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To WRTL.ads@FEC.gov
cc
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Subject Comments of the National Association of Realtors in response to Notice of Proposed Rulemaking 2007-16, regarding Electioneering Communications

Mr. Katwan:

Attached please find a letter containing the Comments of the National Association of Realtors in response to Notice of Proposed Rulemaking 2007-16 regarding Electioneering Communications.

Please contact me if you have any difficulty accessing the attached document, or otherwise have any questions or comments.

Regards,

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FEC Electioneering Communication Rulemaking 10.01.07 final.DOC

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October 1, 2007

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

Via Email to WRTL.ads@FEC.gov

RE: Notice of Proposed Rulemaking Concerning Electioneering Communications

Dear Mr. Katwan:

This letter is submitted on behalf of the National Association of Realtors® ("NAR") in response to the Notice of Proposed Rulemaking ("Notice") regarding proposed revisions to the Commission's rules governing electioneering communications, Notice 2007-16, published by the Federal Election Commission ("Commission") in the Federal Register on August 31, 2007, 72 Fed. Reg. 50261 (2007).

NAR is an Illinois not-for-profit corporation exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code. NAR engages in a variety of federal legislative and political activities intended to advance the interests of its members by improving the legal climate in which the members conduct their businesses.[1] These activities include communications distributed to NAR members and the general public intended to educate and inform them about legislation and other matters pending in Congress or executive and administrative agencies that may impact the real estate industry, real estate professionals, or NAR. Such communications may call for specific Members of Congress or Executive branch officials to support or oppose the legislation or take specified agency action, may encourage readers to contact specified individuals to encourage them to support or oppose a particular legislative or regulatory proposal, or may otherwise identify candidates and/or Members of Congress for purposes not related to elections. These communications and any actions suggested therein are intended to influence the adoption or defeat of legislation or regulation, and in any case are not intended to influence the election or defeat of any candidate for federal office.

[1] NAR has established and operates the Realtors® Political Action Committee ("RPAC"), a separate segregated fund registered with and filing monthly reports to the Commission.

Accordingly, as an incorporated entity that has in the past and intends again in the future to engage in communication activities that may be regulated by the proposed regulations, NAR offers the comments below for the purpose of seeking clarity in the meaning and operation of the amended regulations and protection of NAR's right under the Constitution to engage in speech protected by the First Amendment.

1. Alternative 2 is preferable. The Commission requests comment on whether its proposed Alternative 1 or Alternative 2 is desirable or preferable. NAR believes proposed Alternative 2 is the appropriate approach. That Alternative establishes an exclusion to the definition of "electioneering communication" consistent with the types of communications that constitute protected speech under *Federal Election Commission v. Wisconsin Right To Life*, 551 U.S. ____ (2007) ("*WRTL*"). This is contrasted with Alternative 1, which establishes that certain kinds of electioneering communications (as that term is defined in the statute and regulations) paid for by corporations and labor organizations are permitted, notwithstanding the general prohibition of such communications by such entities. Corporate or labor organizations communications permitted under Alternative 1 would nevertheless remain subject to the other provisions applicable to electioneering communications, such as the requirement that they be reported.

NAR believes Alternative 2 is more conceptually consistent with the principle established by *WRTL* that certain non-electoral communications are outside the scope of what may be, and what was intended to be, regulated by the electioneering communications provisions of the Act and regulations. Those provisions were designed generally to apply to address certain perceived abuses of the ability of corporations and others to "engage in political speech so long as that speech did not expressly advocate the election or defeat of a clearly identified candidate" and to "cut back on corporations' ability to engage in (such) speech." *WRTL*, at 2660. Under *WRTL*, protected speech is that which is neither express advocacy nor its' functional equivalent, *Id.*, at 2667. Thus, because *WRTL* holds that certain speech is beyond that which the Constitution permits these provisions to proscribe, it is most appropriate that all of the relevant provisions be made inapplicable to that speech.

As stated in the explanation of Alternative 2 in the Notice, this means that the reporting and accounting provisions of the electioneering communication rules should not apply to protected communications. This is proper since Constitutionally protected speech should be free from any inhibiting factors whatsoever, including the administrative burdens associated with reporting as well as any chilling effects of having to affirmatively place on the public record the source of the funds used to pay for such speech to an extent beyond what the speaker chooses.

