TREVOR POTTER
J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002
(202) 736-2200

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

---

* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY

APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
FEC	Federal Election Commission
JA	Joint Appendix
WRTL	*FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)

INTRODUCTION AND RULE 35(b)(1) STATEMENT

The Bipartisan Campaign Reform Act of 2002 (BCRA) requires "[e]very person" spending more than $10,000 per year on electioneering communications to disclose "all contributors" who contributed over $1,000 to that person in a specified period. 52 U.S.C. § 30104(f)(2)(F). A Federal Election Commission rule governing spending for electioneering communications by corporations and unions, in contrast, eliminates the duty to disclose any contributors, except those who give expressly "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). Because that rule allows donors to "avoid reporting altogether by transmitting funds but remaining silent about their intended use," JA447, the district court twice invalidated it, and the FEC twice declined to appeal. But on intervenors' appeal, the panel (Brown, J., joined by Sentelle and Randolph, S.JJ.) upheld it as a reasonable reading of BCRA and not arbitrary or capricious.

Numerous errors pervade the panel opinion, but two in particular bring this case within the demanding Rule 35 standard. First, the panel sustained the rule on constitutional grounds the panel conceded were inconsistent with Supreme Court precedent. In the panel's view, a disclosure rule any broader than the FEC's would violate constitutional speech and privacy rights. Op. 24. That analysis—which appears nowhere in the FEC's explanation for the rule—defies Supreme Court precedent consistently upholding BCRA's disclosure requirements. *Citizens*

United v. FEC, 558 U.S. 310, 367 (2010); *McConnell v. FEC*, 540 U.S. 93, 196-198 (2003); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1459-1460 (2014); *SpeechNow.org v. FEC*, 599 F.3d 686, 696-697 (D.C. Cir. 2010). The panel acknowledged the conflict, but criticized that precedent as "'based on the flimsiest of justifications'" and bound to collapse. Op. 25-26, 28. Second, the panel announced an administrative-law standard that conflicts with precedent invalidating regulations that frustrate statutory purpose. *E.g.*, *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The panel acknowledged that *Shays* supports the FEC rule's invalidation but declined to follow it, calling it an outmoded "results-oriented brand of purposivism" that no longer has any place in the law. Op. 13-14.

When the Court believes, as the panel did here, that the law "has moved beyond" a mode of analysis employed by prior decisions, Op. 13—or that prior decisions "subsist[], … for now, on a fragile arrangement" that should be abandoned, Op. 28—the proper mechanism for effectuating those views is the en banc process. Instead, the panel refused to apply controlling precedent, injecting conflict and confusion into otherwise settled and highly consequential areas of law. Fed. R. App. P. 35(a)(1). In doing so, it sustained a regulation that eviscerates BCRA's disclosure requirements, undermining a campaign-finance system that hinges on the pairing of corporate spending with effective disclosure. *Citizens United*, 558 U.S. at 370; Fed. R. App. P. 35(a)(2).

BACKGROUND

Congress enacted BCRA in response to a "'"meltdown" of the campaign finance system,'" *Shays*, 528 F.3d at 918, caused in part by the use of soft money to fund "issue ads" that sought to influence federal elections but escaped existing disclosure requirements. *McConnell*, 540 U.S. at 129-132; *Shays v. FEC*, 414 F.3d 76, 81-82 (D.C. Cir. 2005). Because the ads' sponsors could "'hid[e] behind dubious and misleading names'" without disclosing the sources of funding, the ads escaped "the scrutiny of the voting public." *McConnell*, 540 U.S. at 197. In BCRA, Congress responded by requiring expanded disclosure to "inform the voting public of who is sponsoring and paying for" electioneering communications and to deter corruption by revealing "who is trying to influence the election." 147 Cong. Rec. 4865, 4895 (2001) (statement of Sen. Jeffords); *see* 147 Cong. Rec. 5001, 5005 (2001) (statement of Sen. Snowe).

To that end, BCRA identified a new category of campaign spending called "electioneering communications," defined as broadcast, cable, or satellite ads that refer to an identified federal candidate, run shortly before an election, and target the relevant electorate. 52 U.S.C. § 30104(f)(3). BCRA requires "[e]very person" who spends over $10,000 for electioneering communications during the year to disclose "the names and addresses of *all contributors* who contributed an aggregate amount of $1,000 or more to the person making the disbursement"

during a specified time period. *Id.* § 30104(f)(2)(F) (emphasis added).[1] Alternatively, if ads are paid for from a segregated bank account, BCRA requires disclosure of "all contributors" who gave over $1,000 "to that account" during the relevant period. *Id.* § 30104(f)(2)(E). In 2003, the FEC promulgated regulations mirroring BCRA's disclosure provisions. 68 Fed. Reg. 404 (Jan. 3, 2003).

This suit challenges a rule the FEC adopted in 2007 after *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"), which invalidated BCRA's provision banning corporations and unions from spending general funds on electioneering communications as applied to many ads. Although *WRTL* did not mention disclosure, the FEC revised its rules to require corporations and unions paying for electioneering communications out of general funds to disclose only those donors who donated specifically "for the purpose of furthering electioneering communications." JA313 (reprinted in the Addendum). That limitation requires disclosure only when funds are "received in response to solicitations specifically requesting funds to pay for [electioneering communications]" or "specifically designated for [electioneering communications] by the donor." JA311.[2]

---

[1] "[P]erson" includes corporations and unions. 52 U.S.C. § 30101(11).

[2] For example, in 2010, the FEC dismissed a complaint alleging a disclosure violation because the complaint did not show that any donations were made specifically to support the ad at issue in the complaint. *See* Statement of Reasons of Chairman Petersen et al., *In re Freedom's Watch, Inc.*, MUR 6002 (Aug. 13, 2010), http://eqs.fec.gov/eqsdocsMUR/10044274536.pdf.

The FEC gave two reasons for this limitation. First, the FEC posited that corporations' general funds might derive from shareholders who purchase stock, customers who buy goods or services, or persons who donate to support a general mission. JA311. These persons, the FEC stated, "do not necessarily support" the corporation's campaign ads. *Id.*[3] Second, the FEC asserted that disclosing all donors who exceed the threshold amounts "would be very costly and require an inordinate amount of effort." *Id.* The purpose test, the FEC stated, would inform the public about "those persons who actually support the message conveyed" without imposing "the significant burden of disclosing the identities of … customers, investors, or members" who gave funds for unrelated purposes. *Id.*

Congressman Van Hollen challenged the rule under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and the Administrative Procedure Act (APA). Citing evidence that persons making electioneering communications in 2010 had disclosed the sources of less than 10 percent of their $79.9 million in spending, the complaint alleged that the FEC's rule frustrates Congress's intent and "creat[es] a major loophole in [BCRA's] disclosure regime." JA316; *see also* JA326 (showing that the 10 biggest spenders on electioneering communications disclosed the sources of only five percent of money spent).

[3] Similarly, a labor union might receive dues from members who "may not necessarily support the organization's electioneering communications." JA311.

The Center for Individual Freedom and Hispanic Leadership Fund (Intervenors) intervened to support the FEC. The district court granted summary judgment to Van Hollen, holding at *Chevron* step one that BCRA plainly required disclosure of "all" contributors who gave over $1,000 during the reporting period. JA354-367. The FEC did not appeal. Intervenors appealed and sought a stay. This Court denied the stay, finding that Intervenors had failed to show a likelihood of success on the merits. JA379. But on appeal, a different panel reversed, holding that Congress had not anticipated the situation that arose after *WRTL* and that "contributors" could be read to entail a purpose element. JA385-386.[4]

On remand, the district court again invalidated the regulation as arbitrary and capricious and an unreasonable interpretation of BCRA. JA404-450. The FEC again declined to appeal. On Intervenors' appeal, the panel reversed, holding that the FEC rule satisfies both *Chevron* step two and the APA.

ARGUMENT

The panel opinion contravenes precedent in at least two important areas. In doing so, it upholds a regulation that has gutted BCRA's disclosure rules—an entirely predictable result the FEC completely ignored in its rulemaking. En banc review is necessary to secure the uniformity of the Court's decisions and to correct an erroneous opinion with significant consequences for the electoral system.

[4] The Court remanded with instructions to refer the matter to the FEC for further consideration, JA386, but the FEC took no action.

I. THE PANEL'S CONSTITUTIONAL RATIONALE—WHICH THE FEC NEVER ADVANCED—CONFLICTS WITH SUPREME COURT PRECEDENT

The panel placed "significant" weight on its view that the FEC had to "tailor[] the disclosure requirements to satisfy constitutional interests in privacy" because any broader rule would harm First Amendment rights. Op. 24, 26, 27. But "[t]he Supreme Court has consistently upheld … reporting requirements" in light of the "governmental interest in 'provid[ing] the electorate with information' about the sources of political campaign funds." *SpeechNow*, 599 F.3d at 696. In *McConnell*, the Supreme Court upheld BCRA's disclosure requirements against facial attack. 540 U.S. at 196-199; *id.* at 321 (Kennedy, J., dissenting). The Court reaffirmed that view in rejecting an as-applied challenge in *Citizens United*, 558 U.S. at 365-371. As Justice Kennedy noted—in a portion of *Citizens United* joined by seven other Justices—disclosure in fact promotes First Amendment values:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. at 371. And in *McCutcheon*, 134 S. Ct. at 1459-1460, the Court reiterated the importance of disclosure, emphasizing that it "minimizes the potential for abuse" and "offers … robust protections against corruption."

Citing only dissents, the panel assailed those cases as a "startling intrusion" on constitutional rights and criticized the "'Justices' failure'" to elevate the interest

in anonymity above its other "'flims[y] … justifications.'" Op. 25-26 (citing *Citizens United*, 558 U.S. at 483 (Thomas, J., dissenting); *McConnell*, 540 U.S. at 276 (Thomas, J., dissenting); *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., dubitante)). Based on this critique of the Supreme Court's "fragile" jurisprudence, Op. 28, the panel sustained the FEC's purpose requirement as a necessary "safeguard [of] the First Amendment," Op. 24-27. That analysis contradicts consistent and near-unanimous decisions of the Supreme Court.

Moreover, the FEC did not advance the panel's rationale. While the FEC described its rule as "'narrowly tailored'" to address "'commenters' concerns regarding individual donor privacy,'" Op. 23, it said so only in rejecting a proposed alternative rule that would have exempted many ads from disclosure altogether. JA425-427. Some commenters had championed that alternative based on constitutional objections to disclosure, but the FEC responded that it had "no mandate" to limit disclosure for constitutional reasons because "eight Justices in *McConnell* voted to uphold" BCRA's reporting requirements and "*McConnell* continues to be the controlling" precedent. JA301. "[P]rivacy interests," the FEC stated, "are adequately protected" by as-applied challenges. *Id.*

In explaining its reasons for adopting the purpose limitation, the FEC cited only two rationales: (1) that disclosure should be limited to "those persons who actually support the message conveyed," and (2) that identifying all donors "would

be very costly and require an inordinate amount of effort." JA311. The FEC never hinted that it was adopting the purpose limitation to avoid constitutional concerns.

A court may consider "only the rationales the [agency] actually offered in its decision." *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011); *see Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). By relying instead on a discredited constitutional theory the FEC never advanced, the panel opinion creates conflict in a significant area.

II. THE PANEL'S ADMINISTRATIVE-LAW ANALYSIS FLOUTS PRECEDENT

The FEC's rule allows funders of electioneering communications to evade disclosure, thwarting BCRA's purposes. *McConnell*, 540 U.S. at 197. Many commenters raised this concern, JA216, 229, 237, 245-247, 256-258, but the FEC never addressed the likelihood that its rule would drastically reduce disclosure.

"At *Chevron* step two and under the APA, [courts] must reject administrative constructions of [a] statute … that frustrate the policy that Congress sought to implement." *Shays*, 528 F.3d at 919; *see also Village of Barrington*, 636 F.3d at 660 (court must "determine whether [the agency's] interpretation is 'rationally related to the goals of' the statute"). In *Shays*, the Court rejected a FEC rule implementing BCRA's ban on coordinated communications between campaigns and outside groups because it "not only ma[de] it eminently possible for soft money to be 'used in connection with federal elections,' but also

provide[d] a clear roadmap for doing so, directly frustrating BCRA's purpose" and "lead[ing] to the exact perception and possibility of corruption Congress sought to stamp out." 528 F.3d at 925 (citation omitted); *id.* at 926-927 (rule "'create[d] the potential for gross abuse'" and "'unduly compromise[d]' [BCRA's] purpose"); *id.* at 927-928 (rule created "enormous loophole" that "reopen[ed] the very … floodgates BCRA aimed to close").

This case is indistinguishable from *Shays*. Like the coordinated-communication rule, the purpose test permits corporations and unions that wish to circumvent BCRA's disclosure requirements to do so easily by soliciting money for general support and instructing (or merely permitting) donors to remain silent about their intent. Moreover, as in *Shays*, the FEC not only failed to consider the likelihood that its rule would allow BCRA to be evaded, but gave "savvy campaign operators" a "roadmap" of how to do so. *Shays*, 528 F.3d at 925, 928.

Neither Intervenors nor the panel claimed that *Shays* could be distinguished. Indeed, the panel acknowledged that *Shays* supports the district court's decision. Op. 13.[5] But the panel rejected the reasoning of *Shays*—decided in 2008—as a

[5] The panel's erroneous suggestion that the FEC had to "accommodat[e] … conflicting policies" under the First Amendment, Op. 14, provides no basis for distinguishing *Shays* and related decisions, which invalidated agency action that frustrated congressional purpose even where statutes balanced rival objectives. *See Shays*, 528 F.3d at 925-926 (in accommodating First Amendment, FEC must "establish, consistent with APA standards," that its rule "draw[s] a rational line" in light of congressional purpose); *Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861, 866

"particularly results-oriented brand of purposivism" that the law "has moved beyond." Op. 13-14. Instead, the panel held that "overtures to … 'purpose'" are an improper basis for setting aside agency action. Op. 15-16. And it made mere linguistic possibility the touchstone of the reasonableness of an agency's statutory construction, *id.*, thereby collapsing *Chevron*'s second step into the first and ignoring whether the construction rationally serves the statute's goals.

That analysis contravenes not only *Shays*, but also the precedent on which it drew. *See Shays*, 528 F.3d at 919, 925 (citing *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988), and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)). Under *Continental Air Lines*, "an agency interpretation d[oes] not merit judicial approbation if it actually frustrate[s] the policies Congress was seeking to effectuate." 843 F.2d at 1453. This Court has frequently applied that principle to invalidate agency action. *E.g.*, *Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865-867 (D.C. Cir. 2000) (invalidating rule where agency "violated the basic requirement that its actions must 'not deviate from or ignore the ascertainable legislative intent'"); *Kerr-McGee Chem. Corp. v. U.S. Nuclear Regulatory Comm'n*, 903 F.2d 1, 6-8 (D.C. Cir. 1990) (invalidating regulation that "recreate[d] the regulatory gap that the [statute] was designed to eliminate" "by attaching the

---

(D.C. Cir. 2000) (even when statute's purpose was "constrained … by" other goals, rule was invalid where agency did not reconcile its rule with that purpose).

narrowest possible meaning" to ambiguous language); *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1261 (D.C. Cir. 1990) (holding agency interpretation unreasonable in light of its "potential wholly to undermine the [statutory] regime"). The Supreme Court has done so as well. *E.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2707-2712 (2015) (although statute was "capacious[]" and "flexib[le]," agency interpretation that clashed with statutory context, "'fail[ed] to consider an important aspect of the problem,'" and "overlook[ed] the whole point" of the statutory provision was unreasonable). If the law "has moved beyond" the reasoning employed in those decisions, Op. 13, that is for the en banc Court to say.

III. THE PANEL REACHED THE WRONG RESULT IN AN EXCEPTIONALLY IMPORTANT CASE

Effective disclosure was a centerpiece of BCRA and has become a linchpin of campaign-finance jurisprudence. *Citizens United*, 130 S. Ct. at 368-371; *McCutcheon*, 134 S. Ct. at 1459-1460; *McConnell*, 540 U.S. at 196-199. After careful review of the administrative record, the district court invalidated the FEC rule on several grounds, including that it "create[s] an easily exploited loophole," with "little or no[]" support in the record, that threatens "to swallow [BCRA's disclosure] rule entirely." JA406-407, 447. In reversing that decision, the panel committed several additional errors and ignored entire arguments. And as a result of those errors, the panel sustained a rule that cripples BCRA's disclosure regime.

Among the other errors, the panel found the purpose test reasonable because it mirrors language Congress included in reporting requirements applicable to independent expenditures. Op. 12.[6] But the FEC rejected that very approach in its 2003 rulemaking, finding that the rules governing independent expenditures should not apply to electioneering communications under BCRA given several differences between the statutes. 68 Fed. Reg. at 413. For example, the FEC emphasized in 2003 that BCRA omits any reference to purpose and that its requirements are tailored in other ways that reduce any burden associated with disclosure. *Id.* In 2007, the FEC neither acknowledged its reversal nor explained why it was no longer inappropriate to import a limitation from other provisions that Congress omitted in BCRA. The panel ignored this gap in the FEC's reasoning.

The panel also credited the FEC's "burden" and "support" theories—which the panel conceded were "difficult to discern," left many questions unanswered, and "were not corroborated with any hard evidence," Op. 20, 23—without addressing the fact that funders of electioneering communications can avoid those alleged concerns by using a segregated bank account. 52 U.S.C. § 30104(f)(2)(E). Many commenters noted that option, JA214-215, 238-240, 256-258, and the FEC cited it in 2003 as a basis to reject a narrow disclosure rule for corporate spenders,

[6] Pre-BCRA provisions governing "independent expenditures"—a separate category of campaign spending—require disclosure of contributions "made for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C).

68 Fed. Reg. at 413.[7] But in 2007, the FEC ignored that option without addressing or explaining its about-face. *Cf. American Radio Relay League v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (agency must "consider responsible alternatives to its chosen policy" and "give a reasoned explanation" for rejecting them); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 412 (D.C. Cir. 1996) (Sentelle, J., concurring in part and dissenting in part) (where agency rejects suitable alternatives without discussion, "court cannot reassure itself that the agency did not act arbitrarily").

