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November 1, 2007

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VIA HAND DELIVERY and EMAIL (*wrtl.ads@fec.gov*)


Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street, NW
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Re: Supplemental Written Comments of the Chamber of Commerce of the
United States of America (Notice 2007-16, Electioneering
Communications)

Dear Mr. Katwan:

The Chamber of Commerce of the United States of America submits the attached supplemental comments in response to the Commissioners' questions posed to undersigned counsel at the October 17, 2007 hearing for the Notice of Proposed Rulemaking published at 72 Fed. Reg. 50261, *Electioneering Communications* (Aug. 31, 2007).

Sincerely,



Jan Witold Baran

Counsel to the Chamber of Commerce of the United States of America

cc: The Honorable Robert D. Lenhard,
The Honorable David M. Mason,
The Honorable Hans A. von Spakovsky,
The Honorable Steven T. Walther,
The Honorable Ellen L. Weintraub

BEFORE THE FEDERAL ELECTION COMMISSION

Notice of Proposed Rulemaking)
)
Electioneering Communications) 72 Fed. Reg. 50261 (Aug. 31, 2007)

**SUPPLEMENTAL COMMENTS OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA**

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I. BACKGROUND

At the Federal Election Commission's hearing on October 17, 2007 regarding its Electioneering Communications Notice of Proposed Rulemaking ("NPRM"), the Commissioners asked the undersigned counsel for the Chamber of Commerce of the United States of America ("Chamber") to provide supplemental comments that discuss the seven sample advertisements that the Commission included in its NPRM. The Commission asked whether the ads would be permissible speech following the Supreme Court's decision in *FEC v Wisconsin Right To Life* ("*WRTL I*") 127 S. Ct. 2652 (2007) under the Commission's proposed rules. 72 Fed. Reg. 50267-69.

II. SUMMARY OF SUPPLEMENTAL COMMENTS

In the comments that it submitted on October 1, 2007, the Chamber addressed, among other things, the Commission's proposed grassroots lobbying safe harbor. The Chamber suggested that, to follow the guidance set forth in *WRTL II*, the Commission should make certain changes to that safe harbor:

- Grassroots lobbying communications need not be limited to issues pending before the legislative or executive branches. Grassroots lobbying may permissibly address issues in order to give them prominence or past actions to remedy erroneous decisions.
- Grassroots lobbying communications need not be limited to targeting only officeholders. Non-incumbent candidates who may become officeholders are also permissible targets.

- Grassroots lobbying communications may permissibly mention voting by the general public. *WRTL II* did not include voting by the general public as an “indicia of express advocacy.” 127 S.Ct. at 2667.
- Grassroots lobbying communications may address a candidate’s position on a public policy issue. Discussion of a candidate’s position cannot be deemed unambiguous express advocacy if it lacks either a call to vote for or against candidates with certain positions or an imputation against a candidate that is *per se* inconsistent with public office.

WRTL II mandates that any ad with a reasonable interpretation other than an appeal to vote for or against a candidate is permissible. Therefore, this safe harbor, while providing bright-line rules for ads that are like those discussed in *WRTL II*, does not constitute the *only* way that an ad can satisfy *WRTL II*. There must be no presumption in the rules to the contrary.

The Commission has properly included within its NPRM an exemption for communications that are otherwise “susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” 72 Fed. Reg. 50274. The Commission must ensure that any review of a communication that fails to satisfy one of the safe harbor prongs separately include a determination of whether the ad has another reasonable interpretation other than an appeal to vote for or against a candidate. Such review must be explicitly stated within the rules.

Only if an ad meets neither the safe harbor nor the “reasonable interpretation” standard may the Commission properly regulate an electioneering communication. Given this understanding, the Chamber addresses the Commission’s examples below.

III. REVIEW OF SAMPLE ADS

Because the Chamber believes that the Congressman Bass ad, which is the fifth example in the Commission's NPRM, highlights exactly the instance described above – an ad that does not meet one or more of the safe harbor prongs but does have an alternate “reasonable interpretation” – the Chamber will first address the Bass ad, followed by the rest of the examples in the numeric order of the NPRM.

