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VIA HAND DELIVERY

January 13, 2006

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

Re: Notice 2005-28

Dear Mr. Deutsch:

The American Cancer Society, Inc. (ACS) and the American Cancer Society Cancer Action Network, Inc. (ACS CAN) are community-based voluntary health organizations dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer through research, advocacy and service. These comments are submitted by both entities.

The Federal Election Commission ("the Commission") has requested comment on proposed new regulations regarding communications that have been coordinated with Federal candidates and political party committees. Neither ACS nor ACS CAN support or oppose political candidates, but both organizations work to affect legislation that will positively impact our mission goals. We believe the definition of coordination should not prohibit the ability of our organizations to work with current lawmakers on the passage or defeat of legislation. We hope to assist the Commission in formulating standards that provide transparency into the campaign finance process, but also provide a safe harbor for lobbying activities.

Sincerely,

F. Sheffield Hale

F. Sheffield Hale
Chief Counsel

Mary Rouvelas
Associate Counsel

**COMMENTS OF THE AMERICAN CANCER SOCIETY, INC. AND THE
AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, INC. ON THE
PROPOSED RULES REGARDING COORDINATED COMMUNICATIONS
(NOTICE 2005-28)**

The American Cancer Society, Inc. (ACS) and our related advocacy organization, the American Cancer Society Cancer Action Network, Inc. (ACS CAN) submit the following comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Federal Election Commission (“the Commission”), Notice 2005-28. The Notice seeks comments on proposed changes to its rule defining “coordinated communications” under the Federal Election Campaign Act of 1971, as amended (FECA).¹ The Commission seeks to issue new regulations that define when a payment for a communication constitutes an in-kind contribution because it is 1) made for the purpose of influencing an election; and 2) made “in cooperation, consultation, or concert, with, or at the request or suggestion of” a Federal candidate, candidate’s authorized committee, a political party, or agents thereof.²

Both ACS and ACS CAN are nonpartisan organizations. We share the mission of eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer. Neither organization supports or opposes political candidates. ACS is a public charity organized under section 501(c)(3) of the Internal Revenue Code, and is therefore absolutely barred from intervening in political campaigns. ACS CAN is organized under section 501(c)(4) of the Internal Revenue Code, and is not subject to the same prohibition. However, ACS CAN has chosen not support or oppose candidates. ACS CAN’s leadership made this choice in order to remain a neutral, nonpartisan source of information. Indeed, the desire to remain nonpartisan and refrain from making candidate contributions or endorsements was so strong that it has been codified in the Articles of Incorporation and Bylaws of ACS CAN.

We provide this background so that the Commission will understand that our communications do not seek to influence elections,³ but rather continually advocate for policies that will positively impact our mission. Our comments are intended to assist the Commission in building an administrative record that supports a safe harbor for communications geared towards passage or defeat of legislation. To this end, we are providing specific examples of legislative campaigns that included public communications intended to impact the legislative process, with a description of each campaign and advertisements attached for the Commission’s reference.

¹ 2 U.S.C. 431 et seq.

² 70 Fed. Reg. 73947 (Dec. 14, 2005) (hereinafter “NPRM”).

³ ACS CAN has created nonpartisan voter guides in compliance with 11 CFR §114.4(c)(5). In accordance with the law, these guides were not coordinated with candidates, provided all candidates equal opportunity to respond and equal prominence within the guide, and did not contain electioneering messages, scorecards, or endorsements of any kind.

I. The Need for a Safe Harbor

Organizations must be able to advocate for public policies that serve their missions at all times. The legislative cycle does not stop during the election cycle, so election law should be crafted to ensure that legitimate lobbying communications may continue.⁴ On the issue of coordination, we want to ensure that working with current lawmakers on legislation not be defined as making an in-kind contribution to a candidate. Specifically, regardless of the test the Commission crafts for determining whether a communication is coordinated, the test should include a safe harbor for organizations to work with lawmakers (who may also be candidates) on passage or defeat of legislation.

In general, we have found that the greatest legislative successes are achieved when we work closely with Members of Congress and their staff towards a mutual goal. It is customary for us to design, develop and implement legislative campaigns around specific priority issues. We consult with and advise Members and staff on the technical specifics of legislative proposals, and strategic plans for moving those proposals forward. Such strategic plans may include generating broad support among other Members of Congress, engaging the media, and mobilizing our grassroots network.

We believe that the Commission outlines valuable criteria in the NPRM for determining whether a communication would fall within the safe harbor, including:

- the communication is devoted exclusively to a particular pending legislative or executive branch matter;
- the communication does not refer to the political party affiliation or the political ideology (e.g. "liberal," "conservative," etc.) of a clearly identified candidate;
- the communication does not refer to a clearly identified Federal candidate's character, qualifications, or fitness for office; and the communication does not refer to an election, voters or the voting public, or anyone's candidacy.⁵

Of the criteria listed in the NPRM, two concern us. These include:

⁴ The Commission recently approved regulations defining "electioneering communications" that included a ban on certain broadcast communications within 30 days before a primary election, and 60 days before a general election. Draft Final Rules with Explanation and Justification: Electioneering Communications, Agenda Document No. 05-62 (Dec. 13, 2005)(to be codified at 11 C.F.R. 100.29). Our practices will conform to these restrictions. However the NPRM specifically requested information on whether 120 days is an appropriate amount of time in defining the "content" prong of coordinated communications after the Court of Appeals invalidated this 120-day window, NPRM at 73948. We are concerned that 120 days without a safe harbor is too large of a window. During an election year, it would mean in practice that these communications would be barred for ACS and ACS CAN for an entire eight months of the legislative cycle.