The FEC could also have avoided any concern, as commenters suggested, by clarifying that shareholders and customers are not "donors" and that business income or funds that entail no "truly … donative act" are not "donations" or "contributions" and need not be disclosed. JA189-191, 194, 205-206, 212-213, 216-218, 310-311. The FEC did not address that option. The panel excused that failure by asserting that exempting business income and similar revenue from disclosure "was not … viable." Op. 22-23. But the FEC never advanced that view; to the contrary, it took a similar approach in 2003 and in the period between the district court's first decision and this Court's first reversal.[8] And neither the

---

[7] Even in 2003, BCRA's disclosure rules applied to some nonprofit corporations, as well as unincorporated trade associations and membership groups, partnerships, and other unincorporated organizations. 67 Fed. Reg. 51,137 (Aug. 7, 2002).

[8] *See* 68 Fed. Reg. at 414; News Release, FEC Statement on *Van Hollen v. FEC* (July 27, 2012), http://fec.gov/press/press2012/20120727_VanHollen_

FEC nor the panel explained why substituting a massively underinclusive regime for one perceived to be overinclusive was consistent with BCRA's objectives.

Finally, the panel ignored the FEC's failure to consider that its rule would facilitate evasion of any duty to disclose. Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Commenters warned that a narrow approach "w[ould] lead again to a proliferation of issue ads by entities with misleading names," JA43, as the decline in disclosure has confirmed, JA326; *see Shays*, 528 F.3d at 927 ("BCRA reflects 'the hard lesson of circumvention' Congress has learned from 'the entire history of campaign finance regulation'"). The FEC's failure to consider that outcome was arbitrary and capricious. Yet the panel did not even address that point.

These consequential errors—and the panel's express repudiation of settled precedent—warrant en banc review to secure the uniformity of the Court's decisions and to ensure a correct determination of the validity of this exceptionally important regulation. Fed. R. App. P. 35(a).

CONCLUSION

The Court should grant rehearing en banc and affirm the district court.

---

v_FEC.shtml. Moreover, to maintain tax-exempt status, § 501(c) organizations must already distinguish donations from unrelated business taxable income and other revenue. 26 U.S.C. § 6033(b)(5); Treas. Reg. § 1.6033-2(a)(2)(ii)(f).

Respectfully submitted,

/s/ Catherine M.A. Carroll

CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Avenue NW
Washington, DC 20036
(202) 355-9610

ROGER M. WITTEN
FIONA J. KAYE
STEPHANIE SIMON
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8800

DONALD J. SIMON
SONOSKY CHAMBERS SACHSE
ENDRESON & PERRY, LLP
1425 K Street NW, Suite 600
Washington, DC 20005
(202) 682-0240

TREVOR POTTER
J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, DC 20002
(202) 736-2200

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

March 4, 2016

ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 20, 2015 Decided January 21, 2016

No. 15-5016

CHRISTOPHER VAN HOLLEN, JR.,
APPELLEE

v.

FEDERAL ELECTION COMMISSION,
APPELLEES

CENTER FOR INDIVIDUAL FREEDOM AND HISPANIC LEADERSHIP FUND,
INTERVENOR-APPELLANTS

Consolidated with 15-5017

Appeals from the United States District Court
for the District of Columbia
(No. 1:11-cv-00766)

Thomas W. Kirby argued the cause for appellant Center for Individual Freedom. With him on the briefs were *Jan Witold Baran*, *Caleb P. Burns*, and *Samuel B. Gedge.*

Jason Torchinsky was on the brief for appellant Hispanic Leadership Fund.

Daniel Z. Epstein and *Joshua N. Schopf* were on the brief for *amicus curiae* Cause of Action in support of appellants.

Catherine M.A. Carroll argued the cause for appellee Christopher Van Hollen Jr. With her on the brief were *Roger M. Witten*, *Donald J. Simon*, *Trevor Potter*, *J. Gerald Hebert*, *Fred Wertheimer*, and *Scott L. Nelson*.

Kevin A. Deeley, Acting Associate General Counsel, *Harry J. Summers*, Assistant General Counsel, *Holly J. Baker* and *Seth E. Nesin*, Attorneys, Federal Election Commission, were on the brief for appellee Federal Election Commission.

Before: BROWN, *Circuit Judge*, SENTELLE and RANDOLPH, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: The arc of campaign finance law has been ambivalent, bending toward speech and disclosure. Indeed what has made this area of election law so challenging is that these two values exist in unmistakable tension. Disclosure chills speech. Speech without disclosure risks corruption. And the Supreme Court's track record of expanding who may speak while simultaneously blessing robust disclosure rules has set these two values on an ineluctable collision course.

That tension is on full display in this appeal. At issue is whether to uphold the FEC's rule requiring corporations and labor organizations to disclose only those donations "made for the purpose of furthering electioneering communications" or whether the Bipartisan Campaign Reform Act requires disclosure of *all* donations irrespective of donative purpose.

Christopher Van Hollen, Jr.—a member of the United States House of Representatives—challenged this rule under the familiar *Chevron* and *State Farm* frameworks. In a previous judgment, we reversed the district court and held the rule survived *Chevron* Step One. We now consider whether the rule survives Step Two and *State Farm*'s "arbitrary and capricious" test. We hold that it does.

I

Congressman Van Hollen's challenge to the FEC's disclosure rules is best understood in its broader context, the century-long conflict over campaign finance reform. That context is a protean cascade of perspectives, supplied by each branch of government, on how best to safeguard democracy without unnecessarily sacrificing liberty.

Throughout the twentieth and early twenty-first centuries, campaign finance reform efforts endeavored both to ban corporate contributions and to expand disclosure requirements. These efforts date as far back as President Theodore Roosevelt's State of the Union address in 1905. Nine years earlier, William McKinley defeated populist William Jennings Bryan with a war chest of $16 million, dwarfing Bryan's paltry $600,000. Public opinion steadily galvanized in favor of campaign finance reform, prompting Roosevelt to champion the cause. Roosevelt urged Congress to forbid "[a]ll contributions by corporations . . . for any political purpose" and to "secure by law the full and verified publication in detail of all [political contributions]." President Theodore Roosevelt, State of the Union Address (Dec. 5, 1905), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29546. Two years later, Congress heeded his call with the Tillman Act of 1907. *See* Ch. 420, 34 Stat. 864.

The Tillman Act was just the beginning. Over the ensuing decades, Congress passed, in piecemeal fashion, several reform measures. The Federal Corrupt Practices Act, the Hatch Act, the Smith-Connolly Act of 1943, and the Taft-Hartley Act of 1947 each contained provisions aimed at tackling political corruption in campaign finance, either through restricting speech or requiring disclosure. And in 1974, Congress completed a massive campaign finance overhaul with passage of the Federal Election Campaign Act (FECA).

FECA confronted headlong the "who" and "how much" of campaign contributions. The Act established caps on contributions and expenditures, restricted corporations and unions from making independent expenditures, and required that the identities of any individuals making a contribution or expenditure be disclosed to the newly created Federal Elections Commission. The Supreme Court blessed most of FECA's reforms in *Buckley v. Valeo*, 424 U.S. 1 (1976), striking only the caps on individual, candidate, and campaign expenditures. But critically, while upholding FECA's disclosure requirements, the Court construed them narrowly to reach only "contributions earmarked for political purposes" and "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

The Court's gloss on FECA's disclosure requirements turned out to be a pyrrhic victory for campaign finance reformers. The "express advocacy" carve-out opened a gaping new loophole: advertising expenditures that eschewed magic words like "elect Mary Smith" or "defeat John Brown" could now go undisclosed. Corporations, unions, and political parties took full advantage by sponsoring "issue ads," which

were functionally equivalent to express advocacy but comfortably skirted FECA's disclosure requirements.

Determined to close this loop, Congress passed the Bipartisan Campaign Reform Act (BCRA) in 2002. BCRA recognized and regulated a new category of political advertising called "electioneering communications," defined as communications that "refer[] to a clearly identified candidate" "made within" sixty days of a general election or thirty days of a primary election. 2 U.S.C. § 434(f)(3)(A)(i) (2002). These communications were precisely the sort left unregulated by *Buckley*'s construction of FECA, and BCRA now subjected them to robust disclosure requirements. It required any person making an expenditure (referred to as a "disbursement") totaling more than $10,000 to disclose "all persons sharing the costs of the disbursement." *Id.* §§ 434(f)(2)(A), (B), and (D). BCRA also went one step further: it altogether banned corporations and unions from using their general treasuries to fund electioneering communications. *Id.* § 441b(b)(2). These provisions were upheld by a sharply divided Court in *McConnell v. FEC*, 540 U.S. 93 (2003).

In BCRA's wake, the FEC promulgated several rules to enforce the various reforms, two of which are relevant to today's appeal. First, the FEC promulgated a rule enforcing BCRA's ban on corporate and union expenditures for electioneering communications. Electioneering Communications, 67 Fed. Reg. 65190, 65190 (Oct. 23, 2002). Second, the FEC promulgated a rule to enforce BCRA's requirement for disclosure of "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement." 52 U.S.C. 434(f)(2)(E)–(F). The FEC's rule mirrored this language almost identically but replaced the words "contributor" and "contributed" with "donor" and "donated." Bipartisan

Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 420 (Jan. 3, 2003). Whatever the import of that choice, it is clear that as of 2003, (1) corporations and unions could not fund electioneering communications out of their general treasuries, and (2) with certain exceptions not relevant to this opinion, persons making disbursements for electioneering communications had to disclose the names of *anyone* who donated $1,000 or more to them.

But the Supreme Court would soon deliver a heavy blow to BCRA's attempt to regulate electioneering communications. With its ruling in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), another sharply divided decision, and this time without even a majority opinion, the Court held corporations and unions could not be barred from electioneering communications unless they are "the functional equivalent of express advocacy." *Id.* at 465. And an ad is only the functional equivalent of express advocacy, the Court said, when it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469–70. The three ads before the Court in *Wisconsin Right to Life* couldn't satisfy this exacting test, and neither, it seems, could the vast majority of issue ads funded through independent expenditures. *See Id.* at 476. For restrictions on core political speech, the Court announced it would "give the benefit of the doubt to speech, not censorship." *Id.* at 482. BCRA's prohibition on corporate- and union-funded electioneering communications, beaten and tattered by *Wisconsin Right to Life*, was left on life support.[1]

[1] The Court's subsequent decision in *Citizens United v. FEC* pulled the plug on this ban once and for all, ruling unconstitutional the prohibition on corporate- and union-funded "express advocacy." 558 U.S. 310, 365 (2010).

The FEC was now left to decide how BCRA's disclosure requirements should apply to a class of speakers Congress never expected would have anything to disclose. The FEC published a Notice of Proposed Rulemaking (NPRM) and requested comments on proposed rules that "would implement the Supreme Court's decision in *Wisconsin Right to Life*." 72 Fed. Reg. 50261, 50262 (Aug. 31, 2007). That NPRM advanced two proposals for applying BCRA's disclosure provisions to corporations and unions. Under the first, the FEC would simply apply the existing disclosure requirements for individuals and qualified nonprofit corporations (QNCs) to corporations and unions, which would require disclosure of *all* $1,000 contributors. *Id.* Under the second, the FEC proposed to exempt corporations and unions from the disclosure requirements altogether. *Id.*

The FEC received twenty-seven comments and held a two-day hearing. Rather than embracing either of the NPRM's proposals, it adopted a middle path. *See* Electioneering Communications, 72 Fed. Reg. 72899, 72900 (Dec. 26, 2007). Corporations and unions would not be altogether exempted, but neither would they be required to disclose every donation totaling $1,000 or more. *Id.* Rather, corporations and unions would be required to disclose all donations totaling $1,000 or more that were "made for the purpose of furthering electioneering communications." *Id.* at 72911. This new "purpose requirement" set corporate and union electioneering communications apart from communications funded by other persons, who were still required to disclose all donations regardless of purpose.

Representative Christopher Van Hollen challenged the FEC's new purpose requirement and persuaded the district court that it violated BCRA's text. *Van Hollen v. FEC*, 851 F.Supp.2d 69 (D.D.C. 2012); *see Chevron, USA, Inc. v. Nat.*

Res. Def. Council, Inc., 467 U.S. 837 (1984). That decision was appealed to and reversed by a panel of this court, which concluded BCRA's disclosure provisions were ambiguous, and the FEC's rule cleared Chevron Step One. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012). Congress's use of the terms "contributors" and "contributed," the panel said, is "anything but clear." *Id.* The panel did "not agree with the District Court that the[se] words . . . cannot be construed to include a 'purpose' requirement." *Id.* However, it concluded that it was "in no position to assess the parties' arguments on whether § 104.20(c)(9) is reasonable, and thus entitled to deference under *Chevron* Step Two, or whether the regulation survives arbitrary and capricious review." *Id.* at 112. The panel sent the case back to the district court to sort these questions out.[2]

On remand, the district court concluded that the FEC's rule failed at both the *Chevron* Step Two and arbitrary and capricious stages. The Center for Individual Freedom filed its notice of appeal shortly thereafter.[3] We review the FEC's action de novo, according no particular deference to the

[2] Technically, the panel instructed that the matter be referred back to the FEC in order to give it a chance to revisit and clarify its rule. *Ctr. for Individual Freedom*, 694 F.3d at 112. But when the FEC declined to comment further, Van Hollen's challenge in district court resumed.

[3] Our previous ruling affirmed the Center for Individual Freedom's and the Hispanic Leadership Fund's standing to appeal the district court's judgment. *Ctr. for Individual Freedom*, 694 F.3d at 110 ("We are satisfied that the Intervenors have standing to pursue this appeal, for they have convincingly demonstrated that the District Court's decision . . . has caused them injury that will be redressed by a favorable decision from this court."). As the posture of this appeal is identical to the previous, we have neither the occasion nor inclination to reconsider our prior determination.

district court's judgment. *Fox v. Clinton*, 684 F.3d 67, 74 (D.C. Cir. 2012).

II

Our analysis of Van Hollen's challenge picks up where our prior judgment left off. Van Hollen argues the FEC's disclosure rule is both an impermissible construction of BCRA and an arbitrary and capricious use of the FEC's regulatory authority, and the district court agreed on both scores. For the reasons outlined below, we do not.

A

We are first asked to decide whether the FEC's purpose requirement is "based on a permissible construction of [BCRA] in light of its language, structure, and purpose." *Nat'l Treasury Emp. Union v. FLRA*, 754 F.3d 1031, 1042 (D.C. Cir. 2014). This inquiry, often called *Chevron* Step Two, "does not require the best interpretation, only a reasonable one." *Am. Forest and Paper Ass'n v. FERC*, 550 F.3d 1179, 1183 (D.C. Cir. 2008). "We are bound to uphold agency interpretations . . . regardless whether there may be other reasonable, or even more reasonable, views." *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 296 (D.C. Cir. 2013). In this case, BCRA is ambiguous, and the FEC's construction of it is reasonable. We defer accordingly.

The starting place for any *Chevron* Step Two inquiry is the text of the statute. BCRA states, in relevant part:

> "Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any

> calendar year shall . . . file with the Commission a statement containing . . . the names and addresses of *all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement*."

52 U.S.C. § 30104(f) (emphasis added). This provision directs the disclosure of "all contributors" and omits any explicit mention of a purpose requirement. By contrast, the neighboring section governing express advocacy directs disclosure of "each person who made a contribution . . . for the purpose of furthering an independent expenditure." *Id.* § 30104(c)(2)(C). The nonparallel nature of these two related provisions, Van Hollen contends, renders impermissible the FEC's purpose requirement. At the same time, FECA elsewhere defines "contribution," a term derived from the same root as the words in the challenged section, as a donation "by any person *for the purpose of influencing any election for Federal office*." 52 U.S.C. § 30101(8)(A)(i) (emphasis added). And the FEC intentionally drew upon the express advocacy purpose requirement as precedent for resolving the ambiguity in the electioneering communications provision. *See* 72 Fed. Reg. at 72911 n.22. Our question, then, is this: Does BCRA's text permit the FEC's purpose requirement?

To answer this, we must first remember what we've already settled. In our previous ruling, we concluded Congress did not have "an intention on the precise question" whether a purpose requirement is permissible as "it is doubtful that . . . Congress even anticipated the circumstances that the FEC faced when it promulgated [this regulation]." *Ctr. for Individual Freedom*, 694 F.3d at 111. We noted "it was due to the complicated situation that confronted the agency in 2007 and the absence of plain meaning in the

statute that the FEC acted . . . to fill 'a gap' in the statute." *Id.* But while we might have stopped there, our analysis went beyond merely highlighting BCRA's ambiguity. We also weighed in on the precise interpretive question relevant to Step Two. We disagreed with the district court "that the words 'contributors' and 'contributed' . . . cannot be construed to include a 'purpose' requirement" and cited multiple dictionaries that "define 'contribute' in a way that is consistent with the regulation." *Id.* at 110–11. In other words, we held that whether corporations and unions should be required to disclose every person who gave $1,000 or more or only those who gave for the purpose of influencing electioneering communications was an open policy question, one Congress left for the FEC to decide.

That decision largely foreordains our *Chevron* Step Two answer. In deciding the Step One question, we did not limit our analysis to whether BCRA is ambiguous; we specifically concluded the FEC's interpretation of "contributors" was within the range of linguistically permissible constructions. Having thus already concluded section 30104(f) *could* be construed to include a purpose requirement, it would be odd for us to reverse course now and declare it *could not*.

