October 22, 2007

Mr. Robert D. Lenhard
Chairman
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington D.C. 20463

VIA ELECTRONIC MAIL

Re: Additional Comments of the Center for Competitive Politics on *Notice of Proposed Rulemaking on Electioneering Communications, 72 FR 50261* (Aug. 31, 2007)

Dear Chairman Lenhard:

The undersigned submit additional comments on behalf of the Center for Competitive Politics ("CCP").

During the hearing Commissioner von Spakovsky asked CCP's Stephen Hoersting about congressional intent with regard to the disclosure of electioneering communications. Enclosed you will find a memorandum entitled "re: Congressional Intent" which suggests that issue ads that do not promote, support, attack, or oppose a federal candidate would not fall under its definition of electioneering communications for purposes of disclosure. As such, Congress intended that groups engaged in genuine issue advocacy would not be subject to the disclosure requirements of 2 U.S.C. §434(f).

CCP has also enclosed two additional sets of materials that explain the detrimental effect disclosure regulations can have on the rights of individuals and associations that engage in issue advocacy. The first, "Policy Primer: Grassroots Lobbying Proposals Ignore Constitutional Protections for Anonymous Speech," lays out the extensive line of cases in which the Supreme Court has provided robust First Amendment protection for anonymous speech and association. These cases clearly state that donor privacy for issue advocacy unrelated to a federal election is protected by the First Amendment. The second, "MLK, Grassroots Lobbyist," underscores the importance of anonymous speech and association when an individual chooses to advocate for a politically and/or socially unpopular cause.

We appreciate the opportunity to submit these additional comments.

Sincerely,

/s/ Michael Darner

Michael Darner
Legal Associate
Center for Competitive Politics
mdarner@campaignfreedom.org

**MEMORANDUM**

**TO:** CHAIRMAN ROBERT D. LENHARD, FEDERAL ELECTION COMMISSION

**FROM:** MICHAEL DARNER, LEGAL ASSOCIATE, CENTER FOR COMPETITIVE POLITICS

**SUBJECT:** RE: CONGRESSIONAL INTENT

**DATE:** **10/22/2007**

**CC:** STEPHEN HOERSTING, VICE-PRESIDENT, CENTER FOR COMPETITIVE POLTICS

DISCUSSION

Commissioner von Spakovsky is particularly interested in whether Congress intended that 2 U.S.C. §434(f) would apply to organizations engaged in genuine issue advertising during the 30- and 60-day blackout periods. CCP suggests that the language of the alternate definition of electioneering communication found at 2 U.S.C. §434(f)(3)(A)(ii) makes clear that Congress explicitly intended that organizations producing genuine issue advertisements would fall outside the class of organizations required to disclose.

In crafting the Bipartisan Campaign Reform Act ("BCRA"), Congress proposed a clear definition of electioneering communication.[1] However, this first definition provides little illumination as to how Congress felt about groups engaged solely in issue advocacy inside the 30- and 60-day windows. All the provision can tell the Commission is that Congress intended to define a discreet category of speech as electioneering communications.[2]

Luckily, Congress also included a second alternative definition of electioneering communication in BCRA which provides much more insight into Congress' intent regarding the speech of issue advocacy organizations.[3] This alternative definition, often referred to as the so called "PASO" definition, defines an electioneering communication as "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office…and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."[4] Under any plausible interpretation of this PASO standard, genuine issue discussion cannot fall within the definition of electioneering communication. Genuine issue ads, even those that mention federal candidates, can plausibly be interpreted as being something other than an "exhortation to vote for or against a specific candidate." As such, it must be assumed that Congress intended that organizations engaged in genuine issue advocacy speech would not be subject to 2 U.S.C. §434(f).

CONCLUSION

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[1] 2 U.S.C. §434(f)(3)(A)(i) (electioneering communication defined as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office; is made within 60 days before a general, special or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.").

[2] Even with regards to the primary definition, Congress intended for the FEC to exempt from disclosure certain ads that did not PASO a candidate. 2 U.S.C. 434(f)(3)(B)(iv).

[3] 2 U.S.C. §434(f)(3)(A)(ii).

[4] *Id.*

Congress had the opportunity to craft a definition of electioneering communication that could have swept organizations funding genuine issue advertisements within §434(f). Instead, it decided to craft a definition that could not possibly be interpreted to include these groups. Since 2 U.S.C. §434(f)(3)(A)(iii) lays out the sole type of communication that Congress intended to apply 2 U.S.C. §434(f) disclosure to, and since grassroots issue organizations do not engage in this type of communication, Congress must have intended that grassroots lobbying organizations not be subject to 2 U.S.C. §434(f).