A. Example 5 – The Congressman Bass Ad

What's important to America's families? [middle-aged man, interview style]: “My pension is very important because it will provide a significant amount of my income when I retire.” And where do the candidates stand? Congressman Charlie Bass voted to make it easier for corporations to convert employee pension funds to other uses. Arnie Arnesen supports the “Golden Trust Fund” legislation that would preserve pension funds for retirees. When it comes to your pension, there is a difference. Call or visit our website to find out more.

Id. at 50268-69.

This ad has a reasonable interpretation other than an appeal to vote for or against a candidate, even though it arguably fails to meet all of the safe harbor factors. That such a grassroots lobbying communication would exist is not surprising because *WRTL II* constituted an as-applied challenge to a particular set of ads rather than a facial challenge of the electioneering communication definition. The Court was not attempting to craft an entire rule regime, but rather was providing reasons why the ads in question were susceptible of a reasonable interpretation other than an appeal to vote for or against a particular candidate and, thus, were not the functional equivalent of express advocacy

Under the safe harbor, this ad fails to meet all of the required prongs. The ad does consider retirement issues generally and specifically addresses employee pension funds.

Particular legislation is not only mentioned, but described. However, while the ad also contains language asking the public to call (presumably a telephone number for the organization making the grassroots lobbying communication) or visit the organization's website, it does not ask the public to contact an officeholder or candidate or ask an officeholder or candidate to take a particular position. The ads in *WRTL II* included not only a request to visit a website, but also a specific request that the public contact Senators Feingold and Kohl. 127 S.Ct. at 2660. Under the safe harbor, it appears that language urging the public to contact Congressman Bass would be necessary in order to fall within the exception. Therefore, changing the call to action from “[c]all or visit our website to find out more” to “[c]ontact Congressman Bass and tell him to support the Golden Trust Fund legislation” would change the analysis.¹

Further, while the ad does not address Congressman Bass's character, qualifications, or fitness for office, it does mention candidacy generally and Congressman Bass's opponent specifically. While this discussion relates to the subject issue of the ad in question, under a strict reading of the safe harbor, this ad may not meet the standard of this prong because it includes the name of Congressman Bass's opponent.

The mere fact that the ad may not meet all of the safe harbor factors, though, must not end the review of this ad. Rather, one must determine if the communication is “susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” 72 Fed. Reg. 50274. This ad is, in fact, susceptible of another reasonable interpretation.

¹ It is important to note that a grassroots lobbying communication containing a link to a website, even one that arguably contains express advocacy, does not render an ad the functional equivalent of express advocacy. *WRTL II*, 127 S.Ct. at 2668-69.

While it does compare and contrast two federal candidates, the ad does so in the context of advocating a particular policy position: preserving pension funds for retirees. It is using the election, therefore, as a backdrop. The ad does not address multiple, unrelated issues. It does not contain any call, either direct or implicit, to vote for or against Congressman Bass or the challenger. Rather, it addresses the “Golden Trust Fund” legislation and provides background information to better inform the public about the positions of the two candidates. One reason for doing so might be to arm the public with information so that it can effectively lobby the candidates on employee pension protection. Therefore, it is susceptible of *another* reasonable interpretation other than as an appeal to vote for or against a candidate. That is all that *WRTL II* requires.

Because of this type of ad, which is protected under *WRTL II* even though it does not fall within the Commission’s safe harbor, the Commission must make clear that the safe harbor is not the *only* way that an ad can satisfy *WRTL II*. It must not limit the language of *WRTL II*, which it is also incorporating into its proposed rules, to only those communications that fall within the safe harbor. Rather, it must ensure that a review of any communication that does not satisfy all of the safe harbor prongs also considers whether another reasonable interpretation of the ad exists. As is evidenced by the ad in this example, such a communication is possible and must be protected.

B. Example 1 – The Ad In *WRTL II*

*LOAN OFFICER: Welcome Mr. and Mrs. Shulman.
We’ve received your loan application, along with your
credit report, the appraisal on the house, the inspections,
and well * ***

*COUPLE: Yes, yes * ** we’re listening.*

*OFFICER: Well, it all reminds me of a time I went fishing
with my father. We were on the Wolf River Waupaca * ***

VOICE-OVER: Sometimes it's just not fair to delay an important decision.

But in Washington, it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right To Life (befair.org), which is responsible for the content to this advertising and not authorized by any candidate or candidate's committee.

Id. at 50267.