But even setting aside that we all but answered the Step Two question last time around, the FEC's purpose requirement is more than just a permissible construction of BCRA; it's a persuasive one. For one, as suggested above, the FEC's purpose requirement is consistent with the purpose-laden definition of "contribution" set forth in FECA's very own definitional section. *See* 52 U.S.C. § 30101(8)(A)(i) (defining "contribution" as "anything of value made . . . for the purpose of influencing [a federal] election"). "

Moreover, the FEC's purpose requirement regulates electioneering communication disclosures in precisely the same way BCRA itself regulates express advocacy disclosures. In a neighboring provision, BCRA requires a person making an express advocacy expenditure to disclose only those "person[s] who made a contribution . . . for the purpose of furthering an independent expenditure." *Id.* § 30104(c)(2)(C). Thus, to resolve the ambiguity it faced in *Wisconsin Right to Life*'s wake, the FEC simply opted for an approach already endorsed by Congress in a related context. That "Congress codified the very approach" the FEC now adopts in a similar context is "highly persuasive in demonstrating" the FEC's construction of BCRA "does not reflect an unreasonable interpretation of the statute." *Public Citizen v. Carlin*, 184 F.3d 900, 906 (D.C. Cir. 1999).

Van Hollen counters this point, arguing Congress's failure to include a purpose requirement in the electioneering communication context—which it included for express advocacy— textually precludes the FEC from later doing so. This is a classic invocation of the *expressio unius* canon of construction, and if we were interpreting this statute directly rather than filtered through an agency's construction, Van Hollen's argument would have serious bite. However, as is usually the case, the procedural posture matters. The *expressio unius* canon operates differently in our review of agency action than it does when we are directly interpreting a statute. *See Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("[T]his canon has little force in the administrative setting."); *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) ("Whatever [*expressio unius*'s] general force, we think it an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved."). In scenarios of precisely this ilk, "we

have consistently recognized that a congressional mandate in one section and silence in another often suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion." *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009). This approach dovetails appropriately with the wide latitude we afford agencies when interpreting statutes: we do not demand the *best* interpretation, only a reasonable one.

Nor do Van Hollen's other arguments persuade us that the FEC's purpose requirement was an impermissible construction of BCRA. Van Hollen contends the requirement "frustrate[s] the policy that Congress sought to implement" and therefore must be rejected. *See Shays v. FEC*, 528 F.3d 914, 919 (D.C. Cir. 2008). Specifically, he asserts the FEC's rule violates BCRA's primary purpose of "improv[ing] disclosure" and "curtail[ing] circumvention of campaign finance rules," allowing contributors to "avoid reporting altogether" by simply "transmitting funds but remaining silent about their intended use." Van Hollen Br. at 27–28. And here, his invocation of our *Shays* decision does lend a measure of credibility. A panel of this court invalidated a regulation allowing "candidates to evade—almost completely—BCRA's restrictions on the use of soft money" because it "frustrate[d] Congress's goal of prohibiting soft money" in federal elections. 528 F.3d at 925. According to Van Hollen (and the district court), since "the legislative history of the BCRA makes it clear that the purpose behind the disclosure requirements was to enable voters to be informed about who was trying to influence their decisions," the purpose requirement's "limiting language" similarly frustrates BCRA. *Van Hollen*, 74 F.Supp.3d at 433–34.

But the art of statutory construction has moved beyond

this particularly results-oriented brand of purposivism. Just because *one* of BCRA's purposes (even *chief* purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive.[4] Statutes are hardly, if ever, singular in purpose. Rather, most laws seek to achieve a variety of ends in a way that reflects the give-and-take of the legislative process. *See Patel v. USCIS*, 732 F.3d 633, 636 (6th Cir. 2013) ("[I]t is folly to talk about 'the purpose' of the statute when the statute reflects a compromise between multiple purposes."). That BCRA seeks more robust disclosure does not mean Congress wasn't also concerned with, say, the conflicting privacy interests that hang in the balance. In fact, Congress "took great care in crafting . . . language to avoid violating the important p[]rinciples in the First Amendment." 147 CONG. REC. S3033 (daily ed. Mar. 28, 2001) (statement of Sen. Jeffords). *Chevron* demands our deference when an agency's interpretation is "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." 467 U.S. at 845.

Moreover, the district court's invocation of such a sweeping disclosure purpose contradicts the very statute whose purposes it purports to protect. BCRA does *not* require disclosure at all costs; it *limits* disclosure in a number of

---

[4] At oral argument, Van Hollen's counsel conceded that BCRA did not call for unbounded disclosure. The district court, however, was less sanguine, suggesting unbounded disclosure was BCRA's aim:

> [I]t was contrary to the policy goal that Congress intended to implement for the Commission to add limiting language to its regulations when the aim of that language was—as the FEC put it—'to ensure that disclosure of the newly-permitted electioneering communications would be narrowly tailored.' Congress did not call for narrow tailoring; it called for just the opposite.

Van Hollen, 74 F.Supp.3d at 434.

ways. For example, for electioneering communications under $10,000, no disclosures are necessary, *see* 52 U.S.C. § 30104(f)(1), and for those over $10,000, BCRA does not require disclosure of those who contribute $999 or less, *see id.* § 30104(f)(2)(E). These disclosure limitations suggest Congress's purposes were far more nuanced than the district court's characterization concedes.

To be sure, a statute's purpose is *relevant* to *Chevron*'s Step Two inquiry. *See UC Health v. NLRB*, 803 F.3d 669, 675 (D.C. Cir. 2015) (requiring deference so long as an agency construction is "reasonable and consistent with the statute's purpose"). But we are judges, not legislators, and it behooves us to maintain a healthy sense of modesty regarding our ability to discern the scope and priority of purposes the BCRA Congress pursued. "What judges believe Congress 'meant' (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, i.e., *should* have meant." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting). What matters here is that Congress left the meaning of "contributor" ambiguous. Congressional silence of this sort is, in *Chevron* terms, "an implicit delegation from Congress *to the agency* to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (emphasis added). It is a transfer of authority to the FEC, whose task it then became "not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made *by the agency rather than Congress*." *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (emphasis added). The FEC did precisely that, deciding to fill the gap left in BCRA with the same purpose-requirement Congress adopted in related contexts. We are loathe to upset such a policy

judgment based on nothing more than highly generalized overtures to BCRA's "primary purpose."

Because the FEC's purpose requirement is consistent with BCRA's text, history, and purposes, it easily clears the *Chevron* Step Two hurdle.

B

We are next asked to decide whether the FEC's purpose requirement is "arbitrary and capricious." The Administrative Procedure Act deems unlawful any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2), but to invalidate a regulation under *State Farm* review, *see Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), a challenger must show the agency action is not a product of reasoned decisionmaking, *see Fox*, 684 F.3d at 74–75. This is "a heavy burden," since *State Farm* entails a "very deferential scope of review" that forbids a court from "substitut[ing] its judgment for that of the agency." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000). The APA's arbitrary and capricious standard requires, *inter alia*, that an agency adequately explain its action so that a reviewing court can "evaluate the agency's rationale at the time of decision." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

This appeal presents two *State Farm* challenges. First, the district court held the FEC acted unreasonably in revisiting its original 2003 rule, concluding the FEC's subsequent action was unnecessary because the Supreme Court's *Wisconsin Right to Life* decision left existing disclosure provisions "untouched." *Van Hollen*, 74 F.Supp.3d at 419. Second, Van

Hollen contends the FEC failed to adequately explain its decision to adopt the purpose requirement.

1

The district court held "it was unreasonable for the FEC to alter the statutory reporting requirements on the stated grounds that it was implementing the Supreme Court's decision in [*Wisconsin Right to Life*]" as "nothing" in that decision "required narrowing the disclosure requirements." *Van Hollen*, 74 F. Supp. 3d at 419.[5]

But in focusing on the opinion's silence regarding disclosure, *id.* at 418–19, the district court downplays *Wisconsin Right to Life*'s disruptive import. Before 2007, the *modus operandi* of campaign finance law had always been that Congress could restrict corporate and union speech in the interest of deterring "corruption" or "the appearance of corruption." *See Buckley*, 424 U.S. at 26. But *Wisconsin Right to Life* marked the first chink in that conventional wisdom's armor, an onslaught that would ultimately culminate in the most expansive, speech-protective campaign finance decision in American history, *Citizens United.* After *Wisconsin Right to Life*, corporations and unions suddenly could expend general treasury funds for issue ads, a result Congress had explicitly prohibited under BCRA. An entirely new class of

[5] The court apparently proceeds under *Chevron* Step Two, but curiously concludes "[t]he starting point of the second step of the *Chevron* analysis must be the stated reason behind the regulation," and attempts to assess the *adequacy* of that explanation. *See Van Hollen*, 74 F. Supp. 3d at 415. This seems more like *State Farm* than *Chevron*. So, while the district court speaks of the FEC's "unreasonable" action, we think it more appropriate to consider whether its decision to revisit its previous regulation was "arbitrary."

previously silenced speakers was now subject to BCRA's disclosure requirements. And just as the FEC was authorized to decide how to implement BCRA's disclosure provisions for qualified speakers in 2003, it was authorized to decide how to implement BCRA's disclosure provisions for these newly qualified speakers in 2007, too.

It is true *Wisconsin Right to Life* "said absolutely nothing" about the challenged disclosure provisions, but that does not mean the FEC was barred from promulgating a new regulation. An agency "must consider varying interpretations and the wisdom of its policy on a continuing basis . . . in response to changed factual circumstances." *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The Supreme Court's decision brought an entirely new class of speakers within reach of BCRA's disclosure requirements, a class altogether different from those already subjected to them. Constitutional decisions of this magnitude unquestionably justify an agency in updating its existing regulations to appropriately compensate for changed circumstances.

2

Van Hollen also argues, and the district court agreed, that the FEC failed to adequately explain its decision to adopt the purpose requirement. While an agency is required to adequately explain its decision, this does not mean that its explanation "must be a model of analytical precision." *Dickson v. Sec. of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995). It is enough that a reviewing court can reasonably discern the agency's analytical path. *Bowman Transp. Inc. v. Ark.-Best Freight Sys. Inc.*, 419 U.S. 281, 286 (1974). That low hurdle is cleared where the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for

its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

Here, we acknowledge the FEC's explanation was *not* one of "ideal clarity," but, again, ideal clarity is not the standard. The FEC advanced three explanations for its purpose requirement, which we refer to as the "support," "burden," and "privacy" rationales. 72 Fed. Reg. at 72901, 72911. Because we can reasonably discern the FEC's analytical path from these three rationales, we uphold its purpose requirement against Van Hollen's challenge.

1. The Support Rationale

The FEC was concerned that some individuals who contribute to a union or corporation's general treasury may not support that entity's electioneering communications, and a robust disclosure rule would thus mislead voters as to who really supports the communications. The agency explained,

> A corporation's general treasury funds are often largely comprised of funds *received from investors such as shareholders* who have acquired stock in the corporation and *customers who have purchased the corporation's products or services*, or in the case of a *non-profit corporation, donations from persons who support the corporation's mission. These investors, customers, and donors do not necessarily support the corporation's electioneering communications.* Likewise, the general treasury funds of labor organizations and incorporated membership organizations are *composed of member dues obtained from individuals and other members who may not*

> *necessarily support the organization's electioneering communications.*

72 Fed. Reg. at 72911 (emphases added). It's hard to escape the intuitive logic behind this rationale. Imagine the following not unlikely scenario. A Republican donates $5,000 to the American Cancer Society (ACS), eager to fund the ongoing search for a cure. Meanwhile, Republicans in Congress, aware of a growth in private donations to ACS, push for fewer federal grants to scientists studying cancer in order to reduce the deficit. In response to their push, the ACS runs targeted advertisements against those Republicans, leading to the defeat of several candidates in the upcoming election. Wouldn't a rule requiring disclosure of ACS's Republican donor, who did *not* support issue ads against her own party, convey some misinformation to the public about who *supported* the advertisements?

Granted, as Van Hollen is quick to point out, the FEC's assertions here were not corroborated with any hard evidence showing contributors who disagree with their chosen corporation's electioneering communications. But these assertions "are, at the very least, speculation based firmly in common sense and economic reality." *Verizon v. FCC.*, 740 F.3d 623, 646 (D.C. Cir. 2014); *see also San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44 (D.C. Cir. 1986) ("[T]he Commission is not required to hold a hearing to prove what common sense shows."). Here, the FEC's assertion that some number of a corporation's investors, a nonprofit's donors, or a union's members may generally support the entity but not its electioneering communications seems fairly intuitive, at least enough to pass *State Farm*'s "very deferential scope of review." *Transmission Access*, 225 F.3d at 714.

2. The Burden Rationale

This second rationale displayed the FEC's concern not for the interests of contributors or the public, but with the onus placed on the disclosing entity to curate an exhaustive list of every individual who provided more than $1,000. The FEC explained,

> Furthermore, witnesses at the Commission's hearing testified that the effort necessary to identify those persons who provided funds totaling $1,000 or more to a corporation or labor organization would be very costly and require an inordinate amount of effort. Indeed, one witness noted that labor organizations would have to disclose more persons to the Commission under the ECs rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act.

72 Fed. Reg. at 72911. As further support for its explanation, the FEC noted that "all commenters who addressed disclosure of electioneering communications stated that corporations and labor organizations should not be required to report the sources of funds that made up their general treasury funds." *Id.* And one commenter urged an exemption for nonprofits, stating that "nonprofit corporations have a wide variety of sources of income, and unlimited disclosure would create a heavy burden for them." *Id.*

Van Hollen suggests this explanation is inadequate for a couple of reasons. First, he argues the FEC did not support its assertion that identifying contributors would be "very costly and require an inordinate amount of effort" with anything more than "conclusory assertions." Van Hollen Br. at 39. But

this isn't entirely accurate. The Commission cited to one commenter who testified "that labor organizations would have to disclose more persons to the Commission under the [electioneering communications] rules than they would disclose to the Department of Labor," and another commenter who testified that the "reporting requirements would far exceed all other reporting requirements that currently apply to nonprofit organizations, such as reporting to the Internal Revenue Service." 72 Fed. Reg. at 72911. These assertions, relied upon by the FEC, are uncontradicted in the record, and "[w]ithout any contrary evidence to disprove these findings," Van Hollen has "not shown any arbitrary and capricious action." *Agape Church v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013).

Second, Van Hollen suggests the FEC could have mitigated the cost of compliance by clarifying that business income (such as from customers or shareholders) and union dues do not entail "truly donative acts" and are therefore exempt from disclosure. Van Hollen Br. at 43. He points out that the FEC took a similar approach in promulgating the 2003 version of the disclosure rules, clarifying that "individuals are required to disclose donations received, which does not include salary, wages, or other compensation for employment." 68 Fed. Reg. at 414. By exempting these sources of revenue, which are less relevant to voters anyway, the overall compliance costs of the regulation would drop. But this alternative would only reduce the disclosure burdens borne by for-profit corporations and unions. Nonprofit corporations, which, as we've already noted, faced reporting requirements that "would far exceed all other reporting requirements that currently apply to nonprofit[s]," obtain no benefit from this alternative, and the FEC was justifiably concerned about their compliance costs, too. Accordingly, this was not a viable alternative. Since agencies are only required

to consider "significant and *viable*" alternatives, *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (emphasis added), we find no error in the FEC's decision not to adopt this only partially mitigating alternative.

To be sure, the FEC's explanation was far from ideal, and it is more difficult to discern its analytical path on this point. For instance, what are the Department of Labor's disclosure requirements, and how much more burdensome was the existing rule? The IRS's? Would different rules for nonprofits solve most concerns? What is actually more burdensome about disclosing all donations as opposed to only a subset of donations? And does that justify a change in policy that will have a markedly decreased effect on the amount of disclosures? The answers to these questions may exist and may likely support the rule, but the FEC's explanation did not provide them. Ultimately, however, *State Farm*'s standard is "[n]ot particularly demanding," and the FEC's burden rationale leaves just enough detail for us to see "what major issues of policy were ventilated and why the agency reacted to them as it did." *Republican Nat'l Cmte v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996).

3. The Privacy Rationale

The FEC's final explanation centered on its effort to tailor the regulations such that they both effectuate BCRA's purpose in disclosure while also minding carefully the constitutional interests in privacy also at stake. The FEC reasoned that the revised purpose requirement is "narrowly tailored to address many of the commenters' concerns regarding individual donor privacy." 72 Fed. Reg. at 72901.

This explanation is significant. The FEC is "[u]nique among federal administrative agencies," having "as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). Thus, more than other agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights. By tailoring the disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate.

And the FEC's concerns about the competing interests in privacy and disclosure were legitimate. We began this opinion by acknowledging the unmistakable tension that exists in campaign finance law between speech rights and disclosure rules. The Supreme Court has vigorously protected the public's right to speak anonymously, even recognizing that anonymous speech has "played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). "Anonymity," the Court elsewhere observed, "is a shield from the tyranny of the majority" and "exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). This is not to say the Court is naïve to the potential downsides that may accompany this right to anonymity. Much to the contrary, the *McIntyre* Court acknowledged "political speech by its nature will sometimes have unpalatable consequences," but, vindicating the right to speak anonymously, declared "our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.*

And yet, the Court has sanctioned startling intrusions on this right to anonymity by upholding mandatory disclosure requirements. The Court held in *Buckley* that such requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist," all the while recognizing "public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute" and "expose contributors to harassment or retaliation." 424 U.S. at 68. Ironically, these two values the *Buckley* Court acknowledged would be harmed by the disclosure requirements were the very same values the *McIntyre* Court later believed "exemplifie[d] the purpose behind the Bill of Rights and of the First Amendment in particular"—namely, "protect[ing] unpopular . . . ideas from suppression" and "individuals from retaliation." *McIntyre*, 514 U.S. at 357. But even after *McIntyre*, the Court upheld the disclosure requirements in *McConnell*, and again in *Citizens United*, without much more than a passing citation to *McIntyre* or any of the Court's other precedents establishing the right to speak anonymously.[6] As one dissenting justice observed in *McConnell*, "The Court now backs away from [*McIntyre*], allowing the established right to anonymous speech to be stripped away based on the flimsiest of justifications." 540 U.S. at 276 (Thomas, J. dissenting).

