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cc
bcc
Subject Comments on NPRM 2007-16

October 1, 2007

Mr. Ron B. Katwan:

Attached please find the comments of the American Taxpayers Association and Americans for Limited Government.

I wish to present testimony in person at the scheduled hearing on October 17, 2007.

Sincerely,

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October 1, 2007

Via E-Mail
Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: Electioneering Communications

Dear Mr. Katwan:

American Taxpayers Alliance ("ATA") and Americans for Limited Government ("ALG") submit through counsel, the following comments on the Notice of Proposed Rulemaking, 72 Fed. Reg. 50261 (August 31, 2007), to implement the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007) ("*WRTL II*"). ATA and ALG appreciate the opportunity to comment on these proposed rules, and request the opportunity to testify, through undersigned counsel, at the hearing to be conducted on October 17, 2007.

ATA is a § 501(c)(4) non-profit organization dedicated to government reform through grassroots organization and public education and discussion of issues. ATA regularly expresses its opinions on issues in the media and uses television to educate and lobby the public. Some of ATA's positions on issues are unpopular and controversial and for these reasons cause strong, and often adverse reactions. Consequently, many of ATA's donors contribute to ATA to support its speech and positions yet remain protected from disclosure and subsequent harassment.

ALG is a § 501(c)(4) non-profit organization dedicated to limited government and Constitutional principles. ALG regularly educates the public and advocates for policies that reduce government spending and taxing power, defends property rights and aggressively asserts First Amendment rights. ALG's strong positions on its policies have led to attacks by its opponents. ALG fiercely guards its donors' anonymity.

In the NPRM, the Commission seeks comment on two proposed alternative ways to implement the *WRTL II* decision. In implementing the decision, the Commission must exercise its discretion, whenever possible, and promulgate only regulations within Constitutional limits. As officials of the executive branch who have independently taken an oath to uphold the

Constitution, the Commission must implement the Supreme Court's decision in a constitutional fashion. ATA and ALG urge the Commission to implement the Supreme Court's decision in a manner that is least offensive to the First Amendment and that least infringes upon the rights of non-profit organizations to engage in constitutionally protected speech. Any ties must go to the speaker, because the law "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 127 S.Ct. at 2667 (citation omitted). The Commission's foremost obligation is to the Constitution, which demands no less.

I. Role of Non-Profit Organizations

In implementing this decision in the least offensive manner possible, it may be helpful to the Commission to understand the role of non-profit organizations in the public policy process, how the electioneering communication provisions of the Bipartisan Campaign Reform Act specifically affect them, and how the Internal Revenue Service's (IRS) consideration of its lobbying rules are instructive here.

Section 501(c)(3) organizations are tax exempt and are permitted to engage in only an insubstantial amount of lobbying; too much lobbying risks losing their tax exempt status. Organizations making the § 501(h) election must ensure that only 25% of their permissible lobbying expenditures are for grassroots lobbying. For this reason, many § 501(c)(3) organizations establish a related § 501(c)(4) organization to conduct lobbying.[1] The ability of a § 501(c)(3) organization to establish a related § 501(c)(4) lobbying organization was an important factor in the concurring opinion in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), in which the Supreme Court upheld the prohibition on substantial lobbying by § 501(c)(3) organizations.

Section 501(c)(4) organizations are tax exempt and focused on promoting the social welfare of the community. Some § 501(c)(4) organizations operate to bring about civic betterments and social improvements and do not qualify as § 501(c)(3) organizations because a substantial part of their activities may involve lobbying, both direct and grassroots.

There are no restrictions under the Internal Revenue Code ("IRC") on the timing or amount of lobbying, whether direct or grassroots, in which § 501(c)(4) organizations may engage. Additionally, under the IRC, § 501(c)(4) organizations may engage in nonpartisan voter education activities, which enhance public awareness of social and political activities. Finally, the IRC permits § 501(c)(4) organizations to intervene in political campaigns so long as the organization is primarily engaged in other activities that promote social welfare.

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[1] IRC 504(a) precludes an organization that has lost its § 501(c)(3) status due to attempts to influence legislation from qualifying as a § 501(c)(4) organization.