As also indicated in the Notice, exclusion of the protected communications from the definition of electioneering communications would further mean that the coordinated communications rules at 11 C.F.R. §§109.20-23 would not apply to them. This is likewise appropriate, since by definition the protected communications are not "political speech," and should not be treated as such. There is no basis for communications protected under *WRTL* to be

regulated as contributions or expenditures even if made after communication with a candidate in the manner set forth in the coordinated communications rules.

2. These amendments to the electioneering communications rules affect the Commission's existing definition of "express advocacy," 11 C.F.R. §100.22(a) and (b), and these amendments and/or amendments to that definition should address the relationship between these provisions.

WRTL holds that certain communications may not Constitutionally be prohibited as "electioneering communications" unless they constitute "express advocacy" or its functional equivalent. Concurrently, §100.22(a) and (b) of the Commissions' regulations define "express advocacy" in relation to other significant provisions of the Act not considered by the Court in *WRTL*. For example, an expenditure of money for a communication that is express advocacy under §100.22(a) and (b) constitutes an "expenditure" under the Act. 2 U.S.C. 431(9)(A). Such expenditure applies towards the $1,000 threshold for an entity to become a political committee under the Act and required to register and report to the Commission. Such expenditure is also unlawful if made by a corporation or labor organization.

There is therefore a need for consistency and harmony between the determination of "express advocacy" under the Act for purposes of the electioneering communications rules and application of that same defined term with respect to other requirements and limitations on expenditures for public communications under the Act. At an absolute minimum, differing and inconsistent definition or interpretation of "express advocacy" or its functional equivalent for different purposes under the Act would produce serious confusion and uncertainty. Notably, the same compelling interest supports the Constitutionality of both the electioneering contribution rules and the rules prohibiting corporate political campaign expenditures – concern for the real or apparent *quid pro quo* corruption of candidates and elected Members of Congress that might result from such expenditures. Therefore, because the same compelling interests and Constitutional justifications underlie regulation of "express advocacy" in both contexts, it is reasonable to conclude that the Supreme Court would, if presented with the issue, construe §100.22(a) and (b) in the same way as it characterized "express advocacy" or its functional equivalent in *WRTL*.

For these reasons, the Commission should extend this rulemaking to address §100.22(a) and (b), and, specifically, to modify those definitions to be consistent with the meaning it ultimately gives to the language "express advocacy or its functional equivalent" in the context of the present rulemaking for purposes of regulation of electioneering communications. In particular, this should include elimination of the ability of the Commission to consider the contextual matters presently incorporated in §100.22 (b) but consideration of which is precluded under *WRTL*. *WRTL* at 2669.

3. The proposed definition of "permissible electioneering communications" is too narrow.

Finally, the substantive heart of these proposed regulations is the definition of permissible electioneering communications, under either Alternative. NAR has several concerns about the proposed definition, primarily related to whether the proposed definition adequately satisfies the Court's admonition in *WRTL* that speakers are entitled to know with certainty whether a communication is within or outside the scope of the proscribed communications[2].

First, the definition includes the general exempting language that a communication is a permissible electioneering communication if it is "susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." We believe that the regulatory language should explicitly implement the directive of *WRTL* with respect to communications that may have more than one reasonable interpretation. The *WRTL* opinion concludes that a communication is not the functional equivalent of express advocacy if is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. *WRTL* at 2667. We believe that this language indicates the Court's intent that a communication should not be deemed to be the functional equivalent of express advocacy if it expresses a message other than an appeal to vote for or against a specific candidate, in addition to one that some readers might construe to have election-related implications.

