"Mary Coogan" <MaryC@independentsector.org>
10/01/2007 05:32 PM

To <wrtl.ads@fec.gov>
cc "David Thompson" <davidt@independentsector.org>
bcc
Subject IS comments on Electioneering Communications

Dear Mr. Katwan,

Attached please find the comments from Independent Sector in response to the Notice of Proposed Rulemaking on Electioneering Communications. Please contact me at the address or telephone below if you are unable to open this attachment. We appreciate your consideration of our views.

Sincerely,

Mary Coogan

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IS comments to FEC on issue ads FINAL 10-1-07.doc

October 1, 2007

Mr. Ron B. Katwan, Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Proposed Rule on Electioneering Communications

Dear Mr. Katwan:

Thank you for the opportunity to comment on the Federal Election Commission's proposed rule on electioneering communications (Notice 2007-16). Independent Sector is a nonpartisan membership organization, organized as a 501(c)(3) public charity, that brings the nonprofit community together to make a greater difference in the lives of individuals and their communities. Our coalition of over 600 charities, foundations, and corporate philanthropy programs advocates for public policies that advance the common good, strengthens the effectiveness of organizations, and connects nonprofit leaders so they can develop ideas and take action.

Independent Sector joined a coalition of public charities in filing an amicus brief[1] in the case which prompted this proposed rule – *FEC v. Wisconsin Right to Life*. The amicus brief focused on the unconstitutional effect of the electioneering communications rule[2] on 501(c)(3) organizations that, due to restrictions inherent in their tax status, do not have the option of running ads through a related political committee during the black out period when electioneering communications are banned. The brief stressed the value of allowing these nonpartisan voices to speak out on topics related to their mission during election times. We file these comments in support of the positions taken in that brief.

In *Wisconsin Right to Life*, the U.S. Supreme Court found the electioneering communications rule unconstitutional as applied to certain issue advertisements. In response, the FEC has proposed two alternative approaches

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[1] Brief of a Coalition of Public Charities, as Amici Curiae, in support of Appellee, in FEC *v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

[2] The electioneering communications rule bans corporations, both nonprofit and for-profit, from running broadcast ads that refer to a candidate for federal office within 30 days of a primary or 60 days of a general election. 2 U.S.C. § 434(f)(3) and §441(b).

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for interpreting this decision, one requiring disclosure to the FEC of the costs and funding sources, i.e., names of contributors, for such ads, and the other in which such disclosures would not be required. For the following reasons, Independent Sector believes strongly that the second alternative is the legally appropriate and more reasonable response.

I. Independent Sector members engage in advocacy efforts that at times include communications mentioning elected officials who may be candidates.

IS and its members engage in advocacy on a broad range of public policy issues, including federal and state regulation of charitable organizations, federal tax and spending policies, federal tax incentives for charitable giving, and protecting the advocacy rights of nonprofit organizations. The majority of our members are 501(c)(3) organizations that are precluded by law from participating or intervening in any political campaign on behalf of (or in opposition to) any candidate for public office. These organizations frequently do engage in lawful advocacy efforts to inform public policy debates on issues that affect their ability to fulfill their charitable purposes. These advocacy efforts at times include communications mentioning elected officials in their current capacity as representatives of the people, whether or not they are, at the same time, candidates for federal office.

Organizations cannot predict or control the timing of when an issue will be considered by public officials. Some of IS's member organizations are concerned, for example, about the possibility of estate tax repeal because of the negative effect such repeal would have on charitable giving. Their ability to encourage the public to contact their elected officials about a pending congressional vote on the estate tax would be curtailed if the vote was scheduled during an election period, as was the case in 2006. Other IS members may find it necessary to run ads asking a local official to keep a homeless shelter open, even though the official is also a candidate for federal office. IS members have also called on the public to contact their congressional representatives about pending votes that affect the funding and eligibility requirements for specific government programs related to charitable purposes ranging from human services to health to the arts. Even public service announcements could run afoul of the electioneering communications regulations if they mention an elected official who is currently a candidate.

In short, the right of nonprofit organizations to communicate with the public through advertisements is a legitimate form of advocacy. The existing restrictions on nonprofits already preclude their involvement in political activities and campaigns, so it is essential that FEC regulations not encroach unnecessarily on this form of speech.

II. Reporting requirements under Alternative One would present unnecessary and inappropriate obstacles to lobbying.

Alternative One would require nonprofits spending more than $10,0000 on exempted ads in a year to either report all donations over $1,000, or set up a separate segregated fund for such reporting, even though the permissible ads are not political campaign ads. The argument in support of this alternative is that the Supreme Court in *Wisconsin Right to Life* struck down only the electioneering communication funding restrictions and did not address

the existing disclosure rules under the Bipartisan Campaign Reform Act of 2002.[3] As explained above, issue advocacy is a fundamental right and purpose of nonprofit organizations. A distinction between the funding of ads, which the Supreme Court struck down, and the disclosure of funding for that right cannot be maintained.