Many § 501(c)(4) organizations, including ATA and ALG, advocate controversial positions, or at a minimum, positions that are not always held by a majority of elected officials. Rather than risk ostracism, harassment and public criticism that would result if they themselves took these positions, many citizens instead choose to contribute to organizations that share their views. As Justice Harlan noted, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). These organizations, including ATA and ALG, use the pooled resources of their donors to educate, lobby and persuade members of the public and Congress to adopt certain positions. Section 501(c)(4) organizations also analyze, comment on, praise and criticize the policy choices of government officials. As part of these activities, a non-profit organization may engage in grassroots lobbying to engage the public and urge them to contact their elected officials.

In implementing these regulations, the Commission should take great care to ensure that the final rules do not take the autonomy of speech away from citizens and associations and instead place it in the hands of government bureaucrats. "In the free society ordained by our constitution, it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley v. Valeo*, 424 U.S. 1, 57 (1976). Consistent with the Constitution, the Commission should fashion regulations that permit non-profit organizations to retain as much freedom over their lobbying, speech, and activities as possible.

II. Specific Comments on Proposed Regulations

The NPRM is lengthy and detailed, and for that reason, ATA and ALG will not attempt to address every issue raised by the Commission. ATA and ALG submit these comments to aid the Commission in upholding its oath to the Constitution to implement regulations that are least offensive to the First Amendment and most protective of the rights of non-profit organizations to engage in free speech. ATA and ALG would welcome the opportunity to comment on, or expand upon, any of these issues at the hearing later this month.

Whatever the Commission's resulting approach, it must protect issue advocacy in a manner that allows for robust debate and accountability, while providing a workable standard that permits speakers to determine what is and is not exempt. As the Supreme Court stated, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *WRTL II*, 127 S.Ct. at 2659.

The First Amendment is also implicated by the rules and regulations of the IRS, specifically as they apply to non-profits. The approach taken by the IRS in regulating lobbying,

and lessons learned, may be helpful to the Commission as it seeks to draw a line that gives the most breathing room to speech.

The Joint Committee on Taxation, in its *General Explanation of the Tax Reform Act of 1976*, 1976-3 C.B. (Vol. 2) 419-20, explains the issue that faced the IRS:

> The language of the lobbying provision was first enacted in 1934. Since that time neither Treasury regulations nor court decisions gave enough detailed meaning to the statutory language to permit most charitable organizations to know approximately where the limits were between what was permitted by the statute and what was forbidden by it. The vagueness was, in large part, a function of the uncertainty in the meaning of the terms "substantial part" and "activities."
>
> Many believed that the standards as to the permissible level of activities under prior law were too vague and thereby tended to encourage subjective and selective enforcement.

In 1986, the IRS proposed regulations to implement certain provisions of the Internal Revenue Code, including the definition of grassroots lobbying. The IRS and Congress received more than 10,000 letters requesting withdrawal of the proposed regulations on the grounds that they were overly restrictive and would have a "chilling effect" on charities' involvement in the policy making process. James J. McGovern, Paul G. Accetura, and Jerome P. Walsh Skelly, *The Revised Lobbying Regulations, A Difficult Balance*, 41 Tax Notes 1426, 1428 (Dec. 26, 1988) (authors had primary responsibility for drafting the proposed regulations). The IRS also received comments from Members of Congress, who also expressed concern. The main concern was that the definition of grassroots lobbying was overly broad and included many communications that were not lobbying. In particular, groups argued that communications were treated as grassroots lobbying even where the communications did not include a "call to action." Commenters also objected that the definition arbitrarily concluded that a discussion of legislation reflected a view solely on the basis of its dissemination. *See* Judith E. Kindell and Jack Francis Reilly, *Lobbying Issues*, 1997 EO CPE Text 261, 299 n.34.

Substantial revisions to the regulations were proposed in 1988. *See* 53 Fed. Reg. 51826 (Dec. 23, 1988). As the drafters later recounted,

> The 1988 proposed regulations were an attempt to address charities' legitimate concerns without eliminating the statutory limits and thus opening the Service up to charges of failing to fulfill its statutory mandate. To accomplish this, the Service crafted a number of bright-line objective rules. Like all bright-line objective rules, these rules are imperfect: in certain cases, the rules will inevitably permit expenditures to be treated as nonlobbying even though the public would probably consider those expenditures to be clear examples of lobbying.