Both an individual's right to speak anonymously and the public's interest in contribution disclosures are now firmly entrenched in the Supreme Court's First Amendment jurisprudence. And yet they are also fiercely antagonistic. The

[6] Judge Easterbrook, dubitante in *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004), also noted "the Justices' failure to discuss *McIntyre*" and concluded it was therefore "impossible for courts at our level to make an informed decision—for the Supreme Court has not told us what principle to apply."

deleterious effects of disclosure on speech have been ably catalogued. "Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United*, 558 U.S. at 483 (Thomas, J., dissenting) (highlighting how mandatory disclosure of contributors to California's controversial "Yes on Proposition 8" campaign led to their being singled out for ruthless retaliation and intimidation). "[T]he advent of the Internet enables prompt disclosure of expenditures, which provides political opponents with the information needed to intimidate and retaliate against their foes." *Id.* at 484 (internal quotation marks omitted). "Disclosure also makes it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped." *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., dubitante).

In addition to these general burdens, the specific disclosure requirement Van Hollen advocates here would present its own unique harms. For instance, an American Cancer Society donor who supports cancer research but not ACS's political communications must decide whether a cancer cure or her associational rights are more important to her. This is categorically distinct from deciding whether a political issue, such as tax reform, is as important as one's associational right. Cancer research isn't a political issue, but disclosure rules of this sort would undeniably transform it into one. These disclosure rules also burden privacy rights in another crucial way: modest individuals who'd prefer the amount of their charitable donations remain private lose that privilege the minute their nonprofit of choice decides to run an issue ad. The Supreme Court routinely invalidates laws that chill speech far less than a disclosure rule that might scare away charitable donors. *See Watchtower Bible and*

Tract Soc'y of New York, Inc. v. Stratton, 536 U.S. 150 (2002) (striking a law requiring religious canvassers to obtain a permit before advocating door-to-door on private property).

The ones who would truly bear the burden of Van Hollen's preferred rule would not be the wealthy corporations or the extraordinarily rich private donors that likely motivated Congress to compel disclosure in the first place. Such individuals would have "little difficulty complying" with these laws, as they can readily hire "legal counsel who specialize in election matters," who "not only will assure compliance but also will exploit the inevitable loopholes." *Majors*, 361 F.3d at 357–58 (Easterbrook, J., dubitante). Instead, such requirements "have their real bite when flushing small groups, political clubs, or solitary speakers into the limelight, or reducing them to silence." *Id.* at 358.

By affixing a purpose requirement to BCRA's disclosure provision, the FEC exercised its unique prerogative to safeguard the First Amendment when implementing its congressional directives. *See AFL-CIO*, 333 F.3d at 170. Its tailoring was an able attempt to balance the competing values that lie at the heart of campaign finance law. We therefore do not find this rationale inadequate.

* * *

At the close of its explanation, the FEC succinctly defended its decision to adopt a purpose requirement for corporate and union electioneering communications:

> In the Commission's judgment, requiring disclosure of funds received only from those persons who donated specifically for the purpose

> of furthering [electioneering communications] appropriately provides the public with information about those persons who actually support the message conveyed by the [electioneering communications] without imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of [electioneering communications].

72 Fed. Reg. at 72911. In light of its three rationales—the support, burden, and privacy rationales—we conclude the FEC's purpose requirement is neither arbitrary nor capricious.

III

Holding, as we do here, that the FEC's purpose requirement satisfies both *Chevron* Step Two and *State Farm* review has the benefit both of being a correct application of black letter administrative law *and* of forestalling to some other time an answer to the important constitutional questions bubbling beneath the surface of this case. As our discussion of the FEC's rule has shown, the Supreme Court's campaign finance jurisprudence subsists, for now, on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents. But "the centre cannot hold." William Butler Yeats, *The Second Coming* (1919). Until then, however, the FEC's purpose requirement survives, and the judgment of the district court is therefore

Reversed.

Rules and Regulations

Federal Register
Vol. 72, No. 246
Wednesday, December 26, 2007

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

FEDERAL ELECTION COMMISSION

11 CFR Part 104, 114

[Notice 2007–26]

Electioneering Communications

AGENCY: Federal Election Commission.

ACTION: Final rule and transmittal of rule to Congress.

SUMMARY: The Federal Election Commission is revising its rules governing electioneering communications. These revisions implement the Supreme Court's decision in *FEC* v. *Wisconsin Right to Life, Inc.,* which held that the prohibition on the use of corporate and labor organization funds for electioneering communications is unconstitutional as applied to certain types of electioneering communications. Further information is provided in the supplementary information that follows.

DATES: *Effective Date:* December 26, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ron B. Katwan, Assistant General Counsel, Mr. Anthony T. Buckley, or Ms. Margaret G. Perl, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is revising 11 CFR parts 104 and 114 to implement the recent U.S. Supreme Court decision in *FEC* v. *Wisconsin Right to Life, Inc.,* 127 S. Ct. 2652 (June 25, 2007).

I. Background

A. Statutory and Regulatory Provisions Governing Electioneering Communications

The Bipartisan Campaign Reform Act of 2002 (''BCRA'') [1] amended the Federal Election Campaign Act of 1971, as amended (the ''Act'' or ''FECA''),[2] by adding a new category of political communications, ''electioneering communications,'' to those already governed by the Act. *See* 2 U.S.C. 434(f)(3). Electioneering communications (''ECs'') are broadcast, cable or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i). Individuals and entities that make ECs are subject to certain reporting obligations. *See* 2 U.S.C. 434(f)(1) and (2). Corporations and labor organizations are prohibited from using general treasury funds to finance ECs, directly or indirectly. *See* 2 U.S.C. 441b(b)(2). Finally, all ECs must include a disclaimer including the name of the individual or entity who paid for the EC and a statement as to whether or not the EC was authorized by a candidate. *See* 2 U.S.C. 441d(a).

The Act exempts certain communications from the definition of ''electioneering communication'' found in 2 U.S.C. 434(f)(3)(B)(i) to (iii), and specifically authorizes the Commission to promulgate regulations exempting other communications as long as the exempted communications do not promote, support, attack or oppose (''PASO'') a candidate. *See* 2 U.S.C. 434(f)(3)(B)(iv), *citing* 2 U.S.C. 431(20)(A)(iii).

The Commission promulgated regulations to implement BCRA's EC provisions. *Final Rules and Explanation and Justification for Regulations on Electioneering Communications,* 67 FR 65190 (Oct. 23, 2002) (''*EC E&J*'').[3] *See also* 11 CFR 100.29 (defining ''electioneering communication''); 104.20 (implementing EC reporting requirements); 110.11(a) (requiring disclaimers in all ECs); 114.2 (prohibiting corporations and labor organizations from making ECs); 114.10 (allowing qualified non-profit corporations (''QNCs'') to make ECs); 114.14 (restricting indirect corporate and labor organization funding of ECs). Commission regulations exempt five types of communications from the definition of ''electioneering communication.'' *See* 11 CFR 100.29(c).[4]

B. U.S. Supreme Court Precedent Regarding Electioneering Communications

In *McConnell* v. *FEC,* 540 U.S. 93 (2003) (''*McConnell*''), the U.S. Supreme Court upheld all of BCRA's EC provisions against various constitutional challenges. *Id.* at 194, 201–02, 207–08. Specifically, the Supreme Court held that the prohibition on the use of general treasury funds by corporations and labor organizations to pay for ECs in 2 U.S.C. 441b(b)(2) was not facially overbroad. Id. at 204–06. In *Wisconsin Right to Life, Inc.* v. *FEC,* 546 U.S. 410 (2006) (''*WRTL I*''), the U.S. Supreme Court explained that *McConnell's* upholding of section 441b(b)(2) against a facial constitutional challenge did not preclude further as-applied challenges to the corporate and labor organization funding prohibitions. *See WRTL I,* 546 U.S. at 411–12.

Subsequently, in *FEC* v. *Wisconsin Right to Life, Inc.,* 127 S. Ct. 2652 (2007) (''*WRTL II*''), the Supreme Court reviewed an as-applied challenge brought by a non-profit corporation seeking to use its own general treasury funds, which included donations it had received from other corporations, to pay for broadcast advertisements referring to Senator Feingold and Senator Kohl during the EC period before the 2004 general election, in which Senator Feingold, but not Senator Kohl, was on the ballot. The plaintiff argued that these communications were genuine issue advertisements run as part of a grassroots lobbying campaign on the issue of Senate filibusters of judicial nominations. *WRTL II,* 127 S. Ct. at 2660–61. The Supreme Court held that section 441b(b)(2) was unconstitutional as applied to the plaintiff's advertisements because the

[1] Pub. L. 107–155, 116 Stat. 81 (2002).

[2] 2 U.S.C. 431 *et seq.*

[3] The Commission revised its rule defining ''electioneering communication'' in 2005, in response to *Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd,* 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied,* No. 04–5352 (D.C. Cir. Oct. 21, 2005). *See Final Rules and Explanation and Justification for Regulations on Electioneering Communications,* 70 FR 75713 (Dec. 21, 2005).

[4] The exemptions in 11 CFR 100.29(c)(1) (non-broadcast communications), 100.29(c)(2) (news stories, commentaries or editorials), 100.29(c)(3) (expenditures and independent expenditures) and 100.29(c)(4) (candidate debates or forums) are based on the express language of the Act. *See* 2 U.S.C. 434(f)(3)(B)(i) to (iii). Section 100.29(c)(5) exempts communications paid for by State or local candidates that do not PASO any Federal candidate.

advertisements were not the ''functional equivalent of express advocacy.'' *Id.* at 2670, 2673. A communication is the ''functional equivalent of express advocacy'' only if it ''is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'' *Id.* at 2667. Thus, *WRTL II* limited the reach of the EC funding prohibitions to communications that were the ''functional equivalent of express advocacy'' as determined under this newly articulated test.

C. The Commission's Rulemaking After WRTL II

The Commission published a Notice of Proposed Rulemaking in August 2007 seeking public comment on alternative proposed rules implementing the WRTL II decision. *See Notice of Proposed Rulemaking on Electioneering Communications,* 72 FR 50261, 50262 (August 31, 2007) (''*NPRM*''). The Commission sought public comment generally regarding the effect of the *WRTL II* decision on the Commission's rules governing corporate and labor organization funding of ECs, the definition of ''electioneering communication,'' and the rules governing reporting of ECs, as well as comment on the specific requirements of the proposed rules. The Commission also requested public comment regarding specific examples of communications that should be covered by the proposed rules and those that should not be. *Id.* at 50267–69. Finally, the Commission sought public comment regarding the impact, if any, of the *WRTL II* decision on other parts of the Commission's regulations, such as the definition of ''express advocacy'' in 11 CFR 100.22. *Id.* at 50263. The comment period ended on October 1, 2007. The Commission received twenty-seven written comments on the proposed rules. The Commission held a public hearing to discuss the proposed rules on October 17 and 18, 2007 at which fifteen witnesses testified. All written comments and hearing transcripts are available at *http://www.fec.gov/law/law_rulemakings.shtml* under the heading ''Electioneering Communications (2007).'' For purposes of this document, the terms ''comment'' and ''commenter'' apply to both written comments and oral testimony at the public hearing.

After consideration of the comments, the Commission has decided to implement the *WRTL II* decision by promulgating an exemption from the corporate and labor organization funding prohibitions in part 114 of the Commission's rules. Under the final rule, ECs that qualify for the *WRTL II* exemption may be funded with corporate and/or labor organization funds, including general treasury funds, but are subject to EC reporting and disclaimer requirements. The EC reporting requirements in 11 CFR 104.20 are also being revised to accommodate both reporting by corporations and labor organizations for ECs permissible under the new exemption, and reporting the use of corporate and labor organization donations by individuals and unincorporated entities to pay for ECs permissible under the new exemption. The Commission has decided to leave open possible revisions to the definition of ''express advocacy'' in 11 CFR 100.22 and to address the issue at a later date.

II. Effective Date and Transmittal of Final Rules to Congress

The final rule is effective immediately upon publication under 5 U.S.C. 553(d)(1) and (d)(3). Typically, rules must be published not less than thirty days before their effective dates under the Administrative Procedure Act (''APA''). *See* 5 U.S.C. 553(d). However, a rule that ''grants or recognizes an exemption or relieves a restriction'' is exempted from this requirement under 5 U.S.C. 553(d)(1). This final rule grants an exemption and relieves the funding restrictions for certain communications that meet the definition of ''electioneering communications.'' Therefore, this final rule meets this exception to the APA, is not required to be published thirty days prior to its effective date, and will therefore be effective immediately upon publication. In addition, 5 U.S.C. 553(d)(3) states that an agency may make a rule effective immediately ''for good cause found and published with the rule.'' The U.S. Supreme Court's decision in *WRTL II* was issued on June 25, 2007, less than six months before the first EC periods began (thirty days before various state Presidential caucuses and primaries in January 2008). The Commission has worked diligently to promulgate the final rule in time to provide guidance to organizations as to the permissible funding and required reporting for communications broadcast within the EC periods, which began in early December 2007 for certain states. The final rule implementing the *WRTL II* decision should apply to all EC periods for the 2008 election cycle and it would be contrary to the public interest to delay the effective date of the final rule until some time after the first EC periods start. Therefore, the Commission has ''good cause'' under section 553(d)(3) to make the final rule effective immediately.

Under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate before they take effect. The final rule that follows was transmitted to Congress on December 17, 2007.

III. Explanation and Justification

A. Scope of the WRTL II Electioneering Communications Exemption

The NPRM included two alternative proposals implementing the *WRTL II* decision in the rules governing ECs. Alternative 1 incorporated the new exemption into the rules prohibiting the use of corporate and labor organization funds for ECs in 11 CFR part 114. *See NPRM* at 50262. This alternative required corporations and labor organizations to comply with the reporting and disclaimer requirements for all ECs that qualify for the exemption. Alternative 2 incorporated the new exemption into the definition of ''electioneering communication'' in 11 CFR 100.29. This alternative removed all reporting and disclaimer requirements for these communications, whether run by corporations and labor organizations, or individuals and unincorporated entities not subject to the funding prohibitions in part 114. *See NPRM* at 50262–63.

The commenters were divided in their support for each alternative. Commenters supporting Alternative 1 pointed out that the plaintiffs in *WRTL II* did not challenge the EC reporting and disclaimer requirements, the Court did not address the issue of whether the EC reporting requirements were constitutional as applied to genuine issue advertisements, and the EC reporting requirements had been upheld against a facial challenge in *McConnell.* These commenters also contended that disclosure requirements are held to a less rigorous constitutional standard than funding prohibitions, and that a broader exemption would violate the Commission's statutory authority. In contrast, commenters supporting Alternative 2 argued that *WRTL II* held that the communications at issue were protected from any regulation (including disclosure), that the constitutionality of disclosure requirements is linked to the constitutionality of the funding restrictions on the communication, and that the costs of compliance with reporting obligations would chill speech by small nonprofit organizations. Some commenters stated their policy preference would be to adopt Alternative 2 and remove reporting

requirements for communications qualifying for the *WRTL II* exemption, but argued that the Commission's authority was confined to creating an exemption from the funding restrictions on ECs unless the EC reporting and disclaimer provisions are successfully challenged in court.

After consideration of the comments, the Commission has decided to adopt a revised version of Alternative 1 and create an exemption solely from the prohibition on the use of corporate and labor organization funds to finance ECs. Accordingly, the revisions to 11 CFR 114.2 and new section 114.15 do not create (1) an exemption from the overall definition of ''electioneering communication'' in section 100.29, (2) an exemption from the EC reporting requirements in section 104.20, or (3) an exemption from the EC disclaimer requirements in section 110.11. Corporations and labor organizations are permitted to use general treasury funds for ECs that are permissible under section 114.15, but are also required to file EC disclosure reports once they spend more than $10,000 in a calendar year on such communications. *See* revised 11 CFR 104.20.

The plaintiff in *WRTL II* challenged only BCRA's corporate and labor organization funding restrictions in section 441b(b)(2) and did not contest either the separate statutory definition of ''electioneering communication'' in section 434(f)(3), the separate reporting requirement in section 434(f)(1), or the separate disclaimer requirement in section 441d. *See WRTL II,* 127 S. Ct. at 2658–59; *see also* Verified Complaint for Declaratory and Injunctive Relief, ¶ 36 (July 28, 2004) in *Wisconsin Right to Life, Inc.* v. *FEC* (No. 04–1260), available at *http://fecds005.fec.gov/law/litigation_related.shtml#wrtl_dc* (''WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements.''). Nor did any of the four separate opinions issued by the Justices in *WRTL II* discuss the EC reporting or disclaimer requirements. Accordingly, the Commission agrees with the commenters who argued that *WRTL II*'s holding that the Act's EC funding restrictions are unconstitutional as applied to certain advertisements does not extend to the EC reporting or disclaimer requirements.

Because *WRTL II* did not address the issue, *McConnell* continues to be the controlling constitutional holding regarding the EC reporting and disclaimer requirements. *McConnell* held that the overall definition of ''electioneering communication'' in section 434(f)(3) is facially valid. *McConnell,* 540 U.S. at 193–94. Moreover, eight Justices in McConnell voted to uphold the EC reporting requirements (including three Justices who separately voted to strike down the EC funding prohibitions). *Id.,* 540 U.S. at 196 (Stevens, J.) and 321 (Kennedy, J.). The EC disclaimer requirements were similarly upheld as constitutional by a vote of 8–1. *McConnell,* 540 U.S. at 230 (Rehnquist, C.J., joined by all Justices except Thomas, J.). Thus, because *McConnell* has upheld the definition of ECs, as well as the reporting and disclaimer requirements, as facially valid, and because *WRTL II* did not address these provisions, the Commission has no mandate to revise the underlying definition of ''electioneering communication'' or remove the reporting and disclaimer requirements. *WRTL II* requires that the Commission implement an as-applied exemption to the EC funding requirements and nothing more. By adopting a revised version of Alternative 1, the Commission is acting in accordance with *WRTL II.*

The Commission disagrees with the comments that contended that Alternative 2 is more consistent with the Congressional intent because they believed BCRA did not contemplate reporting by corporations and labor organizations. While it is true that under BCRA, corporations and labor organizations were prohibited from funding any ECs, the statute requires every ''person'' (which by definition includes corporations and labor organizations) funding ECs over the reporting threshold to report. 2 U.S.C. 431(11). Moreover, incorporating the *WRTL II* exemption into the regulatory definition would remove certain ECs that are currently subject to reporting and disclaimer requirements when run by individuals, QNCs, or unincorporated entities from public disclosure entirely. While Congress provided for certain possible effects of judicial review of the definition of ''electioneering communication'' (*see* 2 U.S.C. 434(f)(3)(A)(ii)), Congress did not expressly address the consequences for the reporting provisions in the event of a successful as applied challenge to the funding restrictions. Thus, the Commission cannot conclude that Congress has spoken directly to this issue.

