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To <WRTL.ads@fec.gov>

cc

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Subject Notice 2007-16

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October 1, 2007

Ron B. Katwan
Assistant General Counsel
Federal Election Commission
VIA E-MAIL: WRTL.ads@fec.gov

Re: Electioneering Communications (Notice 2007-16)

Dear Mr. Katwan:

These comments are submitted in response to Notice 2007-16 to urge the Commission to adopt Alternative 2, creating an exception from the definition of "Electioneering Communication" for those communications protected under the standard set forth in the Supreme Court's recent decision.[1]

I write from my perspective as a lawyer who primarily advises nonprofit advocacy groups. In my day-to-day practice I work closely with a wide variety of nonprofit organizations, citizen groups, political action committees, and individuals. Many are primarily focused on electoral politics, but most are not, and enter that arena, if at all, only incidentally to their core mission focus. Although my firm represents many different nonprofit issue advocacy organizations, I submit these comments on my own behalf.

The literature on the important role that nonprofit advocacy plays in our society is vast, and I trust this Commission needs no detailed review of that point. These organizations that serve as the vehicle through which many citizens exercise their core constitutionally guaranteed freedoms of assembly and petitioning the government. When they wade into the waters of public policy advocacy, these groups must take into account several complex and detailed bodies of law that govern their speech, including the Internal Revenue Code, the Federal Election Campaign Act, the Federal Lobbying Disclosure Act, state campaign finance laws, and state lobbying disclosure laws. A significant portion of my professional life is dedicated to helping nonprofits understand the different limitations of each law, and to structure their activities so as to comply with all relevant provisions. Nonprofits struggle to maintain complex organizational structures that allow them to exercise the full range of political speech. It is not uncommon to find groups administering 501(c)(3) and 501(c)(4) corporations, a federal PAC, one or more state PACs, and a committee registered in each state where the organization seeks to influence a ballot measure. If the 501(c)(4) is a Qualified Nonprofit Corporation, it may also maintain a separate bank account out of which to pay for Electioneering Communications in order to protect the privacy of its general donors.

[1] Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (June 25, 2007) ("WRTL").

Understanding what activities may be supported by each member of this nonprofit "family" can be a challenge for staff, who are not typically legal experts. The burden of complying with different reporting regimes, each with its own set of definitions and particular quirks, would be hard to understate. While any single provision may be relatively easy to understand and apply in isolation, in practice it will be combined with the existing host of legal requirements. Every incremental increase in administrative burden will divert more of a nonprofit's resources from direct pursuit of the organization's mission. Additional complexity in the legal rules should be avoided unless it creates a clear and significant benefit to the public interest.

Alternative 2 eases the compliance burden for nonprofit corporations engaging in constitutionally protected issue advocacy. It is easy to understand, carving out from the definition of the law's regulation the type of communication that the Supreme Court held to be protected. An organization need only determine that its message is permitted under this definition, and its FECA compliance burden is met. Alternative 1 is vastly more complex, as the text of the Notice and the proposed regulations easily demonstrate. Nonprofit advocates would have to understand not only what constitutes express advocacy and electioneering communications, but that there are two different types of the latter. Yet another bank account will be required for the newly-designated second type, with different rules for funding and spending. Confusion is likely to multiply, as organizations or coalitions attempt to determine whether they can run a lobbying ad and the consequences of doing so. An entirely new vocabulary will have to be developed to discuss corporate-fundable electioneering communications.

Organizations would have to choose between establishing yet another bank account to be separately administered, or intruding on their donors' privacy. Alternative 1 would demand financial disclosure for speech that the Court characterized as "genuine issue ads."[2] It is true that the *McConnell* Court upheld the disclosure rules for electioneering communications, but it did so in a context where it concluded that those ads may be regulated as the "functional equivalent of express advocacy."[3] The Commission is now faced with the task of drafting regulations regarding speech which does not meet that standard. It would be erroneous to conclude that the Supreme Court has spoken definitively on the question of requiring speakers to disclose information to the Federal Election Commission when engaging in non-electoral speech.

Of course, the Commission is not charged with drafting laws, only interpreting them. These policy considerations, serious though they may be, cannot be the sole guide in this process. Fortunately, the statute itself provides a suggestion of Congress's intent should its regulation of Electioneering Communications be limited. Foreseeing that it might have reached too broadly in its attempt to regulate broadcast communications, Congress provided a "back-up" definition to apply should the primary definition be "held to be constitutionally insufficient by final judicial

[2] *WRTL* at 2668.
[3] McConnell v. Federal Election Commission, 540 U.S. 93, 206 (2003).

decision."[4] The *WRTL* Court did not revisit the facial challenge to this definition, but did limit its practical application. While its holding did not trigger the back-up definition, the inclusion of that definition in the statute nonetheless provides insight into Congress's intent should the sweep of the "Electioneering Communication" definition be limited. Tellingly, Congress did not provide alternate back-ups for disclosure under BCRA section 201 and the corporate prohibition of section 203. Rather, if the initial definition were to be found unconstitutional as written, it created the back-up to spring into effect for all purposes. There is absolutely no indication that Congress would have wanted to apply a different standard for disclosure than applies to the prohibitions of section 203. In the absence of other more compelling evidence of legislative intent, this provides a clear indication for the Commission to follow.

A final reason not to pursue Alternative 1 is the complexity and, ultimately, futility of applying the Electioneering Communication disclosure requirements to organizations that make constitutionally protected electioneering communications with funds donated by corporations and labor unions. BCRA did not envision its disclosure requirements applying to such entities. It is predicated on the premise that knowing the names of all donors to a fund or organization will be sufficient to identify them, because under BCRA as enacted, only funds donated by individuals may be used to pay for electioneering communications. That is not the case with corporations or unions, however. Those who seek to hide their identity can simply create an extra corporate layer so that only the corporation giving to another organization (or its segregated bank account) is disclosed. The donor corporation will not have to disclose its funding sources because it is not itself paying for electioneering communications or otherwise making expenditures that would trigger FECA disclosure. An effective corporate disclosure scheme would have to consider this problem of pass-through funding. A legislative body might apply an earmarking standard, or might look through each corporate donor to require disclosure of its own funders at some level of giving. However, establishing such a look-through approach goes far beyond the statute that this body is charged with interpreting. The absence of any such provisions in BCRA is further evidence that Congress had no intention of applying its disclosure rules to corporations for speech allowed under any applicable exception or constitutionally-mandated limitation.

Thank you for the opportunity to provide these comments.

Sincerely,

/s/ Elizabeth Kingsley
Elizabeth Kingsley

[4] Bipartisan Campaign Reform Act of 2002 § 201(a), 2 U.S.C. § 434(f)(3)(ii).