McGovern, Accetura, and Walsh Skelly, *The Final Lobbying Regulations: A Challenge for Both the IRS and Charities*, 48 Tax Notes 1305, 1306 (Sept. 3, 1990); 3 EOTR 766, 767 (Sept. 1990). The authors discussed the complex considerations that bore on the issue:

> One factor that doubtless motivated the Service to carefully consider the issue in developing the final regulations was concern that the lobbying restriction not become a prohibition on influencing legislation. . . . Because of the more restrictive limit on grass roots lobbying, and because of the inherently high costs of reaching voters (particularly in large states such as California), treating such lobbying as grass roots lobbying could amount to an effective prohibition, rather than the intended limitation. Accordingly, given the slight ambiguity in the statute, the final regulations treat such lobbying as direct lobbying.

Id. at 1311; EOTR at 771. Although First Amendment concerns prompted the IRS to craft narrow rules to protect speech (as opposed to the instant case where broad exemptions are necessary to protect speech), like the IRS, the Commission should strive for bright-line rules that give the tie to the speaker.

Alternative 1

Alternative 1 is not consistent with the Supreme Court's holding in *WRTL II*. As the Court stated, it "has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." *WRTL II*, 127 S.Ct. at 2670. "Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *Id.* at 2672. If there is no compelling interest in regulating issue ads, there can be no compelling interest in requiring disclosure.

The Supreme Court recognized that "compelled disclosures of affiliations with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The right to privacy in one's political associations and beliefs will yield only to a "'subordinating interest of the State [that is] compelling,'" *NAACP v. Alabama*, 357 U.S. at 463 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (opinion concurring in result)), and then *only if* there is a "substantial relation between the information sought and [an] overriding and compelling state interest." *Gibson v. Florida Legislative Comm.*, 372 U.S. at 546.

In *NAACP v. Alabama*, the NAACP showed that previous disclosures of membership lists "had exposed those members to economic reprisal, loss of employment, threat of physical

coercion, and other manifestations of public hostility." *Id.* at 462. The Court found that because the means of compelled disclosure did not have a "substantial bearing" on Alabama's need, the state had "fallen short of showing a controlling justification" for compelling disclosure. *Id.* at 463-66.

Apart from the fact that there is no compelling interest in requiring disclosure of exempt electioneering communications, Alternative 1's requirement that § 501(c)(4) organizations disclose its donors of $1,000 or more if they air exempt electioneering communications will have a significant impact on non-profit organizations. Non-profits that choose to exercise their First Amendment rights before an election will see their donor bases shrink, and/or will see donors refusing to give more than $1,000. This is so since such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

The importance of anonymity to donors is evidenced by litigation involving ATA. The Gray Davis Committee sued ATA in California state court to force ATA to disclose the names of its donors because ATA ran television ads criticizing Governor Davis' energy policies more than eight months before the primary election. *The Governor Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal.Rptr.2d 534 (Cal.Ct.App. 2002). To protect its donors' anonymity, as well as to avoid compelled disclosure of information which it was not required to disclose, ATA vigorously defended itself in the case. The California Supreme Court ultimately sided with ATA and held that nothing in the explicit language of the ad "unambiguously" urged Gray Davis' defeat in the election. *Id.* at 552. The court further held that "[c]ommunications that discuss 'the record and philosophy of specific candidates,' like the one before us, 'do not constitute express advocacy under *Buckley* and *MCFL* unless they also contain words that exhort viewers to take specific electoral action for or against the candidates." *Id.* (citation omitted). Therefore, ATA could not be compelled to comply with California's disclosure and reporting obligations. *Id.*

It is clear that the First Amendment applies here. "Compelled disclosure [of contributor information] has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. "[T]he invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '(f)inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Id.* (citation omitted).

Reporting of donors represents "the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). It is clear that "release of such information . . . carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment." *Id.*

Alternative 2

The test proposed in § 100.29(c)(6) – "is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate" – faithfully implements *WRTL II*. However, the Commission is caught somewhat between a rock and a hard place when it comes to creating safe harbors. On the one hand, the Commission must avoid the vague and arbitrary nature of a test that gives little guidance and will actually chill speech, and on the other hand, too specific a safe harbor that will exclude protected speech. Thus, it is imperative that the Commission revise § 100.29(c)(6) to make it absolutely clear that a communication can be an exempt electioneering communication even if it does not meet whatever safe harbors the Commission adopts.

The language in § 100.29(c)(6) should be careful to explain that the safe harbors are not the parameters or limits of the exemption. At a minimum, the Commission should delete the word "shall" from § 100.29(c)(6) since it suggests that the safe harbors listed are the only ways in which a communication can be susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate. This is important, because, as will be discussed below, the proposed safe harbors still exclude much speech that can meet the exemption in § 100.29(c)(6).