Finally, while understanding that some nonprofit organizations and their donors have privacy interests and that some donors request to remain anonymous, the Commission disagrees with the commenters who argue the only constitutional way to protect those interests is to adopt Alternative 2, thereby allowing all ECs that qualify for the *WRTL II* exemption to be run without any disclaimers or reporting. First, under revised section 104.20 described below, the reporting requirements for corporations and labor organizations funding ECs that qualify for the *WRTL II* exemption are narrowly tailored to address many of the commenters' concerns regarding individual donor privacy. *See* Section D below. Second, as some commenters noted, there are other ways of protecting donor privacy. When upholding the EC reporting requirements, *McConnell* recognized that these privacy interests are adequately protected on a case-by-case basis for certain organizations that espouse positions such that their donors or members might be subject to reprisal or harassment. *See McConnell,* 540 U.S. at 198–99 (citing *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio),* 459 U.S. 87, 98–99 (1982)). Organizations with significant and serious threats of reprisal or harassment may seek as-applied exemptions to the disclosure requirements under *Socialist Workers* through advisory opinions and court filings. *See, e.g.*, Advisory Opinion 2003–02 (Socialist Workers Party). Therefore, the Commission believes that the carefully designed reporting requirements detailed below do not create unreasonable burdens on the privacy rights of donors to nonprofit organizations.

The Commission notes that the final rule does not affect the coordinated communications rules in section 109.21, because ECs that are permissible under section 114.15 would still meet the ''electioneering communication'' content standard in 11 CFR 109.21(c)(1).[5] Thus, an EC that may be paid for with corporation or labor organization funds under the new exemption in section 114.15 may nevertheless be a prohibited corporate or labor organization in-kind contribution to a candidate or political party if that EC is coordinated with a candidate or party under the coordinated communications rules. In

[5] The coordinated communication rules set forth a three-prong test: A payment prong, a content prong and a conduct prong. *See* 11 CFR 109.21(a). If a communication meets one of the standards under the content or conduct prong, it is deemed to have met that prong. Any communication that meets all three prongs is considered an in kind contribution to the candidate or political party with which the coordination occurs. *See* 11 CFR 109.21(b). Portions of the coordination regulations at 11 CFR 109.21 were held invalid in *Shays* v. *FEC,* 508 F. Supp.2d 10 (2007). However, the Commission is appealing the ruling and the current regulations remain in full force and effect pending the outcome of the proceeding.

addition, the revisions to section 114.14 clarify that individuals and unincorporated entities may receive and spend corporate or labor organization funds for ECs that are permissible under new section 114.15. However, individuals and unincorporated entities are still subject to the general prohibition on using such funds to pay for any EC that is not permissible under section 114.15.

B. Revised 11 CFR 114.2—General Prohibition on Corporations and Labor Organizations Making Electioneering Communications

Section 114.2(b)(2)(iii) implements the funding restrictions of 2 U.S.C. 441b(b)(2) by prohibiting corporations and labor organizations from ''[m]aking payments for an electioneering communication to those outside the restricted class.'' However, as explained in the NPRM, placing a detailed exemption based on the *WRTL II* decision within section 114.2(b) could be confusing and difficult for the reader to locate. *See id.* Therefore, in the NPRM, the Commission proposed to place the exemption in new section 114.15. None of the commenters opposed the placement of the exemption in new section 114.15.

The final rule follows the approach proposed in the NPRM by setting forth the *WRTL II* exemption in new section 114.15, and amending section 114.2(b) to include a cross-reference to this new section. Revised section 114.2(b) states that corporations and labor organizations are prohibited from making ECs ''unless permissible under 11 CFR 114.10 or 114.15.'' *See* revised 11 CFR 114.2(b)(3) (adding the new *WRTL II* exemption reference to the existing reference to the QNC exemption in section 114.10).[6] The language of the final rule is slightly changed from the proposed rule to conform the cross-reference in section 114.2(b)(3) to similar revisions in other sections of part 114. *See, e.g.*, revised 11 CFR 104.20(c)(7) and 114.14(a)(1) discussed below.

C. New 11 CFR 114.15—Permissible Use of Corporate and Labor Organization Funds for Certain Electioneering Communications

The exemption proposed in the NPRM was substantively the same under both Alternative 1 and 2. *See NPRM* at 50264. Under Alternative 1, proposed section 114.15(a) set forth the general standard for determining whether the use of corporate and labor organization funds for an EC is permissible under *WRTL II*. Proposed section 114.15(b) included safe harbor provisions for two common types of ECs: Grassroots lobbying communications and commercial and business advertisements. The NPRM explained that the safe harbors were intended to provide additional guidance as to which ECs would qualify for the general exemption and that an EC that did not qualify for the safe harbor could still come within the general exemption. *See id.* Finally, proposed section 114.15(c) addressed reporting obligations for corporations and labor organizations that choose to use general treasury funds to pay for ECs permissible under section 114.15. *See id.*

Some commenters favored the proposed rule's approach of including both a general exemption and one or more safe harbors. A few commenters suggested that the final rule should include not only safe harbors, but also ''capture nets or red flags'' that would indicate when an EC would generally be considered to be the functional equivalent of express advocacy and therefore not qualify for the general exemption. Other commenters were concerned that the safe harbors would become the *de facto* rule and groups would feel chilled from making ECs that do not qualify for one of the safe harbors without additional guidance in the general rule. Some commenters thought that the safe harbor provisions were too narrow to be useful. Some commenters also suggested that the Commission include a list of those factors that the Commission would consider in determining whether an EC qualifies for the exemption.

After consideration of the comments, the Commission has decided to modify the NPRM's proposed approach by adopting a rule that both incorporates a safe harbor for certain types of EC and sets forth a multi-step analysis for determining whether ECs that do not qualify for the safe harbor nevertheless qualify for the general exemption. First, the final rule includes a revised articulation of the general exemption in new section 114.15(a). Second, the Commission is broadening the safe harbor to provide more detailed guidance as to which ECs qualify for the exemption under the safe harbor. *See* 11 CFR 114.15(b). Third, the final rule contains a provision explaining the Commission's rules of interpretation for determining if an EC that does not qualify for the safe harbor in section 114.15(b) is nonetheless permissible under the general exemption in section 114.15(a). *See* 11 CFR 114.15(c). The final rule also includes three additional paragraphs. First, new paragraph (d) explains what contextual information the Commission may consider in its analysis of ECs under the general exemption and safe harbor. Second, new paragraph (e) indicates that a list of examples of ECs analyzed under the general exemption and safe harbor will be placed on the Commission's Web site. Lastly, new paragraph (f) states that corporations and labor organizations funding ECs that are permissible under section 114.15(a) are subject to certain reporting requirements under 11 CFR 104.20.

1. 11 CFR 114.15(a)—Articulation of the WRTL II Exemption

In the NPRM, proposed section 114.15(a) provided that corporations and labor organizations may make an EC (as defined in 11 CFR 100.29) without violating the prohibition in section 114.2(b)(3), ''if the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.'' *See NPRM* at 50264. Many commenters agreed with this proposed implementation of the *WRTL II* test as a general exemption. However, some commenters urged the Commission to use the exact words used in the *WRTL II* decision and phrase the general exemption so that corporations or labor organizations may make an EC ''unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.'' These commenters argued that the NPRM's formulation of the standard shifted the burden of proving whether an EC qualifies for the exemption from the Commission to the speaker making the EC.

While the Commission disagrees with those commenters who argued that the effect of the NPRM's language was to shift the burden of proof, it appears that the formulation proposed in the NPRM could be misunderstood. Therefore, in the final rule, paragraph (a) tracks the *WRTL II* decision's language: ''Corporations or labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.'' *See* 11 CFR 114.15(a).

[6] To increase clarity and readability, the final rule also revises the title of section 114.2 to include ECs explicitly, and to renumber paragraph (b)(2)(iii) as paragraph (b)(3) with conforming changes as necessary in the text of that paragraph.

2. 11 CFR 114.15(b)—Safe Harbor Provision

As proposed in the NPRM, the final rule supplements the general exemption in section 114.15(a) with a safe harbor provision in section 114.15(b). Satisfying the safe harbor provision demonstrates that the EC is susceptible of a reasonable interpretation other than as an appeal to vote for or against a Federal candidate. Accordingly, an EC that qualifies for the safe harbor would be deemed to be permissible under section 114.15(a) and may be paid for with corporate or labor organization funds. However, an EC that does not qualify for the safe harbor may still come within the general exemption under the analysis described below in section 114.15(c).

The NPRM's proposed safe harbor provisions for grassroots lobbying communications and commercial and business advertisements each contained four prongs, all of which would have had to be met for an EC to qualify for the proposed safe harbor. The first two prongs of both proposed safe harbors would have focused on the content of the communication, while the last two prongs of both safe harbors would have focused on the presence of ''indicia of express advocacy'' as described in the *WRTL II* decision. *See NPRM* at 50265, 50269.

In order to simplify the final rule, the Commission has adopted one safe harbor provision with three prongs. An EC qualifies for the safe harbor if it (1) does not mention ''any election, candidacy, political party, opposing candidate, or voting by the general public;'' (2) does not take a position on the candidate's ''character, qualifications, or fitness for office;'' and (3) either ''focuses on a legislative, executive or judicial matter or issue'' or ''proposes a commercial transaction.'' *See* 11 CFR 114.15(b)(1)–(3). An EC will qualify for the safe harbor only if it satisfies all three prongs. The safe harbor provision in the final rule applies both to ECs that would have been considered ''grassroots lobbying communications'' and to ECs that would have been considered ''commercial and business advertisements'' under the rule proposed in the NPRM.

a. 11 CFR 114.15(b)(1) and (2)—Mentioning an Election or Candidacy and Taking a Position on Character or Qualifications

The Supreme Court determined that WRTL's advertisements were not the ''functional equivalent of express advocacy'' because the communications' content was ''consistent with that of a genuine issue ad'' and the communications lacked ''indicia of express advocacy.'' *WRTL II*, 127 S. Ct. at 2667. The Court found that WRTL's communications lacked ''indicia of express advocacy'' because they did not mention ''an election, candidacy, political party, or challenger,'' and the communications did not ''take a position on a candidate's character, qualifications, or fitness for office.'' *Id.* The first two prongs of the safe harbor in the final rule incorporate the factors the Court used to determine whether a communication lacks ''indicia of express advocacy.'' In order to satisfy the safe harbor's first prong, the EC must not ''mention any election, candidacy, political party, opposing candidate, or voting by the general public.'' *See* 11 CFR 114.15(b)(1). To satisfy the safe harbor's second prong, the EC must not ''take a position on any candidate or officeholder's character, qualifications, or fitness for office.'' *See* 11 CFR 114.15(b)(2).

The NPRM included these same provisions as the last two prongs of the proposed safe harbors for grassroots lobbying communications and commercial and business advertisements. *See NPRM* at 50266–67, 50270. Some commenters believed that these provisions adequately limited the scope of the proposed rule. A few commenters urged the Commission to refrain from adding anything to the list of references in the *WRTL II* decision, such as the reference to ''voting by the general public'' proposed in the NPRM. However, the final rule retains this addition, which applies to ECs that include tag lines that suggest voting by the general public in elections, such as ''Vote. It's important to your future,'' but does not apply to other references to voting such as ''ask Congressman Smith to support the Voting Rights Bill.''

The NPRM sought public comment on whether certain examples constitute ''mentioning'' elections, candidacy, political parties, or opposing candidates, or take a position on a candidate's character, qualifications or fitness for office sufficient to transform an EC into the functional equivalent of express advocacy or to remove them from the proposed new safe harbors. *See NPRM* at 50266–67. Some commenters noted that many of the examples were actually references to officeholder status or to an officeholder's conduct of his or her official duties and should not be construed as mentioning a ''candidacy'' or taking a position on ''character.'' Other commenters believed that everything in the proposed list of references that would constitute indicia of express advocacy should be allowed in an EC so long as the EC focuses on issue advocacy. Some commenters argued that issue advocacy groups should be free to run ECs that comment on officeholders' character and fitness for office in order to hold those officeholders accountable. Other commenters argued that condemning the record or past actions of a candidate or officeholder should automatically disqualify an EC from the exemption.

The following is a non-exclusive list of examples that will be considered to ''mention'' an election, candidacy, political party, opposing candidate or voting by the general public under section 114.15(b)(1), thereby causing an EC to fail to satisfy the first prong of the safe harbor. The Commission notes that because these examples only apply to the safe harbor provisions and to one factor in the rules of interpretation for the general exemption, use of these words or phrases will not necessarily disqualify any EC from the general exemption in section 114.15(a).

- Specific references to an election date such as ''Support gun rights this November 5'' or references to election-related themes, such as pictures of a ballot or voting booth.
- General references to voting such as ''Remember to vote to protect the environment.''
- Specific references to the named candidate's office or candidacy, such as ''Bob Jones is running for Senate.''
- References to political parties by official names, such as ''Democrats,'' or by nicknames or proxy descriptions such as ''GOP.''
- Comparative references to incumbent and opposing candidate, such as ''Bob Smith supports our troops; Bill Jones cut veteran's benefits by 20%.''
- Implied references to incumbents such as ''It's time to take out the trash, select real change with Bob Smith'' or ''This November, we can do better.''

The Commission agrees with the many commenters who argued that a reference to the past voting record of the officeholder or candidate on a particular issue does not by itself constitute taking a position on a candidate's or officeholder's character, qualifications, or fitness for office. Therefore, in determining whether an EC takes a position on the candidate's or officeholder's ''character, qualifications, or fitness for office'' under section 114.15(b)(2) the Commission will examine the entirety of the content of the EC. The Commission is providing examples of ECs below (*see* section 114.15(e)) that illustrate this analysis.

b. 11 CFR 114.15(b)(3)—Lobbying Communications or Commercial Advertisements

The third prong of the final rule's safe harbor combines the first two prongs of the NPRM's proposed grassroots lobbying communications safe harbor and the commercial and business advertisements safe harbor. In order to satisfy the third prong, an EC must meet either section 114.15(b)(3)(i) describing certain lobbying communications *or* section 114.15(b)(3)(ii) describing certain commercial advertisements.

In addition to finding an absence of ''indicia of express advocacy,'' the *WRTL II* decision concluded that WRTL's communications contained content ''consistent with that of a genuine issue ad'' because they ''focus on a legislative issue, take a position on the issue, exhort the public to adopt the position, and urge the public to contact public officials with respect to the matter.'' *See WRTL*, 127 S. Ct. at 2667. Based on the Court's analysis, the NPRM's proposed safe harbor for grassroots lobbying communications covered any EC that ''exclusively discusses a pending legislative or executive matter or issue'' and ''urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue.'' *See NPRM* at 50265–66.

Many commenters argued that the first prong of the safe harbor would be too narrow in several respects, including: (1) It required that the EC discuss the issue ''exclusively;'' (2) it required that the issue be ''pending;'' and (3) it was limited to ECs discussing ''legislative or executive'' issues. Some commenters also argued that the second prong of the safe harbor would be too narrow because it would be limited to officeholders and would not cover ECs that urged the public to contact the candidate simply to ascertain the candidate's position on a particular issue. Other commenters supported the proposed safe harbor's prongs as written and urged the Commission to limit the scope of the safe harbor. These commenters noted that a safe harbor should be narrower than the general exemption.

In response to some of these comments, the final rule incorporates certain modifications in the third prong of the safe harbor. Section 114.15(b)(3)(i) covers any EC that ''focuses on a legislative, executive or judicial matter or issue'' and either ''urges a candidate to take a particular position or action with respect to the matter or issue'' or ''urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue.'' *See* 11 CFR 114.15(b)(3)(i)(A)–(B). This formulation adopts the *WRTL II* decision's language that describes issue advertisements as ECs that ''focus'' on an issue rather than the NPRM's more narrow language that limits the safe harbor to ECs that ''exclusively discuss'' the issue. Thus, under this prong, an EC may qualify for the safe harbor even if it mentions other issues in addition to focusing on matters or issues listed in the safe harbor. In addition, the Commission agrees with the commenters that the safe harbor should cover not only legislative and executive issues as proposed in the NPRM, but also judicial matters. Furthermore, the final rule does not, as did the proposed rule, limit the subject matter of the EC to ''pending'' issues or matters. Instead, the new rule covers ECs that focus on any legislative, executive or judicial issue regardless of whether it is pending before one or more branches of government. This revision allows organizations to address, for example, issues that they believe should be placed on the legislative, executive, or judicial agenda in the future.

Finally, the Commission agrees with those commenters who pointed out that issue advocacy groups may urge a candidate who is not a sitting officeholder to take a certain position on a legislative, executive, or judicial issue, not because they want to advocate the candidate's election or defeat, but because they want the candidate to commit to taking action on a certain issue if the candidate is elected. Therefore, unlike the rule proposed in the NPRM, the final rule includes not only references to sitting officeholders but also references to any Federal candidates. However, in order to qualify for the safe harbor, the EC must either urge the candidates themselves to take a position, or urge the public to take a position and contact the candidates. General appeals to the public to ''educate themselves'' or to contact an organization to learn more about the issue will not satisfy this prong of the safe harbor. Appeals to the public to donate to the organization to help spread the word about the issue will not alone satisfy this prong of the safe harbor. However, such appeals to learn more or contribute will not disqualify from the safe harbor a communication which also includes exhortations to candidates or to the public to contact candidates. In addition, an appeal to learn about issues or to raise awareness (such as asking for donations to ''help spread the word'') may qualify as a ''call to action or other appeal'' under 11 CFR 114.15(c)(2)(iii) (*see below*).