First, the requirement of following complicated FEC reporting regulations would discourage, and would effectively prevent most charities from running issue ads during election periods. The reporting requirements would be an unnecessary obstacle for communications that are actually grassroots lobbying advertisements.

Aside from the daunting complexity involved in following FEC procedures, donor disclosure requirements present significant privacy concerns that are not outweighed by the government interests in disclosure. Americans exercise their rights of free speech and association to affect the formation of public policy largely through their membership in and financial support for a broad range of nonprofit organizations. Independent Sector has long maintained the position that rights to free speech and association would be seriously compromised if public disclosure of donors were made a condition for engaging in advocacy with respect to public policy. The Supreme Court ruled in *NAACP v. Alabama*[4] that forcing a nonprofit organization to disclose the identity of its members and the amount each has provided in financial support violates First Amendment rights to free speech and association absent a compelling governmental interest that is reasonably and clearly served by that disclosure. Given the Court's determination in *Wisconsin Right to Life* that government interests were not sufficient to restrict issue advocacy,[5] it follows that the requisite showing of government interest for requiring donor disclosure for such advocacy is also lacking.

We are also concerned about the chilling effect of proposed Alternative One on advocacy rights. IS members have found that even when their ads mentioning elected officials are run at times that are not election blackout periods, media editorial staff have either declined to run them or have required an accompanying disclaimer. It is difficult enough already to educate the media about the difference between issue ads and political campaign ads without creating another layer of confusion with the reporting requirements in Alternative One.

III. Independent Sector encourages the FEC to allow grassroots lobbying issue ads by adopting its proposed Alternative Two.

Of the two proposals put forth by the FEC, Independent Sector believes that Alternative Two more closely implements the Supreme Court ruling in *Wisconsin Right to Life*, that the issue ads are not the functional equivalent of express advocacy, and that the application of

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

[4] *NAACP v. Alabama*, 357 U.S. 449 (1958).

[5] "We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA §203 is unconstitutional as applied to the advertisements at issue in these cases." *Wisconsin Right to Life*, 127 S.Ct. at 2659.

the electioneering communications rule to such ads is therefore unconstitutional.[6] Alternative Two, which exempts such ads by excluding them from the definition of electioneering communications, is a more logical and administratively efficient approach than Alternative One, which lifts the ban but requires reporting of costs and sources of funding for such ads.

Issue ads that fit the proposed grassroots lobbying criteria[7] are adequately and more appropriately governed by the lobbying restrictions under the Internal Revenue Code and the Lobbying Disclosure Act. Nonprofit organizations described under Section 501(c)(3) of the tax code may engage in lobbying and other advocacy activities provided that "no substantial part" of the activities of such organizations involves "carrying on propaganda, or otherwise attempting, to influence legislation…"[8] Such organizations may elect to operate under the specific expenditure tests described in Section 501(h) for these activities. Public charities must also report their federal, state and local lobbying expenditures on their IRS Form 990. They also must follow Lobbying Disclosure Act rules requiring organizations that employ lobbyists and spend in excess of $24,500 in federal lobbying-related expenses during any six-month reporting period to register with Congress and to file disclosure reports with Congress on a semiannual basis.[9] The reports must include the name of the organization; a list of the specific issues lobbied on during the filing period, including bill numbers and references to specific executive branch actions; and a good faith estimate of the total expenses the organization incurred in connection with lobbying activities.

IV. Independent Sector supports exempting public service announcements and other charity promotions.

In its proposed rulemaking, the FEC also seeks comments on the advisability of regulating other types of ads, such as public service announcements, that mention a federal candidate yet could be reasonably interpreted as something other than as an appeal to vote for or against a clearly identified federal candidate.[10] For example, a charitable organization whose mission is to combat a particular disease might develop an ad campaign featuring an elected official who has some connection with that disease. In our opinion, these ads fall within the constitutionally required exemption established in *Wisconsin Right to Life*. We believe this to be the case even if the ads run during an election period because they obviously could be interpreted as something other than as an appeal to vote for or against a clearly identified federal candidate. Therefore, IS believes that Alternative Two's proposed exemption to electioneering communications in §100.29(c)(6) should include public service announcements as well as promotions of charities or charitable events.

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[6] *Wisconsin Right to Life*, 127 S.Ct. at 2667. The Court found that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

[7] 72 Fed. Reg. 50265-50269.

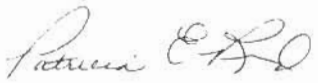
[8] 26 U.S.C. § 501(c)(3)

[9] These requirements will change in January 2008 to registration if lobbying expenses are over $10,000 in a quarter and reports must be filed electronically every quarter. Pub. L. 104-65 , amended by Pub. L. 110-81, 2 U.S.C. 1601 *et seq.*

[10] 72 Fed. Reg. 50270-50271.

We very much appreciate your consideration of these comments.

Sincerely,



Patricia Read
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