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cc "Baran, Jan" <jbaran@wrf.com>
bcc
Subject Notice of Availability [2006--4] - Rulemaking Petition: Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication"

Dear Mr. Deutsch

Attached are comments by Jan Witold Baran, Caleb P. Burns, and Stephen A. Bokat on behalf of the Chamber of Commerce of the United States in the above-captioned matter. The original document will be sent to you today by hand delivery. Please let us know if you have any questions.

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April 17, 2006

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VIA E-MAIL (GRLECNOA@fec.gov) AND HAND DELIVERY

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Notice of Availability [2006—4] – Rulemaking Petition: Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication"

Dear Mr. Deutsch:

On behalf of the Chamber of Commerce of the United States, we respectfully request that the Federal Election Commission initiate rulemaking proceedings in connection with the above-captioned Notice of Availability. Past legislative, judicial, and administrative pronouncements coupled with pending federal elections convincingly demonstrate that rulemaking proceedings in this area are not only appropriate at this time, but are urgently needed. The following outline details each of these factors and the reasons why they all support initiation of rulemaking proceedings.

I. Congress

Congress in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA") specifically empowered the Commission to create exceptions to the electioneering communication provision "to ensure the *appropriate* implementation" as long as the exceptions do not permit communications that would promote, attack, support, or oppose ("PASO") a federal candidate. 2 U.S.C. § 434(f)(3)(B)(iv) (emphasis added). Furthermore, the congressional sponsors of the BCRA have publicly commented to the Commission that an exception for grassroots lobbying communications is "appropriate" and could be written in a manner that would not PASO a federal candidate. *See* Comments to Notice 2002-13 at 10-11 (Aug. 23, 2002) *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

II. Courts

When it remanded a lawsuit against the Commission based on the same issues raised by the instant rulemaking petition, the Supreme Court of the United States noted:

> Although the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of [grassroots lobbying] advertisements at issue here.

Wisconsin Right to Life, Inc. v. FEC, 126 S. Ct. 1016, 1017 (2006). Though not necessary to the Court's ultimate holding, the Court was nonetheless inclined to include this statement in its short *Per Curiam* opinion. The statement is an apparent reminder and suggestion that piecemeal and protracted litigation on this issue can be easily avoided if the Commission simply exercises its authority to craft an exemption for grassroots lobbying.[1] The Court's suggestion was prescient. On April 3, 2006, the FEC was again sued on the same basis. *See Christian Civic League of Maine, Inc. v. FEC*, (D.D.C. 1:06-cv-00614 filed Apr. 3, 2006).

III. The Commission

The Commission originally rejected an exemption for grassroots lobbying communications due to conceptual difficulties it encountered when applying the PASO standard to federal candidates. Its concern was that though "some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner." 67 Fed. Reg. 65190, 65201-65202 (Oct. 23, 2002). However, the Commission's understanding of what can be "reasonably" understood to PASO a candidate as well as what it means to refer to a candidate has evolved in the Commission's subsequent advisory opinions. Accordingly, the conceptual difficulties the Commission

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[1] In fact, the instant rulemaking petition has induced plaintiff's counsel to offer to settle the litigation. *See* Letter to FEC Counsel from James Bopp, Jr. Mar. 23, 2006, *available at* http://www.jamesmadisoncenter.org/WI/LettertoFECresettlement.pdf.

initially encountered are no longer such imposing impediments and the Commission is well-positioned to reexamine a grassroots lobbying exception.

In Advisory Opinion 2003-25, the Commission addressed a different provision of the BCRA that also utilizes the PASO formulation. The Commission modified its concern that any reference to a candidate could be "reasonably perceived" to PASO the candidate stating: "Under the plain language of the FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate." The Commission ultimately concluded that an advertisement featuring a federal candidate who endorsed a state candidate did not PASO the federal candidate.

In Advisory Opinion 2004-31, the Commission addressed the question of what it means to refer to a federal candidate vis-à-vis the electioneering communication provision. The Commission recognized that not every mention of an individual's name must be a reference to the individual in his or her capacity as a candidate. The Advisory Opinion held that advertisements for automobile dealerships that also bore the name of a federal candidate did not constitute a reference to the federal candidate.

The logic of these two advisory opinions demonstrate the Commission's refinement of these legal concepts. The Commission is no longer convinced (1) that any mention of a candidate PASOs the candidate, or (2) that any mention of an individual who is a candidate is a reference to him or her as a candidate. These newly developed principles justify a reexamination of the Commission's ability to craft an electioneering communication exemption for grassroots lobbying.

IV. Impact of Pending Elections

The Commission is well aware that the 2006 primary campaign season has already begun. As important legislative issues continue to be debated in Congress this year, the electioneering communication provision is prohibiting grassroots lobbying on these issues.

In contrast to other proposed exceptions debated or enacted by the Commission – e.g., those for PSAs, 501(c)(3) organizations, etc. – an exception for grassroots lobbying requires immediate action by the Commission because of the critical nature of the affected speech. By keeping constituents informed of pending legislative and policy matters, grassroots lobbying is a vital component to

representative democracy. Electioneering communications, however, are those that by definition are directed to a Member's or Senator's constituents. When grassroots lobbying is limited by the electioneering communication provision, the stock of information upon which constituents base views is correspondingly limited. This necessarily results in official action that does not truly represent the wishes of an otherwise informed constituency. The Commission should proceed with rulemaking proceedings to lift this burden on representative democracy that will only worsen as the year progresses and the electioneering communication provision prohibits bona fide grassroots lobbying.

In addition, the use of Commission resources to conduct a rulemaking proceeding at this stage in the campaign season would be a wise investment that will surely save resources as more primary elections are held this year. As noted above, the Commission has already been sued twice on this issue. Future suits are not only possible, but probable. The willingness of plaintiff's counsel in the two suits to settle at least one of them if the Commission proceeds with this rulemaking strongly suggests that future litigation will also be avoided. *See* note 1 *supra*.

Furthermore, it appears that the Commission will have some availability on its rulemaking docket and will be in a position to devote resources to this particular rulemaking. As explained by Chairman Toner after the completion of the recent Internet rulemaking: "With our completion of the Internet rulemaking, that is the eighth rulemaking as required by the *Shays* litigation. We have one remaining regarding coordinated communications ... and we will then be completing the final rulemaking as required by *Shays*." *See FEC Open Meeting: Final Rules and Explanation and Justification for Internet Communications* (continuation of March 23, 2006, FEC open meeting held March 27, 2006) (audio file available at http://www.fec.gov/agenda/2006/agenda20060323.shtml). The one remaining rule was promulgated on April 7, 2006. *See FEC Open Meeting: Final Rules on Coordinated Communications* (FEC open meeting held April 7, 2006) (audio file available at http://www.fec.gov/agenda/2006/agenda20060407.shtml) (statement by Chairman Toner that "this concludes the final rulemaking as required by the *Shays* litigation).

At this moment, the Commission is uniquely positioned to undertake rulemaking proceedings to remedy a major impediment to free speech, association, and representative government. It would be remiss not to do so.

Sincerely,

Jan Witold Baran
Caleb P. Burns

Counsel to
Chamber of Commerce of the United States

Stephen A. Bokat

Of Counsel
Chamber of Commerce of the United States