The second part of the safe harbor's third prong in section 114.15(b)(3)(ii) is also based upon the safe harbor for commercial and business advertisements proposed in the NPRM, but includes slightly revised language. The NPRM proposed a safe harbor for any EC that ''exclusively advertises a Federal candidate's or officeholder's business or professional practice or any other product or service'' and that ''is made in the ordinary course of business of the entity paying for the communication.'' *See NPRM* at 50270. Many commenters supported the creation of a commercial and business advertisements safe harbor as consistent with the *WRTL II* decision. However, some commenters supporting the safe harbor argued that the proposed provision was too narrow to be useful to the business community. Specifically, a few commenters argued that the Commission should remove the ''ordinary course of business'' prong in the proposed rule. Another commenter criticized the proposed safe harbor as too ambiguous and difficult for advertisers to apply when deciding whether a particular EC may be run.

Other commenters urged the Commission not to adopt any additional safe harbors besides one for grassroots lobbying communications as specifically addressed in the *WRTL II* decision. However, the language of the Supreme Court's general test for determining whether an EC is exempt from the EC funding restrictions is not limited just to grassroots lobbying advertisements but covers any EC that is susceptible of a reasonable interpretation other than as an appeal to vote. As explained in the NPRM, many ECs could reasonably be interpreted as having a non-electoral, business or commercial purpose. Therefore, the Commission believes that explaining how the *WRTL II* exemption applies to commercial and business advertisements is helpful to provide adequate guidance to those seeking to comply with the EC provisions.

Accordingly, the last part of the safe harbor's third prong applies to an EC that ''proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event.'' *See* 11 CFR 114.15(b)(3)(ii). The final rule substitutes ''proposes a commercial transaction'' for the ''in the ordinary course of business'' requirement proposed in the NPRM. As several

commenters pointed out, determining whether an EC is made in the ordinary course of business would require the Commission to look beyond the four corners of the EC and probe into the outside business affairs of the speaker. By contrast, the new ''proposes a commercial transaction'' language appropriately focuses the Commission's inquiry on the objective meaning of the content of the EC.

This prong of the safe harbor will be satisfied regardless of whether the product or service is provided by a business owned or operated by, or employing, the candidate referred to in the EC.[7] Both ECs advertising a Federal candidate's appearance to promote a business or other commercial product or service, and ECs in which the Federal candidate is referred to as the subject of a book, video, or movie will be eligible for the safe harbor. The final rule clarifies that an advertisement urging the public to attend a film exhibition or other commercial event for a fee is also eligible for the safe harbor. By contrast, advertisements for non-commercial events, such as for charities or political events, do not meet this prong and do not qualify for the safe harbor, although they may qualify for the general exemption.

The Commission is providing examples of ECs that illustrate the analysis of this third prong of the safe harbor provision below (*see* section 114.15(e)).

3. 11 CFR 114.15(c)—Rules of Interpretation for Electioneering Communications That Do Not Qualify for the Safe Harbor

The Commission has added new section 114.15(c) to explain how the Commission will analyze ECs that do not qualify for the safe harbor, given that the safe harbor does not include every EC that is permissible under section 114.15(a). Specifically, paragraph (c) of the final rule states that if an EC does not qualify for the safe harbor in section 114.15(b), the Commission will consider: ''whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.'' As with the three prongs of the safe harbor, this analysis is drawn from the *WRTL II* decision's analysis of ''indicia of express advocacy'' and the content of WRTL's communications.

Sections 114.15(c)(1) and (c)(2) describe in more detail the two factors that the Commission will consider in determining whether an EC qualifies for the general exemption in section 114.15(a). The Commission will consider both factors in all cases and will balance the findings under both parts of the test to determine whether an EC has no reasonable interpretation other than as an appeal to vote and is therefore not permissible under section 114.15(a).

For example, even if the Commission found that an EC includes no ''indicia of express advocacy,'' it could still determine that the EC does not have content that would support a determination the EC has an interpretation other than as an appeal to vote, and conclude overall that the EC is not permissible under section 114.15(a) because, on balance, the EC has no reasonable interpretation other than as an appeal to vote. Conversely, even if the Commission found that an EC does include ''indicia of express advocacy,'' it could determine that the EC nevertheless has content that would support a determination that a EC has an interpretation other than a call to electoral action, and conclude overall that the EC is permissible under section 114.15(a) because, on balance, that interpretation is reasonable despite the presence of indicia of express advocacy. The Commission could also find no indicia of express advocacy in an EC, decide that there is content in the EC to support an interpretation of the EC as something other than a call to electoral action, but conclude overall that the EC is not permissible under section 114.15(a) because, on balance, that interpretation is not reasonable.

a. 11 CFR 114.15(c)(1)—Indicia of Express Advocacy

Section 114.15(c)(1) states that under the first factor of this analysis, an EC ''includes indicia of express advocacy'' if it ''mentions any election, candidacy, political party, opposing candidate, or voting by the general public'' or ''takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.'' *See* 11 CFR 114.15(c)(1)(i)–(ii). This list is taken from the *WRTL II* decision, and is a combination of the two lists contained in the first two prongs of the safe harbor in section 114.15(b).

The Commission agrees with the many commenters who argued that mentioning an election or opposing candidate, referring to a candidate's qualifications, or commenting on a sitting officeholder's character should not by itself disqualify an EC from the general exemption in section 114.15(a). Thus, although an EC that includes any one of the references on the list is automatically disqualified from the safe harbor, such an EC may still qualify for the general exemption under the analysis in section 114.15(c).

b. 11 CFR 114.15(c)(2)—Content of Communications

The second factor in paragraph (c)(2) states: ''Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes'' three types of content. *See* 11 CFR 114.15(c)(2). This list of the three types of content is non-exhaustive and the Commission may also consider other types of content to determine whether an EC has some other interpretation besides urging electoral action.

The first type of content that supports a determination that an EC has an interpretation other than as an appeal to vote is content that ''focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue.'' *See* 11 CFR 114.15(c)(2)(i). This provision is broader than the issue advocacy provision of the safe harbor in section 114.15(b) in two ways. First, it considers whether the EC focuses on a ''public policy issue'' rather than, as required by the safe harbor, a ''legislative, executive, or judicial matter.'' Thus, an EC's content may support a determination that it has an interpretation other than as an appeal to vote if it discusses any matter of public importance even if the matter is not a ''legislative, executive, or judicial matter,'' but is instead, for example, a State action or an international event. Second, this provision considers whether an EC urges viewers to contact the candidate about the issue, rather than, as required by the safe harbor, urge viewers ''to adopt a particular position'' and contact the candidate about the issue.

Paragraph (c)(2)(ii) sets out the second type of content that supports a determination that an EC has an interpretation other than as an appeal to vote. This consists of content that ''proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition

[7] The Commission notes that these communications may nevertheless be subject to the Commission's coordination regulations. 11 CFR 109.21

or other event.'' This provision is identical to the commercial transaction provision of the safe harbor in section 114.15(b)(3)(ii). However, the Commission might have to analyze an EC that satisfies the commercial transaction provision of the safe harbor under the rules of interpretation in section 114.15(c), because the EC included references to candidacies or elections that preclude qualification for the safe harbor. For example, a commercial advertisement for a book with the title ''50 Reasons Not to Vote for Congressman Smith'' would not satisfy the first prong of the safe harbor in section 114.15(b)(1). Therefore, the Commission would analyze such an advertisement under section 114.15(c)(2)(ii).

Section 114.15(c)(2)(iii) is a more general provision intended to apply to other types of ECs not covered by the public policy issue and commercial transaction provisions. The final rule states that an EC has content supporting a determination of an interpretation other than as an appeal to vote if it ''includes a call to action or other appeal that interpreted in conjunction with the rest of the communication as urging action other than voting for or against or contributing to a clearly identified Federal candidate or political party.'' *See* 11 CFR 114.15(c)(2)(iii). The Commission will look at the entire content of the EC to determine whether an EC includes such a ''call to action.''

This third provision was added, in part, to respond to commenters who urged the Commission to create a safe harbor provision for other categories of ECs, such as public service announcements. *See NPRM* at 50270–71. These commenters argued that public service announcements and charity advertisements can easily be interpreted as something other than an appeal to vote even though they simply provide information to the public without any specific ''call to action.'' For example, an EC that urges the public to sign up for a preventative screening for a particular type of cancer and includes a Federal candidate endorsing the organization's work on cancer research, would likely be deemed to have content that supports a determination that the EC has an interpretation other than as an appeal to vote.[8] Another common example is an EC that urges viewers to ''find out more'' or visit a Web site for ''more information.'' In analyzing this type of EC, the Commission will look to the actual content of the EC itself to determine whether the ''find out more'' call to action can be interpreted as something other than a call to vote for or against a Federal candidate. Other possible ''calls to action'' under this provision are requests to donate money to a particular charitable organization or disaster relief fund. However, the final rule excludes from this provision requests to make contributions to any clearly identified Federal candidate or political party. Finally, as discussed above, the Commission will analyze ECs promoting charity events under this provision.

c. 11 CFR 114.15(c)(3)—Interpreting the Communication

Several commenters argued that in analyzing whether an EC qualifies for the WRTL exemption, the Commission should be guided by the principle, articulated by the Supreme Court in *WRTL II*, that ''[w]here the First Amendment is implicated, the tie goes to the speaker.'' *See WRTL II*, 127 S. Ct. at 2669. New section 114.15(c)(3) incorporates the principle that ''the tie goes to the speaker'' by providing that ''in interpreting a communication under paragraph (a), any doubt will be resolved in favor of permitting the communication.'' *See* 11 CFR 114.15(c)(3). The Commission intends to follow this principle in determining whether, on balance, the EC is susceptible of a reasonable interpretation other than as an appeal to vote and therefore is permissible under section 114.15(a).

4. 11 CFR 114.15(d)—Information Permissibly Considered

As the NPRM explained, the exemption in section 114.15(a) is objective, focusing on the substance of the EC rather than ''amorphous considerations of intent and effect.'' *WRTL II*, 127 S. Ct. at 2666. In determining whether a particular EC is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate, the Commission may consider ''basic background information that may be necessary to put an ad in context.'' Id. at 2669.[9] According to the *WRTL II* decision, this information could include whether a communication ''describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future.'' *Id.* (internal citation omitted). *See also NPRM* at 50264. However, the Court cautioned that inquiry into such relevant background should not require burdensome or broad inquiries with extensive discovery. *See WRTL II*, 127 S. Ct. at 2669.

Many commenters urged the Commission to clarify in the rule the extent to which the Commission would consider contextual information outside the actual text and visuals of the EC itself when applying the *WRTL II* exemption. The final rule in new section 114.15 includes a new paragraph (d), which limits the contextual information the Commission will consider when analyzing ECs under the *WRTL II* exemption. Some commenters urged the Commission to include in the rule text a list of the types of information that the Commission would consider in evaluating ECs, such as legislative calendars and news stories, and a list of the types of contextual information that the Commission would not consider in its analysis, such as timing of the EC, prior communications or outside activities of the speaker, and the EC's actual effect on elections. Instead of attempting to create exhaustive lists that would fit every circumstance, the final rule sets forth general principles that will guide the Commission's consideration of ''external facts'' beyond the four corners of the EC.

Specifically, section 114.15(d) states that when evaluating an EC under the general exemption or the safe harbor, the Commission may consider only the EC itself and ''basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery.'' *See* 11 CFR 114.15(d). The rule provides the following examples of such basic background information: Whether a named individual is a candidate or whether an EC describes a public policy issue. The Commission will also consider similar background facts about the public policy issue, commercial product or service, or other topics discussed in the EC, so long as these facts may be established with minimal discovery.

5. 11 CFR 114.15(e)—Examples of Communications

In the NPRM, the Commission included a number of examples of communications that would, and would not, qualify for the proposed grassroots

[8] The Commission notes that these communications may nevertheless be subject to the Commission's coordination regulations. 11 CFR 109.21.

[9] The Commission must also consider certain basic facts such as the timing and targeting of the communication in order to determine whether a communication satisfies the basic definition of EC under BCRA and section 100.29(a) (*i.e.*, whether the communication was broadcast within the last thirty or sixty days before a Federal election within the district of the referenced Federal candidate).

lobbying communications safe harbor. *See NPRM* at 50267–69. The Commission sought public comment on whether the final rule should include such examples in the E&J or the rule text itself. *See NPRM* at 50267. The Commission also asked whether there were additional examples of communications that should be included in the list. The commenters that discussed the question of where examples of communications should be published all favored inclusion of those examples in the E&J instead of the rule text.

After consideration of the comments, the Commission has decided to include examples of communications in the E&J instead of the rule. In addition, section 114.15(e) includes a statement to direct readers of the regulation to the Commission's web site on which the Commission will place the examples discussed in this E&J. The Commission intends to update this web page to include examples from court cases, advisory opinions and enforcement matters that apply the *WRTL II* exemption in the future.

The following examples are illustrative only and are not intended to create a requirement for any particular words or phrases to be included before an EC will be permissible under the *WRTL II* exemption. These examples are drawn from past court cases and Commission advisory opinions and enforcement matters.

a. Examples of Communications that Qualify for the Safe Harbor in 11 CFR 114.15(b)

Example 1

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well * * *

COUPLE: Yes, yes * * * we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca * * *

VOICE-OVER: Sometimes it's just not fair to delay an important decision.

But in Washington, it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple ''yes'' or ''no'' vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.[10]

All commenters that discussed the examples agreed with the NPRM's assessment that this example would qualify for the proposed grassroots lobbying communications safe harbor. *See NPRM* at 50267. This example also qualifies for the final rule's safe harbor. First, the communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)). Second, the communication does not take a position on the character, qualifications, or fitness for office of either Senator Feingold or Senator Kohl (section 114.15(b)(2)), or any other candidate. Third, this communication satisfies section 114.15(b)(3)(i) because it focuses on the legislative matter of Senate filibuster votes on judicial nominees, and urges the public to oppose the filibuster and to contact Senators Feingold and Kohl to take a position with respect to the filibuster issue. Therefore, this example qualifies for the safe harbor and is permissible under section 114.15(a).

Example 2

Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202–224–3121 and ask for your senators. Again, that's 202–224–3121. Thank you for making your voice heard.

Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.[11]

All commenters that discussed the examples agreed with the NPRM's statement that this example would qualify for the proposed grassroots lobbying communications safe harbor. *See NPRM* at 50268. This example also qualifies for the final rule's safe harbor. First, the communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public under the first prong in section 114.15(b)(1). The communication also satisfies the second prong in section 114.15(b)(2) because it criticizes the Senators' past voting records only as part of a broader discussion of particular legislation, not as an attack on their personal character, qualifications, or fitness for office. Finally, this example satisfies the third prong of the safe harbor in section 114.15(b)(3)(i) because it focuses on the legislative issue of the legal definition of marriage, and urges the public to support a constitutional amendment, and to contact Senators Snowe and Collins to urge them to support the upcoming vote on the Marriage Protection Amendment. Therefore, this example satisfies all three prongs of the safe harbor and is an EC permissible under section 114.15(a).

Example 3

[VOICE OVER SPEAKING WHILE SHOWING VARIOUS FOOTAGE OF DEALERSHIP]: Cadillac. Style. luxury. Visit Joe Smith Cadillac in Waukesha. Where we uphold the Cadillac legacy of style, luxury and performance everyday. At Joe Smith Cadillac, you'll find a huge selection of Cadillacs and receive award-winning service every time you bring your Cadillac in. Whether you're in the market for a classic sedan or SUV, you can be sure Joe Smith Cadillac has it. And while shopping for your Cadillac, a single detail won't be missed. We know the importance of taking care of our customers. That's why you'll always find incredible service specials to help to maintain your Cadillac. When it comes to care for your Cadillac, you shouldn't settle for anything less than the best.

We're Wisconsin's all-time sales leader and we want to be your Cadillac dealership.

[VOICE OVER SPEAKING WHILE VIDEO OF INSIDE DEALERSHIP ZOOMS IN ON FRAMED PICTURE ON WALL OF JOE SMITH]: Stop into Joe Smith Cadillac, on Highway 18 in Waukesha, and see what Cadillac style really is all about.[12]

The NPRM provided this communication as an example that would qualify for the proposed commercial and business advertisements safe harbor. The few commenters who addressed this example agreed that it would qualify for

[10] ''Loan,'' *Wisconsin Right to Life, Inc.* v. *FEC,* 466 F. Supp. 2d 195, 198 n.4 (D.D.C. 2006). The Supreme Court held that this advertisement was not the ''functional equivalent of express advocacy. *WRTL II,* .127 S. Ct at 2670.

[11] ''Crossroads,'' Verified Complaint for Declaratory and Injunctive Relief, Exhibit A (Apr. 3, 2006), *Civic Christian League of Maine* v. *FEC,* 443 F. Supp. 2d 81 (D.D.C. 2006) (No. 06–0614), *available at http://www.fec.gov/law/litigation/christian_civic_league_complaint.pdf.* The Commission filed a joint motion asking the Court to hold this advertisement meets the *WRTL II* exemption. *See* ''Joint Motion'' (July, 13, 2007), *Civic Christian League of Maine* v. *FEC,* (No. 06–0614).