Second, NAR recognizes that certain safe harbor provisions may be helpful in providing the certainty the Court holds is necessary for speakers to know whether they are engaging in prohibited or protected speech, but we believe that the safe harbors proposed by the Commission are too narrowly cast and do not satisfy the standard of eliminating all unconstitutional vagueness. Inasmuch as the definition of a permissible electioneering communication is one that is devoid of any reasonable interpretation as an appeal to vote for or against a specific candidate, there should be a simple, straightforward safe harbor for communications that do not contain any words of express advocacy, any references to elections, candidates, votes, or political parties, or any explicit references to the qualifications or fitness for office, voting, or election of any candidate identified. Such safe harbor should not require that the communication address other subjects, such as legislation, grassroots lobbying activities, or commercial or business enterprises or activities. Under *WRTL*, it is the absence of an appeal to the reader to vote for or against a candidate that solely determines that a communication is not the functional equivalent of express advocacy, rather than the inclusion of another non-electoral message. To be sure, grassroots lobbying communications were the subject of the communications at issue in *WRTL*, and in fact the Court relied on the grassroots lobbying character of those ads in determining that they were not "susceptible of no reasonable interpretation other than as an appeal to vote for or against a

[2] For example, the opinion in *WRTL* notes that "The test to distinguish constitutionally protected speech from speech that BCRA would proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. *WRTL*, at 2665. Justice Roberts also asserts that [W]here the First Amendment is implicated, the tie goes to the speaker, not the censor" *Id*., at 2669, and that "[w]hen it comes to defining what speech qualifies as the functional equivalent of express advocacy …. We give the benefit of the doubt to speech, not censorship." *Id.* , at 2674.

specific candidate." But the nature of the ads there was relevant only to the Court's conclusion that "WRTL's three ads are plainly not the functional equivalent of express advocacy," and is distinct from the Court's essential holding that communications are not the "functional equivalent" only if they are "susceptible of no reasonable interpretation…." *Id*., at 2667. Thus, any safe harbors prescribed by the Commission may address the inclusion of material that has a message other than that which is election-related, but should not obligate a communication to include any particular other content.

This approach would allow deletion of the vague and imprecise language incorporated in the safe harbors in the proposed regulations as well as the examples and accompanying discussion set forth in the Notice, such as whether a communication "urges" action by a candidate, whether legislation is "pending," whether a communication "exclusively" discusses a legislative issue, or even whether a candidate is, in the opinion of the entity making the communication, properly discharging his duties as a Member of Congress. Significantly, this would also preserve the First Amendment rights of speakers to comment on a wide range of subjects that may involve identifying federal candidates[3].

An alternative and more useful form of regulatory safe harbor, consistent with the above, would consist of a non-exclusive list of the type of statements that the Commission would not be permitted to conclude are the functional equivalent of express advocacy (provided, of course, that they did not also include words of express advocacy, references to elections, candidates, voting, or political parties, or explicit references to the qualifications of fitness of the candidate identified for office, voting, or election.) This list would include, at a minimum, statements to the following effect:

a. Statements calling upon members of the public to contact a Member of Congress or the Executive branch to express a position on a matter that is or might be addressed by Congress or an Executive or administrative agency.

b. Statements calling upon Members of Congress or the Executive branch to take a specified action on a matter that is or might be addressed by Congress or an Executive or administrative agency.

c. Statements calling upon a Federal candidate, including one who is not an incumbent, to take a position on a matter of legislative or administrative public policy that has been or might be raised in Congress or an Executive or administrative agency.

d. Statements that commend or are critical of a named Federal candidate's actions on matters of legislative or administrative public policy that have been or might be raised in Congress or an Executive or administrative agency.

e. Statements that identify Federal candidates who are associated with expressly identified charitable or other eleemosynary causes, or business activities or ventures.

[3] As discussed above, all such communications must omit words of express advocacy, references to elections, candidates, voting, or political parties, and explicit references to the qualifications or fitness of the candidate identified for office, voting, or election.

Each of these statements have legitimate, genuine objectives related to the current or future performance of the named elected officials or other individuals, and unrelated to any appeal to vote for or against such individuals in a forthcoming election. A party may seek to publicly criticize, or to commend, a specifically named candidate or individual to cause that person to adopt publicly a legislative or regulatory policy position, or to change or adhere to such a position previously adopted and expressed publicly, that is consistent with and will serve the interests of such party if the named candidate is elected. Similarly, communication of the association of a prominent Member of Congress with a named charity or business activity may be intended to and in fact benefit the charity or business. In short, each of these types of communications have bona fide non-election related purposes, and the regulated community would benefit greatly from the Commissions' explicit regulatory recognition that such statements will not be deemed the functional equivalent of express advocacy.

Very truly yours,

s/s

Ralph W. Holmen

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