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10/01/2007 11:58 PM

To wrtl.ads@fec.gov
cc
bcc
Subject comments on proposed rule NPRM 2007-16

The comments of OMB Watch are attached. Please let me know if you have any trouble opening this attachement.
Kay Guinane

Combined Federal Campaign #10201

FEC WRTL Comments.doc

October 1, 2007

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

Re: Comments on NPRM 2007-16, Electioneering Communications

Dear Mr. Katwan and Commissioners,

OMB Watch is a nonprofit, charitable organization that promotes government accountability and citizen participation at the national level. We work closely with nonprofit organizations across the country and encourage their participation in governmental decision-making, which includes advocacy, lobbying activities, and nonpartisan voter participation. We advocate for governmental policies that reduce the burden for nonprofits to engage in public policy and help to make nonprofit sector activities more transparent and accountable. It is for these reasons we appreciate the opportunity to comment on changes to the Federal Election Commission's electioneering communications regulations.

This rulemaking is necessary to comply with the Supreme Court's ruling in *FEC v. Wisconsin Right to Life* (WRTL II). The heart of that ruling is that campaign finance laws cannot bar nonprofit organizations, corporations or labor unions from paying for broadcasts that refer to federal candidates during the period before an election if the broadcast cannot reasonably be interpreted as an appeal for votes for or against federal candidates.

In the Bipartisan Campaign Reform Act of 2002 (BCRA) Congress recognized that not all broadcasts that identify federal candidates before elections are attempts to influence the outcome by creating exemptions to the electioneering communications rule for news reports and candidate debates and forums. There are many more types of broadcasts that can identify federal candidates and yet be completely unrelated to elections. These include grassroots lobbying, issue advocacy and educational messages, as well as public service announcements, airing of organizational events and appeals for funds or volunteers. Congress gave the Commission the power to create additional exemptions for these types of broadcasts. We urge the Commission use this authority to craft an exemption that is clear, concrete and treats all exempted broadcasts equally.

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The FEC Should Not Require Disclosure of Exempted Broadcasts

Since "electioneering communications are subject to both funding restrictions and reporting requirements" (p. 6 of NPRM) and the WRTL II case only challenged the funding restrictions, the FEC seeks comment as to "whether the Commission has the authority to change its electioneering communications rules beyond what is required by the Supreme Court's decision." (p. 7 NPRM)

This is an odd question, since the NPRM itself contains the answer. It notes on page 3 that BCRA "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." Nothing in the WRTL II opinion calls on the FEC to limit its exemption to the funding restriction. There is no justification for burdening broadcasts that are unrelated to federal elections with FEC reporting obligations. The WRTL II opinion made it clear that where there is doubt, it must be resolved in favor of the speaker.

Alternative 1 would require nonprofits, labor unions and corporations to file detailed reports naming every funder, donor or shareholder that contributes more than $1,000 or more "during the period beginning on the first day of the preceding calendar year and ending on the disclosure date" if they spent more than $10,000 on exempt grassroots lobbying broadcasts (p. 41). If an organization uses a separate segregated fund (SSF) for its grassroots lobbying broadcasts it would have to report the donors to that fund.

These proposed disclosure requirements are inconsistent with the Supreme Court's holding in the WRTL II case.

- It would violate donor privacy for issue advocacy unrelated to federal elections, which was barred by the Supreme Court in the case *NAACP v. Alabama*.
- On a practical level it leaves a nonprofit with two bad choices: either disclose donors for the entire organization, or have the difficult job of separate fundraising for the SSF.
- FEC reporting for non-electoral activity would place a significant burden on free speech, contrary to the Supreme Court's warning that the enforcement process must not be overly burdensome.

It would also create unequal and inconsistent application of a disclosure requirement. News corporations are not required to file disclosure reports identifying their shareholders.

Congress has not authorized the FEC to regulate grassroots lobbying through disclosure requirements. In fact, earlier this year Congress clearly rejected proposals (supported by OMB Watch) to extend the Lobbying Disclosure Act to cover grassroots lobbying. A proposal by Rep. Martin Meehan (D-MA) was rejected by the Judiciary Committee in May after facing strong opposition from both Democratic and Republican committee members. Rep. Artur Davis (D-AL) commented during the hearing, "Imposing a reporting requirement

does create a burden. My concern is that the individuals, or the entities rather, who will most likely clear that burden, are the well-heeled, those on the corporate side, as opposed to those who may be more on the public interest side."

The New FEC Rule Should be More Specific

The FEC asks whether it should approach the problem by having a general rule supplemented with safe harbors. The proposed general rule would exempt communications that are "susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." We do not believe this is the best approach, since the proposed general rule is too vague, and the proposed safe harbors are overly restrictive. In the absence of concrete guidance in regulations, safe harbors have a tendency to become de facto rules. For nonprofits engaged in issue advocacy and grassroots lobbying the four prongs of the proposed safe harbor raises some concerns. For example:

- Prong 1 requires a broadcast to focus exclusively on a pending legislative matter. The practical problem with this is that a nonprofit might want to include a fundraising appeal or other non-electoral message in its broadcast. It should be able to do so. In addition, there is no definition of "pending." A nonprofit may want to push for consideration of a stalled bill, which should be protected under the WRTL II decision.

- Prong 2 requires the broadcast to urge an officeholder to adopt a position or ask the public to contact him or her and ask to adopt that position. This excludes appeals to contact a federal candidate who is not an officeholder as well as communications that are about issues but not about specific legislation.

- Prong 3 bars the ad from mentioning the election, parties or related activity, including voting. This can be a problem if the issue under discussion is election reform or a related matter. It also possible that nonpartisan get out the vote appeals could be included in an issue advocacy ad.

- Prong 4 says the broadcast cannot comment on an officeholder's character or fitness for office. The FEC says "effective lobbying may require reference to an officeholder's position or record on a particular issue……Thus, a discussion of an officeholder's position on a public policy issue or legislative record may be consistent with the content of a genuine issue advertisement, and may, therefore not automatically render a communication ineligible for the proposed safe harbor." (p. 24-25) This does not adequately recognize or protect criticism of an officeholder's official positions or actions in their capacity as an elected official.

The safe harbors also not account for non-legislative issue advocacy, public service announcements, public access cable airing of organizational events and other broadcasts that may well be unrelated to elections.

If the general rule can be made more specific and provide better guidance, then safe harbors may be useful. We believe the best example of a general rule is the February 2006 proposal in a petition for rulemaking filed by the AFL-CIO, Alliance for Justice, the U.S. Chamber of Commerce, the National Education Association and OMB Watch.

It said to be exempt the broadcast must:

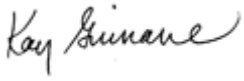
- Be directed at the lawmaker in his capacity as an incumbent officeholder, not a candidate;
- Discuss a public policy issue currently under consideration;
- Urge either the officeholder or the general public to take a specific position on an issue, and in the case of the general public, urge them to contact the officeholder.

But the broadcast *could not*:

- Discuss the officeholder's character or fitness for office;
- Reference any political party or election; or
- Promote, support, attack or oppose any candidate for federal office.

We urge the Commission to adopt a rule consistent with the spirit as well as the letter of the Supreme Court's decision in WRTL II by rejecting Alternate 1 and crafting a more specific general rule that cites the factors listed above.

Yours truly,



Kay Guinane, Director
Nonprofit Speech Rights