[12] This example is drawn from one of the advertisements in Advisory Opinion (''AO'') 2004–31 (Darrow), Attachment A at 3 (Sept. 10, 2004), in which the Commission found that under the particular facts of this advisory opinion, the advertisements did not meet the definition of ''electioneering communication'' because the use of the name ''Russ Darrow'' referred to a business or another individual (in this case, the candidate's son) who was not a Federal candidate.

the proposed safe harbor. Assuming that Joe Smith is a Federal candidate, this example also qualifies for the final rule's safe harbor. First, the communication does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)). Second, this communication does not take a position on the character, qualifications, or fitness for office of the candidate, Joe Smith (section 114.15(b)(2)). Third, the communication ''proposes a commercial transaction'' by advertising the car dealership owned by candidate Joe Smith and inviting viewers to purchase cars at that business (section 114.15(b)(3)(ii)). The external facts that Joe Smith is a candidate and that he owns this business are permissible background facts that the Commission may consider in its analysis of this communication pursuant to section 114.15(d). These facts may be established with minimal, if any, discovery. Thus, this example qualifies for the safe harbor and is permissible under section 114.15(a).[13]

b. Examples of Communications that Do Not Qualify for the Safe Harbor in 11 CFR 114.15(b), but are Permissible Under 11 CFR 114.15(a)

Example 1:

It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.[14]

The NPRM asked for public comment as to whether this example should qualify for the proposed grassroots lobbying safe harbor or the general exemption. *See NPRM* at 50268. Most commenters generally agreed that this example does not qualify for the proposed safe harbor because it does not discuss a pending legislative issue (proposed first prong) and criticizes Representative Ganske's character and fitness for office (proposed fourth prong).[15] However, the commenters disagreed as to whether this example nonetheless qualifies for the general exemption proposed in the NPRM. Some commenters argued that because the communication focuses on the issue of air pollution and related legislative matters, it can reasonably be interpreted as seeking support for certain environmental issues. These commenters thought that the example should qualify for the general exemption as a ''genuine issue advertisement,'' even though it criticizes the Representative Ganske's past position on environmental issues. Other commenters contended that there was no reasonable interpretation of this communication other than as an appeal to vote against Representative Ganske because it includes a personal attack on Representative Ganske's character.

The Commission has determined that this example does not qualify for the safe harbor in section 114.15(b), but is permissible under the general exemption in section 114.15(a). The example satisfies the first prong of the safe harbor because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)). Under the second prong, the communication's criticism of Representative Ganske's past voting record in the context of a broader discussion of the issue of environmental protection does not constitute taking a position on Representative Ganske's character, qualifications, or fitness for office (section 114.15(b)(2)). However, the communication's statement that Representative Ganske voted for particular environmental bills supported by corporations who gave contributions to Representative Ganske is an attack on his character and fitness for office because, without reference to any external facts, the statement suggests that his past votes are a sign of corruption. Therefore, the example fails the second prong in section 114.15(b)(2) and does not qualify for the safe harbor.

The example must then be analyzed under the general exemption in section 114.15(a), using the two-factor approach described in section 114.15(c). As discussed above, this communication takes a position on Representative Ganske's character and fitness for office. Therefore, the communication includes ''indicia of express advocacy'' under the second provision in the first factor (section 114.15(c)(1)(ii)). Under section 114.15(c)(2)(i), the communication includes content that would support a determination that the communication has an interpretation other than as an appeal to vote against Representative Ganske because its content focuses on the public policy matter of environmental regulation of air pollutants and urges the public to call Representative Ganske about the issue and tell him to take action on the issue in the future. Finally, the Commission must balance both the presence of indicia of express advocacy under the first factor and the finding of content supporting another interpretation under the second factor to determine whether the communication is susceptible of no reasonable interpretation other than as an appeal to vote against Representative Ganske. Keeping in mind that any doubt is to be resolved in favor of finding the communication permissible under section 114.15(c)(3), the Commission determines that this communication is permissible under section 114.15(a) because it is susceptible of a reasonable interpretation other than as an appeal to vote for or against a Federal candidate, despite the presence of indicia of express advocacy.

Example 2:

Announcer: Hello, I'm Sally Smith. Most of us think of heart disease as a problem that mostly affects men. But today, heart disease is one of the leading causes of death among American women. It doesn't have to stay that way. Lower cholesterol, daily exercise, and regular visits to your doctor can help you fight back. So have heart, America, and together we can reduce the risk of heart disease.

Voice Over: This message brought to you by DISH Network.[16]

This example was not included in the NPRM for public comment. Assuming that Sally Smith is a Federal candidate, the Commission concludes that this example does not qualify for the safe harbor in section 114.15(b), but is permissible under the general exemption in section 114.15(a). The example satisfies the first two prongs of the safe harbor because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1)) and it does not take a position on Sally Smith's character, qualifications, or fitness for office (section 114.15(b)(2)). However, the

[13] The Commission notes that these communications may nevertheless be subject to the Commission's coordination regulations. 11 CFR 109.21.

[14] *See McConnell* v. FEC, 251 F. Supp. 2d 176, 876 (D.D.C. 2003) (Leon, J.), *available at http://www.fec.gov/pages/bcra/mem_opinion_leon.pdf.*

[15] At least one commenter argued that this example should meet the proposed safe harbor because it does not include any critique of the candidate's character, qualifications or fitness for office. This commenter argued that the information about contributions from corporations merely provides background information to the viewer about the past positions of the candidate on environmental issues, not an attempt to impugn character.

[16] This example is drawn from the sample advertisement in AO 2006–10 (EchoStar), Exhibit A (June 30, 2006). Under the particular facts of that advisory opinion, these advertisements were not analyzed as ECs because the requestor stated these advertisements would not be broadcast during the EC time period.

communication does not satisfy the third prong of the safe harbor because it does not focus on a ''legislative, executive or judicial matter'' (section 114.15(b)(3)(i)) or ''propose[] a commercial transaction'' (section 114.15(b)(3)(ii)). Thus, this example does not qualify for the safe harbor.

Nonetheless, this communication is permissible under the two-factor analysis for the general exemption in section 114.15(a). First, the communication does not include indicia of express advocacy because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(c)(1)(i)), or take a position on Sally Smith's character, qualifications, or fitness for office, (section 114.15(c)(1)(ii)). Nor does the example include any other content that would constitute indicia of express advocacy. Second, this example contains content that would support a determination that the communication has an interpretation other than as an appeal to vote for or against Sally Smith under the third provision in section 114.15(c)(2)(iii). The communication's ''call to action'' is an appeal to viewers to lower their cholesterol, participate in daily exercise, and visit their doctors regularly. The rest of the communication is focused on heart disease and the risk of heart disease for women. In conjunction with the rest of the communication, the call to action can be interpreted as urging action separate from electoral activity. Balancing both factors, this communication is permissible under section 114.15(a) because it is susceptible of a reasonable interpretation other than as an appeal to vote for or against a Federal candidate.

c. Examples of Communications that are Not Permissible under 11 CFR 114.15(a)

Example 1:

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But ''her nose was not broken.'' He talks law and order * * * but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.[17]

All commenters that discussed the examples agreed with the NPRM's statement that this example would not qualify for the proposed grassroots lobbying communications safe harbor. *See NPRM* at 50268. The commenters were also in agreement that this example has ''no reasonable interpretation other than as an appeal to vote for or against a specific candidate'' and should not qualify for the general exemption. Some commenters noted that the Supreme Court in *McConnell* held that this advertisement was the functional equivalent of express advocacy and that it should serve as a model for the types of character attacks that will not be permissible under the final rule.

The Commission has determined that this example does not qualify for the safe harbor and is not permissible under the final rule's general exemption. Although the example meets the first prong of the safe harbor because it does not mention any election, candidacy, political party, opposing candidate, or voting by the general public (section 114.15(b)(1), this communication attacks Bill Yellowtail's character by referring to alleged actions he took against his spouse, as well as his supposed delinquent child-support payments, and his past felony conviction. Such statements clearly constitute taking a position on the candidate's character, qualifications, or fitness for office under the second prong (section 114.15(b)(2)). Therefore, the example does not qualify for the safe harbor.

Nor is the example permissible under the two-factor analysis for the general exemption in section 114.15(a). Under the first factor, the communication includes indicia of express advocacy because it attacks the candidate's character (section 114.15(c)(1)(ii)). This example also does not have any of the types of content supporting a determination that the communication has an interpretation other than as an appeal to vote against Bill Yellowtail. First, although a past vote ''against child support enforcement'' is mentioned, the communication does not focus on any public policy issue under section 114.15(c)(2)(i). Instead, the communication focuses on the candidate's own personal and legal history. The communication does not propose any commercial transaction under section 114.15(c)(2)(ii). Finally, the communication appears to include a ''call to action'': ''Call Bill Yellowtail. Tell him to support family values.'' However, when examined in conjunction with the rest of the communication that focuses on personal character attacks against Bill Yellowtail, this vague appeal does not provide an interpretation other than urging the public to vote against the candidate.

Balancing both the presence of indicia of express advocacy and the lack of content supporting another interpretation, this communication is not permissible under section 114.15(a) because it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a Federal candidate.

Example 2:

What's important to America's families? [middle-aged man, interview style]: ''My pension is very important because it will provide a significant amount of my income when I retire.'' And where do the candidates stand? Congressman Charlie Bass voted to make it easier for corporations to convert employee pension funds to other uses. Arnie Arnesen supports the ''Golden Trust Fund'' legislation that would preserve pension funds for retirees. When it comes to your pension, there is a difference. Call or visit our Web site to find out more.[18]

The NPRM requested public comment as to whether this example should qualify for the proposed grassroots lobbying safe harbor or the general exemption. *See NPRM* at 50269. The commenters generally agreed that this example did not qualify for the proposed safe harbor because it mentioned the Representative Bass candidacy and his opposing candidate in the election, Arnie Arnesen (proposed third prong). However, the commenters disagreed as to whether this example qualified for the proposed general exemption. Some commenters argued that this communication was an issue advertisement focusing on pension protection and merely contrasted the candidates' different positions on that issue. These commenters argued that the example can be reasonably interpreted as providing information about the pensions issue and the candidates' positions on that issue. In contrast, most commenters thought that this example is the ''functional equivalent of express advocacy'' and does not qualify for the general exemption. These commenters noted that the discussion of candidacies in the communication made it unreasonable to interpret the communication in any way other than as urging the viewer to vote for one candidate over the other.

The Commission has determined that this example does not qualify for the safe harbor and is not permissible under the final rule's general exemption. The example fails the first prong of the safe harbor in section 114.15(b)(1) because it specifically discusses ''the candidates,'' including Representative Bass and his

[17] ''Bill Yellowtail,'' *McConnell* v. *FEC*, 540 U.S. 93, 193 n.78 (2003). The Court noted that this advertisement was ''clearly intended to influence the election.'' *Id.*

[18] Adapted from *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 918 (D.D.C. 2003) (Leon, J.), *available at http://www.fec.gov/pages/bcra/mem_opinion_leon.pdf.*

opponent, Arnie Arnesen. The fact that Arnie Arnesen is running against Representative Bass is the type of external background fact that the Commission may consider in its analysis under section 114.15(d) because it requires minimal, if any, discovery. Therefore, the communication does not qualify for the safe harbor.

The Commission then applies the two-factor analysis in section 114.15(c) to determine if the communication is permissible under the general example in section 114.15(a). Under the first factor, the communication includes indicia of express advocacy because, as discussed above, it mentions a candidacy and an opposing candidate (section 114.15(c)(1)(i)). Moreover, this example does not have any of the types of content listed in the second factor that support an interpretation other than as an appeal to vote against Representative Bass. Although the communication discusses the public policy issue of pension funds generally, and the ''Golden Trust Fund'' legislation specifically, it does not urge the candidate(s) to take a particular position on that issue or urge the public to contact the candidate(s) about that issue (section 114.15(c)(2)(i)). Instead, the communication urges the public to ''Call or visit our Web site to find out more.'' This type of call to action is analyzed under the third provision in section 114.15(c)(2)(iii).[19] The Commission may not consider the content of the external Web site referenced in the communication, but must examine the communication's appeal to the public to ''find out more'' in conjunction with the rest of the communication. *See* 11 CFR 114.15(d). The communication characterizes Representative Bass's position on the issue negatively and Arnie Arnesen's position on the issue positively. Moreover, it describes these two positions as ''where the *candidates* stand'' (emphasis added) rather than as where an *officeholder* stands. Thus, in conjunction with the rest of the communication, the call to action here does not constitute content that supports an interpretation other than as an appeal to vote. Considering both factors, this communication is not permissible under section 114.15(a) because it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a Federal candidate.

6. 11 CFR 114.15(f)—Corporate and Labor Organization Reporting Requirement

New section 114.15(f) states that corporations and labor organizations that make electioneering communications permissible under section 114.15(a) aggregating in excess of $10,000 in a calendar year must file statements according to the EC reporting requirements in 11 CFR 104.20. The final rule adopts the NPRM's proposed language, which was not discussed by any of the commenters. Details regarding the reporting obligations for these entities are discussed below.[20]

D. Revisions to the Reporting Requirements for Electioneering Communications

The Act and current Commission regulations require any person that has made ECs aggregating in excess of $10,000 in a calendar year to file a disclosure statement. *See* 2 U.S.C. 434(f)(1); 11 CFR 104.20(b). Generally, these statements must disclose the identities of the persons making the EC, the cost of the EC, the clearly identified candidate appearing in the EC and the election in which he or she is a candidate, and the disclosure date. *See* 2 U.S.C. 434(f)(2)(A)–(D); 11 CFR 104.20(c)(1)–(6). Persons making ECs must also disclose the names and addresses of each person who donated an amount aggregating $1,000 or more during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. *See* 2 U.S.C. 434(f)(2)(F); 11 CFR 104.20(c)(8). However, the Act and Commission regulations provide the option that persons making ECs may create a segregated bank account for funding ECs in order to limit reporting to the donors to that account. *See* 2 U.S.C. 434(f)(2)(E); 11 CFR 104.20(c)(7). The segregated bank account may only include funds contributed by individuals who are U.S. citizens or nationals, or permanent residents. Id. If a person does not create a segregated bank account and funds ECs from its general account, that person must disclose all donors of over $1,000 to the entity during the current and preceding calendar year. *See* 2 U.S.C. 434(f)(2)(F); 11 CFR 104.20(c)(8). Moreover, persons that do not use a segregated bank account must be able to demonstrate through a reasonable accounting method that no corporate or labor organization's funds were used to pay any portion of an EC. *See* 11 CFR 114.14(d)(1).

Alternative 1, proposed in the NPRM, would have required corporations and labor organizations making ECs that are permissible under proposed section 114.15 to comply with the same reporting requirements as other entities making ECs. Thus, under Alternative 1, corporations and labor organizations would have been required to disclose the names and addresses of each person, including corporations and labor organizations, who donated an amount aggregating $1,000 or more during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. In addition, the proposed regulations would have allowed any person making an EC permissible under section 114.15, including corporations and labor organizations, to establish a segregated bank account to accept funds for that purpose.

All commenters who addressed disclosure of ECs stated that corporations and labor organizations should not be required to report the sources of funds that made up their general treasury funds. However, commenters disagreed on what specific EC reporting requirements should apply to corporations and labor organizations.

Some commenters proposed that disclosure by corporations and labor organizations should be limited to funds that are either designated for ECs or received in response to solicitations that specifically request donations for making ECs. Another commenter suggested that the current reporting rules for individuals, unincorporated entities, and qualified nonprofit corporations making ECs also be applied to corporations making ECs. This commenter's proposal would allow a corporation or labor organization to establish an account pursuant to 11 CFR 114.14(d)(2)(i) and report the identities of only those persons who contributed to that account. Without such an account, however, a corporation or labor organization would have to report the identities of everyone who donated $1,000 or more to that corporation or labor organization. If a corporation or labor organization receives no donations, and it paid for an EC out of

[19] The communication does not have content supporting another interpretation under the second provision in section 114.15(c)(2)(ii) because it does not propose any commercial transaction.

[20] In addition to complying with the reporting obligations under section 104.20, all ECs that are permissible under section 114.15 must contain a disclaimer. *See* 2 U.S.C. 441d and 11 CFR 110.11(a)(4). The disclaimer must include the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, as well as a statement that the communication is not authorized by any candidate or candidate's committee. *See* 11 CFR 110.11(b)(3). The disclaimer must be clear and conspicuous and must include both audio and written statements identifying the person responsible for the communication. *See* 11 CFR 110.11(c)(1) and (c)(4)(i)–(iii).

its general treasury funds, it would only have to report that fact.

One commenter argued that the concepts of ''donor'' and ''donate'' should exclude membership dues, investment income, or other commercial or business income. This commenter also suggested that use of general treasury money by a labor organization, *i.e.* funds derived from union dues, should not require a labor organization to report individual union members as donors, and that labor organizations should only have to report the source of funds as general treasury funds. The same commenter further asserted that segregated bank accounts are not a meaningful alternative for labor organizations, and argued that disclosing the sources of their general treasury funds would impose a heavy burden on labor organizations.

Finally, one commenter argued that disclosure by nonprofit corporations should be limited to those amounts listed on line 1 of the corporation's IRS Form 990, which includes ''[c]ontributions, gifts, grants, and similar amounts received'' by an organization exempt from income tax, because nonprofit corporations have a wide variety of sources of income, and unlimited disclosure would create a heavy burden for them. This commenter also argued that more extensive reporting requirements would far exceed all other reporting requirements that currently apply to nonprofit organizations, such as reporting to the Internal Revenue Service. This commenter also suggested that corporations and labor organizations should be required to report only grants and donations that are designated to support ECs.

As discussed in detail below, after consideration of the comments, the Commission has decided to depart from the rules proposed in the NPRM and instead to require corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs made by that corporation or labor organization pursuant to 11 CFR 114.15. The Commission emphasizes that all the other reporting requirements that apply to any person making ECs, which are set forth at 2 U.S.C. 434(f)(2)(A)–(E) and 11 CFR 104.20(c)(1)–(6), apply also to corporations and labor organizations making ECs permissible under section 114.15. Thus, like all persons making ECs that cost, in aggregate, more than $10,000, corporations and labor organizations must also disclose their identities as the persons making the ECs, the costs of the ECs, the clearly identified candidates appearing in the communications and the elections in which the candidates are participating, and the disclosure dates.

1. Revised 104.20(c)(8) and New 11 CFR 104.20(c)(9)—Reporting the Use of Corporate and Labor Organization Funds To Pay for Permissible Electioneering Communications

A corporation's general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission. These investors, customers, and donors do not necessarily support the corporation's electioneering communications. Likewise, the general treasury funds of labor organizations and incorporated membership organizations are composed of member dues obtained from individuals and other members who may not necessarily support the organization's electioneering communications.