Section 100.29(c)(6)(i)(A)

The first prong of the grassroots lobbying safe harbor, § 100.29(c)(6)(i)(A), requires that a communication "exclusively" discuss a "pending legislative or executive matter or issue." This prong excludes a substantial amount of issue speech in three ways. First, the use of the word "exclusively" excludes any communication that contains information other than a discussion of a legislative or executive issue. For example, an ad that urges both federal and state officials to take action on an issue of national importance, would not qualify under this prong.[2] Inclusion of information that is merely informational or educational also bars the communication from meeting the grassroots lobbying safe harbor.

IRS rules permit § 501(c)(3) organizations to make a reasonable allocation between the direct and grassroots lobbying purposes if the organization can demonstrate that the communication was made "primarily" for direct lobbying purposes. Reg. 56.4911-3(a)(3). IRS rules use "primarily" in other places to allow more lobbying speech by § 501(c)(3) organizations. *See* Reg. 56.4911-5(e). Although the IRS' use of "primarily" is more inclusive of speech than "exclusively," the Commission should adopt a standard that is farther down the spectrum, such as "focus on."

[2] Readily apparent examples include immigration and border control and efforts to define marriage.

Second, the prong requires that the issue discussed be "pending." This requirement should be removed to protect the discussion of issues that an organization hopes will soon be "pending." Indeed, sometimes an organization will conduct an issues campaign to generate interest in an issue that is not yet on the radar screen.

In *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), a charitable organization had produced radio and television ads urging viewers to become involved in politics and write letters to their representatives in Congress to support prayer in public schools and oppose foreign aid. The organization argued that attempts to influence legislation would only occur if legislation were actually pending. However, the court held that a charitable organization was engaged in attempting to influence legislation, even if the legislation was not pending.

Prior to amendment in 1990, regulations under IRC 4945 provided that "attempts to influence legislation" included communications "with respect to legislation being considered by, or to be submitted imminently to, a legislative body." Reg. 53.4945-2(a)(1) (1990). When the regulations under IRC 4911 were finalized, the standard "to be submitted imminently" was not used and was deleted from the IRC 4945 regulations. Judith E. Kindell and Jack Francis Reilly, *Lobbying Issues*, 1997 EO CPE Text 261, 296. As the Preamble to the regulations explains:

> a temporal standard is inappropriate and underinclusive given the nature of the legislative process. For example, long before many specific legislative proposals are formally introduced as a bill, they are subject to intensive scrutiny, debate, and controversy. Moreover, effective lobbying could prevent a bill from ever being introduced. Consequently, reference to legislation proposed or adopted in one state that urges its adoption in another state constitutes a specific legislative proposal in the other state even though no such bill has been introduced there.

Id. at 296. Like the Service, the Commission should delete the requirement that an issue be "pending" from its final rules.

Third, this prong requires discussion of a "legislative or executive matter or issue." It is possible that the discussion of a judicial issue could otherwise meet the definition of an electioneering communication. For example, an organization might want to take out an ad urging the public to contact their senator about a recent Supreme Court decision (the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) is a recent example) or a judge's conduct. While these issues might become legislative or executive issues once they are "pending," it is unclear what they are before that point.

Section 100.29(c)(6)(i)(B)

The second prong of the grassroots lobbying safe harbor requires that a communication "[u]rges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue." § 100.29(c)(6)(i)(B). Requiring the public to contact the officeholder is limiting and runs afoul of "'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'" *Id.* at 2671 n.9 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)).

It is not necessary to provide examples of exhortations. "Contact" is a known term, and any examples provided cannot illustrate the varied ways in which a contact can be made. Additionally, a non-profit organization may wish to urge action other than contacting an officeholder. For example, an organization may urge the public to sign a petition, to visit a website to gain more information, to attend a rally in protest, to attend an organizational meeting, or to contribute money to fund the organization's lobbying efforts. A § 501(c)(3) organization, which is severely limited by IRS regulations on the amount it can spend on grassroots lobbying, may need to avoid a "call to action" in order to keep the communication from meeting the IRS' definition of grassroots lobbying.