A communication that the Supreme Court considered protected speech in *WRTL II* must fall within whatever exemption the Commission creates. The safe harbor, as edited by the Chamber, mirrors the four reasons that the Court gave when determining that the ad was reasonably interpreted to be issue advocacy, rather than express advocacy. Without more, the ad addresses the judicial filibuster² and calls for the public to contact Senators Kohl and Feingold and visit a website. The ad does not mention an election, candidacy, political party, or challenger nor does it opine on a candidate's character,

² Though the Commission in its NPRM describes the issue as a "pending legislative matter of Senate filibuster votes," one could argue that this, in fact, was not a "pending" matter: the ad ran after the Senate recessed and there was no upcoming Senate filibuster vote. Clearly for this reason, the Court noted that "a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote." *WRTL II*, 127 S.Ct. at 2668. Given that the ad at issue in *WRTL II* must fall within the safe harbor that the Commission has constructed in the wake of the Court's decision in *WRTL II*, the Commission must strike any language that the Court did not endorse that could cause this ad to fall outside its safe harbor. The term "pending," as noted in the Chamber's previous comments, must not be part of the final rule.

qualifications, or fitness for office in a manner that might otherwise implicate the other prongs of the safe harbor.

C. Example 2 – The Bill Yellowtail Ad

*Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order * * * but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.*

Id. at 50268.

From first to last, this ad attacks the character of a candidate, saying he is a felonious, violent, hypocritical, wife-abuser who does not even support his own children. Although there is a passing reference to a past vote against child support enforcement, there is no indication of what the candidate should do about it. Thus, *McConnell v. FEC* held that this ad seeks to influence an election as the functional equivalent of express advocacy. 540 U.S. 93, 193 n.78 (2003).

Importantly, this is the only actual ad that the Supreme Court ever has so classified. Thus, it serves as the key model in evaluating other ads, illustrating the type of character attack that will permit regulation.

Of course, one could imagine a different ad that called for Yellowtail to support domestic violence or child support legislation and that included some of the information from the original ad. Properly written, this different ad would have a reasonable interpretation other than an appeal to vote against Bill Yellowtail and, therefore, would be permissible under *WRTL II*.

The Yellowtail ad has a second significance. *McConnell* identified it as the type of speech that was not reached by the express advocacy standard and, hence, justified the electioneering communication standard. To conform to that ruling, the Commission must avoid any definition of express advocacy that might encompass this ad.

D. Example 3 – The Marriage Protection Amendment “Crossroads” Ad

Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this county and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that’s 202-224-3121. Thank you for making your voice heard.

Paid for by the Christian Civic League of Maine, which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.

72 Fed. Reg. 50268.

As the Commission stated in its NPRM, the “Crossroads” ad is a grassroots lobbying communication that is protected under *WRTL II* and falls within the safe harbor. *Id.* The Chamber agrees. It clearly focuses on an issue — the marriage protection amendment — and urges Senators Snowe and Collins to take a position in support of the amendment. No election or candidacy is mentioned. No discussion of either senators’ character, qualifications, or fitness for office is undertaken. Any final rule must protect this type of ad.

E. Example 4 – The Congressman Ganske Ad

It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.

Id.

This ad, as well, falls within *WRTL II*. It easily can be interpreted as one advocating action on environmental protection. The entire focus of the ad is Congressman Ganske's past opposition to environmental protection legislation and the need for the public to urge him to support such legislation in the future. All of the information in the ad sheds light on the issue and Ganske's stances on previous legislation. As the Chamber has repeatedly stated, there need not be a pending bill before the legislature or a pending action within the executive branch in order for an issue properly to serve as the subject of a grassroots lobbying communication. The environment is obviously an issue that is important to many groups. A single issue advocacy group would be unconstitutionally deprived of its right to speak at certain times if the definition of electioneering communication only allowed it to make grassroots lobbying ads when a bill specific to the issue was before Congress or an action specific to the issue was before an agency. This ad seeks the public's aid in gaining Ganske's support for future environmental legislation and, as such, meets the proper *WRTL II* issue threshold.

The ad also contains a call to action: “Call Congressman Ganske. Tell him to protect America’s environment.” Since no specific bill or action need be pending, the call to action does not have to be specific, either. A general call to action is sufficient.