Furthermore, witnesses at the Commission's hearing testified that the effort necessary to identify those persons who provided funds totaling $1,000 or more to a corporation or labor organization would be very costly and require an inordinate amount of effort. Indeed, one witness noted that labor organizations would have to disclose more persons to the Commission under the ECs rules than they would disclose to the Department of Labor under the Labor Management Report and Disclosure Act.

For these reasons, the Commission has determined that the policy underlying the disclosure provisions of BCRA is properly met by requiring corporations and labor organizations to disclose and report only those persons who made donations for the purpose of funding ECs. Thus, new section 104.20(c)(9) does not require corporations and labor organizations making electioneering communications permissible under 11 CFR 114.15 to report the identities of everyone who provides them with funds for any reason.[21] Instead, new section 104.20(c)(9) requires a labor organization or a corporation to disclose the identities only of those persons who made a donation aggregating $1,000 or more specifically for the purpose of furthering ECs pursuant to 11 CFR 114.15, during the reporting period. This period begins on the first day of the preceding calendar year and runs through the disclosure date. Donations made for the purpose of furthering an EC include funds received in response to solicitations specifically requesting funds to pay for ECs as well as funds specifically designated for ECs by the donor.[22]

In the Commission's judgment, requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering ECs appropriately provides the public with information about those persons who actually support the message conveyed by the ECs without imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs.

The Commission is also making a conforming amendment to 11 CFR 104.20(c)(8), which sets forth reporting requirements for ECs that were not paid for exclusively from a segregated bank account, by inserting the phrase ''and were not made by a corporation or labor organization pursuant to 11 CFR 114.15,'' after the phrase ''described in paragraph (c)(7) of this section.'' This modification clarifies that the pre-existing reporting requirements that apply to individuals, QNCs, and unincorporated organizations making ECs do not apply to corporations and organizations making ECs permissible under new section 114.15.

2. Revised 11 CFR 104.20(c)(7) and 114.14(d)(2)—Using Segregated Bank Accounts for Electioneering Communications

Previously, section 104.20(c)(7) only addressed segregated bank accounts containing funds solely from individuals who are ''United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20).'' Following the approach proposed in the NPRM, the Commission has decided to divide section 104.20(c)(7) into paragraphs (c)(7)(i) and (c)(7)(ii). New paragraph (c)(7)(i) is substantially the same as former paragraph (c)(7) and sets forth the reporting requirements that apply to a segregated bank account used by individuals, unincorporated

[21] A QNC making an electioneering communication pursuant to 11 CFR 114.10, rather than pursuant to 11 CFR 114.15, would be required to report under 11 CFR 104.20(c)(7) or (8).

[22] The ''for the purpose of furthering'' standard in 11 CFR 104.20(c)(9) is drawn from the reporting requirements that apply to independent expenditures made by persons other than political committees. *See* 2 U.S.C. 434(c)(2)(C), 11 CFR 109.10(e)(1)(vi).

associations, and QNCs to pay for any ECs that do not come under new section 114.15. Corporations and labor organizations continue to be prohibited from donating to such an account.

In contrast, new paragraph (c)(7)(ii) sets forth the reporting requirements for a segregated bank account to be used to pay for ECs that are permissible under 11 CFR 114.15. Because this second type of account is used exclusively to pay for ECs permissible under new section 114.15, paragraph (c)(7)(ii) provides that such an account may contain corporate and labor organization funds. The reporting requirements that apply to a person setting up a segregated bank account to pay for ECs that are permissible under section 114.15 are the same as they are under previous paragraph (c)(7) and new paragraph (c)(7)(i), that is, such a person must report the identity of every person who donates an amount aggregating $1,000 or more to the person making the disbursement during the preceding calendar year.

Additionally, as proposed in the NPRM, the Commission is making conforming changes to 11 CFR 114.14(d)(2), which applies to the use of segregated bank accounts by persons that receive funds from corporations or labor organizations. Specifically, consistent with the changes to section 104.20(c)(7), the Commission is dividing section 114.14(d)(2) into two paragraphs. Paragraph (d)(2)(i) allows any person, other than corporations and labor organizations, wishing to make ECs permissible under 11 CFR 114.15 to establish a segregated bank account for that exclusive purpose. Such an account would report only donations made to the account for the purpose of making ECs, pursuant to 11 CFR 104.20(c)(7)(ii). Consistent with new section 104.20(c)(7)(ii), an account set up under section 114.14(d)(2)(i) may contain corporate and labor organization funds. The Commission notes that QNCs, like all corporations, are excluded from setting up a segregated account under paragraph (d)(2)(i) because they are, by definition, prohibited from accepting any corporate or labor organization funds.

Revised paragraph (d)(2)(ii) is substantially the same as former paragraph (d)(2) and continues to allow persons other than corporations (except for QNCs) and labor organizations to establish a segregated bank account to be used exclusively to pay for ECs that do not come under the new exception in section 114.15.

The Commission believes that if organizations that are not corporations or labor organizations intend to use corporate or labor organization funds to make some ECs that comply with the new *WRTL II* exemption, and intend to make other ECs that do not, or might not, come within the exemption, they would be well-advised to establish two separate bank accounts to ensure that corporate and labor organization funds are only accepted and used to fund exempt ECs. Please note, however, that separate bank accounts are not mandatory because organizations need only show that they used a reasonable accounting method to separate corporate and labor organization funds under 11 CFR 114.14(d)(1).

E. Conforming Revisions to Other Commission Regulations

1. Revisions to 11 CFR 114.4—Communications Beyond the Restricted Class

Paragraph 114.4(c) sets out the types of communications that corporations and labor organizations may make either to the general public or to all employees and members. Such communications include registration and voting communications, official registration and voting information, voting records, and voting guides. The Commission is adding new paragraph (c)(8) to state that any corporation or labor organization may make ECs to the general public that fall within the new exemption in section 11 CFR 114.15. Paragraph (c)(8) also makes clear that QNCs may make ECs regardless of whether they are permissible under 11 CFR 114.15. In addition, the Commission is making a conforming change to section 114.4(c)(1), which lists the paragraphs that describe communications that corporations and labor organizations may make to the general public, by adding a reference to paragraph (c)(8).

2. Revisions to 11 CFR 114.14—Further Restrictions on the Use of Corporate and Labor Organization Funds for Electioneering Communications

Former section 114.14 prohibited corporations and labor organizations from providing general treasury funds to pay for any ECs whatsoever. The Commission's revisions to this section limit this prohibition to ECs that do not come within the new *WRTL II* exemption in section 114.15, consistent with the proposed changes to the general prohibition on the use of corporate and labor organization funds in section 114.2.

Former paragraphs (a)(1) and (a)(2) of this section contained a general ban on corporations and labor organizations providing funds to any other person for the purpose of financing an EC. Likewise, former paragraphs (b)(1) and (b)(2) of this section prohibited persons that accept funds from corporations and labor organizations from using those funds to pay for ECs, or from providing those same funds to any other person for the purpose of paying for an EC. Former paragraph (d)(1) of this section requires any person that receives funds from corporations and labor organizations, and that makes ECs, to demonstrate by a reasonable accounting method that no corporate or labor organization funds were used to pay for the EC.

Paragraphs (a)(1), (b)(1) and (2), and (d)(1) are being modified by adding the phrase ''that is not permissible under 11 CFR 114.15'' after the word ''communication'' in each paragraph. Paragraph (a)(2) is being modified by adding the word ''such'' after the phrase ''pay for.'' These changes implement *WRTL II* by limiting the prohibition on the use of corporate and labor organization funds to those ECs that are the functional equivalent of express advocacy, and therefore are not permissible under new 11 CFR 114.15. Paragraph (d)(1) is being further revised by adding the phrase ''other than corporations and labor organizations'' after the word ''Persons.'' The Commission is making this change to avoid any suggestion that corporations or labor organizations may make ECs that do not come within the new exception articulated in *WRTL II.*

IV. The Definition of Express Advocacy in 11 CFR 100.22

The NPRM sought public comment on whether *WRTL II* also provided guidance as to the scope of other provisions in the Act, such as the definition of ''express advocacy'' in 11 CFR 100.22. *See NPRM* at 50263. Specifically, the NPRM asked whether *WRTL II* required the Commission to revise or repeal any portion of the two-part definition in section 100.22. The commenters were divided as to what, if any, guidance *WRTL II* decision provided the Commission with respect to the proper scope of the ''express advocacy'' definition in section 100.22. The Commission has decided to leave open the issue of the impact, if any, of *WRTL II* on the definition of ''express advocacy'' and to address the question at a later time.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached final rule does not have a significant economic impact on a substantial number of small entities. The basis for this certification is that

any small entities affected should not feel a significant economic impact from the final rule. Overall, the final rule relieves a funding restriction that the prior rules placed on corporations and labor organizations and therefore has a positive economic impact for any affected small entities. The final rule allows small entities to engage in activity they were previously prohibited from funding with corporation or labor organization funding. Moreover, this activity (making and funding ECs) is entirely voluntary, and any reporting obligations are only triggered based on entities choosing to engage in this activity above a threshold of $10,000 per calendar year. The reporting obligations are also limited to donations made for the purpose of furthering electioneering communications and should not have a significant economic impact on any reporting entity.

In addition, there may be few ''small entities'' that are affected by this final rule. The Commission's revisions affect for-profit corporations, labor organizations, individuals and some non-profit organizations. Individuals and labor organizations are not ''small entities'' under 5 U.S.C. 601(6). Most, if not all, for-profit corporations that are affected by the final rule are not ''small businesses'' under 5 U.S.C. 601(3). Large national and state-wide non-profit organizations that might produce electioneering communications are not ''small organizations'' under 5 U.S.C. 601(4) because they are not independently owned and operated and they are dominant in their field.

List of Subjects

11 CFR Part 104

Campaign funds, political committees and parties, reporting and recordkeeping requirements.

11 CFR Part 114

Business and industry, Elections, Labor.

■ For the reasons set out in the preamble, the Federal Election Commission is amending Subchapter A of Chapter 1 of Title 11 of the *Code of Federal Regulations* as follows:

PART 104—REPORTS BY POLITICAL COMMITEES AND OTHER PERSONS (2 U.S.C. 434)

■ 1. The authority citation for part 104 continues to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, 441a, and 36 U.S.C. 510.

■ 2. In § 104.20, paragraphs (c)(7) and (c)(8) are revised and paragraph (c)(9) is added to read as follows:

§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).

* * * * *

(c) * * *

(7)(i) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications not permissible under 11 CFR 114.15, consisting of funds provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or

(ii) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications permissible under 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(9) If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

* * * * *

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

■ 3. The authority citation for part 114 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.

■ 4. In § 114.2, the section heading and paragraph (b)(2) are revised and paragraph (b)(3) is added to read as follows:

§ 114.2 Prohibitions on contributions, expenditures and electioneering communications.

* * * * *

(b) * * *

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D; or

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party.

(3) Corporations and labor organizations are prohibited from making payments for an electioneering communication to those outside the restricted class unless permissible under 11 CFR 114.10 or 114.15. However, this paragraph (b)(3) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(i) The committee is not a political committee as defined in 11 CFR 100.5;

(ii) The committee incorporated for liability purposes only;

(iii) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(iv) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

* * * * *

■ 5. In § 114.4, paragraph (c)(1) is amended by adding the phrase ''and (c)(8)'' after ''(c)(5),'' and paragraph (c)(8) is added to read as follows:

§ 114.4 Disbursements for communications beyond the restricted class in connection with a Federal election.

* * * * *

(c) * * *

(8) *Electioneering communications.* Any corporation or labor organization may make electioneering communications to the general public that are permissible under 11 CFR 114.15. Qualified nonprofit corporations, as defined in 11 CFR 114.10(c), may make electioneering communications in accordance with 11 CFR 114.10(d).

* * * * *

■ 6. In § 114.14, paragraphs (a), (b) and (d) are revised to read as follows:

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse,

donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication that is not permissible under 11 CFR 114.15, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for such an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication that is not permissible under 11 CFR 114.15; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication that is not permissible under 11 CFR 114.15.

* * * * *

(d)(1) Persons other than corporations and labor organizations who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section, must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of any electioneering communication that is not permissible under 11 CFR 114.15.

(2)(i) Any person other than a corporation or labor organization who wishes to pay for electioneering communications permissible under 11 CFR 114.15 may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided for the purpose of paying for such electioneering communications as described in 11 CFR part 104. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication permissible under 11 CFR 114.15 shall be required to only report the names and addresses of those persons who donated or otherwise provided an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(ii) Any person, other than corporations that are not qualified nonprofit corporations and labor organizations, who wishes to pay for electioneering communications not permissible under 11 CFR 114.15 may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals as described in 11 CFR part 104. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for any electioneering communication shall be required to only report the names and addresses of those persons who donated or otherwise provided an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

■ 7. Section 114.15 is added to read as follows:

§ 114.15 Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) *Permissible electioneering communications.* Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) *Safe harbor.* An electioneering communication is permissible under paragraph (a) of this section if it:

(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

(c) *Rules of interpretation.* If an electioneering communication does not qualify for the safe harbor in paragraph (b) of this section, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or

(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:

(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or

(iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication.

(d) *Information permissibly considered.* In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.

(e) *Examples of communications.* A list of examples derived from prior Commission or judicial actions of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) of this section is available on the Commission's Web site, *http://www.fec.gov.*

(f) *Reporting requirement.* Corporations and labor organizations that make electioneering

communications under paragraph (a) of this section aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.20.

Dated: December 17, 2007.

Robert D. Lenhard,

Chairman, Federal Election Commission.

[FR Doc. E7–24797 Filed 12–21–07; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

Airworthiness Standards: Normal, Utility, Acrobatic, and Commuter Category Airplanes

CFR Correction

In Title 14 of the Code of Federal Regulations, Parts 1 to 59, revised as of January 1, 2007, on page 227, in § 23.561, remove the five paragraphs beginning with the second paragraph (d)(1)(i) through paragraph (d)(1)(v).

[FR Doc. 07–55522 Filed 12–21–07; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28876; Directorate Identifier 2000–NE–08–AD; Amendment 39–15311; AD 2007–26–09]

RIN 2120–AA64

Airworthiness Directives; Hartzell Propeller Inc. Compact Series Propellers

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for all Hartzell Propeller Inc. models ( )HC–( )( )Y( )–( )( )( ) compact series, constant speed or feathering propellers with Hartzell manufactured ''Y'' shank aluminum blades. That AD currently requires initial blade inspections, with no repetitive inspections; rework of all ''Y'' shank aluminum blades including cold rolling of the blade shank retention radius, blade replacement and modification of pitch change mechanisms for certain propeller models; and changing the airplane operating limitations with specific models of propellers installed. This AD requires the same actions but clarifies certain areas of the compliance, and updates a certain service bulletin (SB) reference to the most recent SB. This AD results from operators requesting clarification of certain portions of AD 2002–09–08. We are issuing this AD to prevent failure of the propeller blade from fatigue cracks in the blade shank radius, which can result in damage to the airplane and loss of airplane control.

DATES: This AD becomes effective January 30, 2008. The Director of the Federal Register previously approved the incorporation by reference of certain publications listed in the regulations as of June 13, 2002 (67 FR 31113, May 9, 2002). The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of January 30, 2008.

ADDRESSES: You can get the service information identified in this AD from Hartzell Propeller Inc. Technical Publications Department, One Propeller Place, Piqua, OH 45356; telephone (937) 778–4200; fax (937) 778–4391.

The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Tim Smyth, Senior Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Avenue, Des Plaines, IL 60018–4696; e-mail: *timothy.smyth@faa.gov*; telephone (847) 294–8110; fax (847) 294–7132.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 by superseding AD 2002–09–08, Amendment 39–12741 (67 FR 31113, May 9, 2002) with a proposed AD. The proposed AD applies to Hartzell Propeller Inc. models ( )HC–( )( )Y( )–( )( )( ) compact series, constant speed or feathering propellers with Hartzell manufactured ''Y'' shank aluminum blades. We published the proposed AD in the **Federal Register** on August 14, 2006 (71 FR 46413). That action proposed to require the same actions as AD 2002–09–08, but would clarify certain areas of the compliance and would update a certain SB reference to the most recent SB.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comment received.

Incorporate Service Documents by Reference and Publish Them in the Document Management System

The Modification and Replacement Parts Association requests that all service documents deemed essential to the accomplishment of the AD be incorporated by reference into the regulatory instrument, and published in the Docket Management System. We partially agree. We have incorporated pertinent service material into the regulatory section of this AD. However, at this time, the FAA does not post service material on the Federal Docket Management System. We are in the process of reviewing issues surrounding the posting of service bulletins on the Federal Docket Management System as part of an AD docket. Once we have thoroughly examined all aspects of this issue and have made a final determination, we will consider whether our current practice needs to be revised.

Format Changes

We changed the propeller blade shank cold rolling information from being a note, to paragraphs. We also added paragraphs to the alternative methods of compliance, to make the information more readable.

Conclusion

We have carefully reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the changes described previously.

Costs of Compliance

We estimate that this AD will affect 35,750 propellers installed on airplanes of U.S. registry. We expect this AD will cost about $700 per propeller. Total cost to U.S. operators for this AD would be about $25.025 million. However, we also expect that all of the affected propellers should have already been inspected to comply with the existing AD's requirements to inspect, and

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rules 28(a)(1)(A) and 35(c), Rep. Chris Van Hollen submits this Certificate as to Parties and Amici.

The Appellants are Center for Individual Freedom and Hispanic Leadership Fund, who were intervenors in the district court. The Appellee is Rep. Chris Van Hollen, who was the plaintiff in the district court. The Federal Election Commission, who was the defendant in the district court, is an appellee.

No amicus briefs were filed in the district court. Cause of Action filed an amicus brief in this Court in support of Appellants. No other amicus curiae briefs were filed.

CERTIFICATE OF SERVICE

I certify that on March 4, 2016, the foregoing Petition for Rehearing En Banc was filed using the Appellate CM/ECF system, and service was accomplished through the CM/ECF system on all participants in this case.

/s/ Catherine M.A. Carroll
CATHERINE M.A. CARROLL