Any final rule should not require that contact information be provided (e.g., email address, phone number) or that the communication specifically name the officeholder to be contacted as opposed to using a generic title (e.g. "call your senator" or "call your elected representatives"). Nor should the safe harbor require that an issue be identified by either its formal name or by a term that has been widely used in connection with specific pending legislation. It should be permissible to identify legislation merely by its content and effect. *See* Kindell and Reilly, *Lobbying Issues*, 1997 EO CPE Text at 296.

The second prong requires the communication urge an officeholder to take a position, or the public to contact an officeholder. This prong would exclude a communication that urges the public to contact a corporation about the conduct of one of its officers or employees. For example, if a non-profit found particularly offensive the statements of an actor who also happened to be a candidate, and wanted to urge the public to boycott the actor's movie, or contact the movie studio and urge corrective action, the communication would fail to meet this prong.

Section 100.29(c)(6)(i)(C)

The third prong requires that a communication "[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public." §

100.29(c)(6)(i)C). With regards to candidacy, the Commission gives as an example, implied references such as photo shots of a candidate near the Capitol, candidate appearance in a mock-setting of a government office, or other images reasonably suggesting candidacy. Shots of a candidate near the Capitol or in a mock-setting of a government office can reasonably be interpreted other than as a reference to candidacy if the candidate is an officeholder. Shots of the officeholder near the Capitol – where he or she performs official duties – or in a mock-setting of a government office – where he or she performs official duties – does not imply candidacy. These shots, in the context of an issue ad, are shots of an official performing his or her official duties. If these shots are implied references of candidacy, what shots are permissible for an issue ad?

The third and fourth prongs blur the line between an officeholder's role as an elected official and his role as a candidate. Granted, what an official does in office can have an affect on his candidacy. But, citizens must retain the right to petition, change, criticize, and praise their elected officials' actions. As will be shown, the third and fourth prongs capture too much protected speech, removing it from the safe harbor.

The proposed third prong would remove an issue ad from the safe harbor simply for referencing a political party. Political party labels are often necessary when attempting to affect legislative change. If Members of Congress are divided on an issue along party lines, a grassroots lobbying ad may be more effective if it discusses how the Democrats or Republicans are planning to vote.

Mentioning officeholders, one of whom is an incumbent and one of whom is an opposing candidate, should not be enough to take an ad out of the safe harbor. The Commission's first example under "Opposing Candidate," is not unambiguously campaign related simply because it mentions both the incumbent and the challenger. Where the two candidates are members of different chambers, but voting on the same issue, an organization may get more bang for its advertising buck by urging viewers to contact both their Senator and their Representative on an issue being debated in both chambers.

Section 100.29(c)(6)(i)(D)

The final prong would state that the communication "does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." § 100.29(c)(6)(i)(D). To effectively hold their elected officials accountable, citizens need to be able to comment on an officeholder's character, qualifications or fitness for office. Citizens need to be able to urge any action relating to the conduct of official duties, regardless of whether it touches on an officeholder's character, qualifications, or fitness for office. Sometimes, character and fitness are relevant to the performance and, therefore, representation of constituents. For example, an ad discussing an ethics scandal occurring within the 30/60 day window would not

meet the fourth prong. Assume a Congressman admitted to violating an ethics rule or pled guilty to a crime. The safe harbor would not apply to an ad that commented on the Member's character and lack of fitness to serve and urged fellow Members (some of whom are candidates) to take appropriate action. An ad urging an elected official to resign, after pleading guilty to a crime, is not the functional equivalent of express advocacy, even if it is run during the 30/60 day window. To prevent citizens from commenting on the character or fitness of their elected representatives during the 30/60 day window strips them of their ability to hold their representatives accountable and helps insulate representatives from citizen action regarding scandals and improprieties.

An ad that discusses an officeholder's past position on an issue and that implicates his or her character, qualifications or fitness for office, can be related to the conduct of official duties. For example, assume Representative Doe, a Roman Catholic, previously voted for partial-birth abortion ban bills. However, now she is considering voting against such a bill. A religious organization could not air an ad asking, or urging the public to ask, "her to vote her Catholic values" because such an ad touches on her character and would not meet the fourth prong of the safe harbor.

Eligibility for the safe harbor should not depend on the strength of the condemnation. Constituents must be given wide latitude to criticize the performance, both current and past, of their elected officials. Sometimes, inflammatory language is needed to get a point across. Such criticism, or praise, can be an effective method of achieving legislative results. Condemning an officeholder's past record can impact the candidate's reelection, but more important, it can also help hold the officeholder accountable. Any attempt by the Commission to include criteria that limit the ability of citizens to criticize their representatives would impair the speaker's "autonomy to choose the content of his own message." *WRTL II*, 127 S.Ct. at 2671 n.9.