Furthermore, the other factors of the safe harbor analysis are irrelevant. The ad does not mention an election or any candidacy. It does not discuss Congressman Ganske’s character, qualifications, or fitness for office. The Congressman’s votes and the contributions he received provide background information to the listener so that he or she is aware of the Congressman’s previous positions and actions. Such information is necessary to enable just the sort of discussion that *WRTL II* seeks to protect. It is not used to impugn the character of the congressman but rather to characterize, in pointed language, his stance on environmental protection and possible reasons behind that stance. *WRTL II* does not proscribe characterization of a candidate’s position on an issue.³

F. Examples 6 & 7 – The Tom Kean, Jr. Ads

TOM KEAN, JR.

No experience. Hasn’t lived in New Jersey for 10 years. It takes more than a name to get things done.

NEVER. Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean, Jr. may be a nice young man and you may have liked his dad a lot—but he needs more experience dealing with local issues and

³ The Commission also sought comment as to whether the language describing Ganske’s votes converted the ad into a broader attack on the Congressman’s character, qualifications, or fitness for office. Such statements are permissible and do not render the ad improper. While the language may be strong and others might characterize the vote differently, the statement does address the vote itself rather than the Congressman. Further, the votes described are specific to the issue at the heart of the communication, rather than superfluous or gratuitous attacks falling outside the contours of the ad itself. Harsh words and forceful imagery must not be silenced because they hurt feelings or because the officeholder or candidate would disagree with the speaker’s assessment. These statements provide context for the votes and stances that the Congressman has taken in the past so that the listeners who become moved to contact him will have certain background information before doing so.

*concerns. For the last 5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean, Jr. * * * New Jersey need New Jersey leaders.*

Id. at 50269.

[Superimposed over a photograph of Mr. Kean wearing a campaign button]

*For the last 5 years, Tom Kean, Jr. has lived in Massachusetts. Before that, he lived in Washington D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress—Tom never paid property taxes. No experience. TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS. New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrissey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean, Jr. * * * NEW JERSEY NEEDS NEW JERSEY LEADERS.*

Id.

The Tom Kean ads are not permissible grassroots lobbying under *WRTL II*. They do not satisfy the safe harbor and they cannot be reasonably interpreted as anything other than an appeal to vote against Tom Kean, Jr. They do not describe a legislative or executive issue. Rather, the subject matter of both ads is that Tom Kean Jr. does not have sufficient ties to the state of New Jersey in order to be elected to Congress. The electoral nature of this issue is too intertwined in these ads for them to be considered grassroots lobbying. The call to action is to “[t]ell Tom Kean Jr. * * * New Jersey needs New Jersey leaders.” *Id.* There is no way for Tom Kean logically to address this “issue” other than to stop running for Congress. While there are issues connected with campaigns about which groups should be permitted to conduct grassroots lobbying, no such issues

are addressed in the Kean ads. Therefore, this is not an issue susceptible of grassroots lobbying.

Both ads also fail to satisfy the final two prongs of the safe harbor. The second ad not only mentions the name of Kean's opponent, it also contains a picture of Kean wearing a campaign button. The two ads also address Kean's qualifications, or the lack thereof, to serve as a New Jersey representative.

The subject matter of the ads also renders any other reasonable interpretation impossible. As noted above, these ads list various factors that characterize Kean's allegedly insufficient ties to New Jersey. Nowhere is there a discussion of legislative or executive actions to be taken or that should be taken. Unlike the Congressman Bass ad, the election in the Kean ads does not serve as a backdrop against which a general discussion of sufficient candidate qualifications was held, but rather the election is featured by virtue of the fact that the issue of the ads is Tom Kean's qualifications to serve as an elected New Jersey federal officeholder. Therefore, this ad is an electioneering communication subject to regulation.

IV. CONCLUSION

These seven examples showcase the need for the Commission, in implementing *WRTL II* and in reviewing future speech under its new regulatory scheme, to consider not only the safe harbor that it will create but also the overarching admonition of the Court: that permissible speech within the electioneering communication framework is speech susceptible of any reasonable interpretation other than as an appeal to vote for or against a candidate. While a safe harbor, if constituted properly, can encapsulate rules applying to communications similar to those found in *WRTL II*, the safe harbor is not exhaustive. Therefore, the Commission must not *only* review communications within that framework.

It must also consider reasonable interpretations of the ad itself, looking only at its four corners, and ensure that speech permissible under the First Amendment is not impermissibly regulated.

Respectfully submitted,



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