The Commission invites comment on 19 examples of statements about a "candidate" that take a position on the candidate's character, qualifications, or fitness for office. Removing the word "candidate" and replacing it with officeholder from all of the examples helps demonstrate that these examples are issue advocacy, rather than the functional equivalent of express advocacy. All of the following examples provided by the Commission discuss the character, qualifications or fitness for office of an officeholder, but all of them involve character, qualifications or fitness for office *as it relates to official duties or performance as an officeholder*, which must be subject to comment and accountability:

- Allegations that an officeholder is acting from an improper motive.
- Officeholder failing to adhere to the standards of his/her office.
- Officeholder failing to abide by his/her religious convictions.
- Officeholder failing to fulfill family, personal, civil or legal obligations or duties.
- Allegations that the officeholder has violated a law or ordinance.
- Allegations that the officeholder misrepresented his own record or accomplishments.

- Negative characterizations of an officeholder's vote, voting record, or position on an issue.
- An officeholder's untruthfulness or untrustworthiness, truthfulness or reliability.
- An officeholder's sound judgment or lack thereof.
- An officeholder's effectiveness in politics.
- An officeholder's history or absence of public, military or community service could affect the officeholder's position on a bill (e.g., Representative Doe's position on the veteran benefits bill is partly because he has not served in the military and doesn't understand the challenges veterans face).
- An officeholder's loyalty to political party could affect the officeholder's position on a bill (e.g., he always votes the party line and doesn't do what is best for his constituents).
- An officeholder's service to constituents.
- Demonstration of an officeholder's knowledge of requisite topics.
- Medical, psychological or mental fitness of an officeholder: an officeholder may no longer be fit to serve and constituents may want to urge him or her to resign.

ATA and ALG suggest that the Commission not include any examples of communications in the rules themselves so that they are not perceived as government-endorsed examples that are the only means of satisfying the safe harbor. It is more helpful to organizations to have clear criteria that permit them to fashion an exempt communication than examples that may be read as requiring a particular format, words or phrases.

Clearly, a safe harbor cannot be constructed to encompass every conceivable situation or even all of the examples provided above. Consequently, it is important that the Commission make clear in the final rules that the safe harbors are not limits of the exemption.

Additional Safe Harbors

Any communication that meets the IRC definition of grass roots lobbying should automatically be exempted from the definition of electioneering communication. However, because the IRC's definition of lobbying is purposefully narrow to protect speech, it should not be the *only* criterion in formulating a safe harbor.

An exception that requires non-profits to meet all the requirements of the IRC's definition of grass roots lobbying would still exclude a substantial amount of speech that is intended to influence legislative outcomes rather than electoral outcomes. ATA and ALG, as well as other non-profits, frequently run grass roots lobbying ads to influence public opinion on general issues, rather than specific pending legislation. There are several reasons for this. First, there may be several competing pieces of legislation, none of which completely reflect the non-profit's position. Second, there may be proposals being bandied about, but none formally

introduced. Third, a non-profit may want to air an ad that generally discusses a Member's proposal, not yet formally introduced, regarding a particular issue. Fourth, a non-profit may not yet be ready to take a position on particular legislation but may want to lobby generally on the issue. Because of the way in which the political process works, with multiple pieces of legislation introduced and numerous amendments offered, many non-profits have found that sometimes it is easier and more effective to educate and lobby generally on the issue and let the viewer, armed with this knowledge, decide how best to lobby, rather than try to address specific bills. Therefore, any safe harbor the Commission adopts should not rigidly require that ads mention a specific piece of legislation.

III. Conclusion

The Supreme Court's decision should be implemented in a way that is least offensive to the First Amendment rights of corporations, and in particular, non-profit organizations. Whatever safe harbors the Commission adopts, the Commission must avoid drafting ambiguous exceptions that place the power in the hands of bureaucrats to determine whether a communication is issue advocacy or unambiguously campaign related. Furthermore, any safe harbor must give non-profits autonomy over their speech, permit them to determine at the outset whether their proposed communications fall outside the definition of electioneering communication, and most important, allow them to hold our government officials accountable for their actions in office.

Respectfully submitted,

Heidi K. Abegg

Heidi K. Abegg

Counsel for American
Taxpayers Alliance

and

Americans for Limited
Government