⁵ NPRM at 73951.

- the communication does not refer to a clearly identified Federal candidate's record or position on any issue, and
- the communication's reference to a clearly identified candidate is limited to urging the public to contact that candidate to persuade the candidate to take a particular position on the pending legislation or executive branch matters.

As illustrated in two of the examples provided below, we feel it is important at times to inform the public about a legislator's position on a particular issue, either to persuade them to change that position, or to bolster their current support for a measure. The goal in these communications would not be to influence an election, but rather to impact the lawmaker's vote. Indeed, in the examples below, most of the lawmakers were not candidates at the time the advertisements were run. However, in the course of a multi-year campaign to achieve a legislative goal, we would like to retain the ability to run the same types of lobbying advertisements throughout.

There are some other criteria the Commission may want to include. Specifically, ACS and ACS CAN look to Internal Revenue Service (IRS) Revenue Ruling 2004-6⁶ in crafting our communications, in order to ensure that they are considered lobbying communications rather than attempts to influence an election. These criteria include:⁷

- The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);
- The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation);
- The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication;
- The advertisement may include references to non-candidate lawmakers; and
- The communication is part of an ongoing series of substantially similar advocacy communications on the same issue in the same year.

Although there is some overlap between the Commission's original criteria and the IRS's criteria, we believe the inclusion of a standard that requires a communication to be tied to an event outside the control of the organization to be a key factor in the analysis. In our experience, lobbying communications attempt to impact specific

⁶Rev. Rul. 2004-6, 2004-4 I.R.B. 328. Although we are at times highly frustrated with the vagueness of the "facts and circumstances" test used by the IRS, we find the criteria used in this revenue ruling helpful in crafting our communications.

⁷ We do not believe that all of the criteria need to be included in each communication to qualify for the safe harbor. As discussed in the Ruling, these factors tend to show that a communication is made for a non-electoral purpose. There is no specific number or combination of factors required for a message to be considered a lobbying communication.

actions by legislators; we would not run an advertisement in a vacuum, but do so in response to outside events.⁸

The following examples illustrate public communications paid for by ACS or ACS CAN that were conducted during the course of a legislative campaign that included discussions with current lawmakers in order to achieve our legislative goals.

II. Examples of ACS and ACS CAN Campaigns

A. The Patient Navigator Act

ACS led a successful effort to pass the Patient Navigator, Outreach and Chronic Disease Prevention Act. This landmark legislation aimed to expand access to prevention, early detection, and treatment services for cancer and chronic diseases in medically underserved communities. The bipartisan legislation provided grants to create model programs to assist individuals who need help with the health care system. The program improves access to care by providing medically underserved individuals assistance in obtaining treatment, counseling about disease prevention and health lifestyle choices, promoting screening tests, obtaining referrals for treatment, scheduling and arranging transportation to appointments, helping ensure doctor's instructions are followed for visits, and making sure patients have funds to pay for doctor visits and treatments. The legislation also authorized \$25 million in funding for the program over five years.

Our lobbyists worked closely with key Members and their staffs from the inception of this legislation, helping to draft the initial legislation, designing and implementing a strategy for gathering cosponsors and support, pushing the proposal through the legislative process in the House and the Senate, and ultimately getting the bill signed into law. This process took a full three years from beginning to completion, and involved many discussions with our champions and key partners in the advocacy community. It also entailed targeted grassroots activity to bolster our cosponsor lists, and to ensure that the committees of jurisdiction understood the technicalities of the proposal and merits of achieving it. We worked especially closely with committee staff to ensure that the final legislative product reflected our priorities.

At the end of the campaign, in the summer of 2005, we ran "thank you" advertisements geared towards certain Members after the President signed the bill into law. These ads were intended to congratulate the Members, and to help encourage continued support for the program. A sample of one of these advertisements is attached as Exhibit A. Because of the timing these ads would not have been captured by the 120 day rule. However, as discussed, the timing was out of our control. Had the bill moved earlier in the three years during which we worked on it, or had it not been enacted until closer to the 2006 elections, we would have wanted to be able to run the same kind of "thank you" advertisements as an integral part of our lobbying campaign.

⁸ In the course of our advocacy, we do ask Congress to vote on a measure before the end of the current session, before an upcoming Congressional recess, or a similar deadline. However, we do not have any control over whether that vote is actually scheduled.

B. FDA Regulation of Tobacco Products

ACS and other health organizations have worked for decades to pass legislation that would grant the Food and Drug Administration (FDA) authority to regulate tobacco products. In 2004, our campaign brought the bill closer than ever before to being enacted. Although ultimately the bill was not passed, we made tremendous progress when a measure providing this authority passed the Senate overwhelmingly, and for the first time in history.

We worked very closely with key Congressional offices and specific Members of Congress who were our champions in developing the legislation, as well as in designing and implementing the legislative strategy. In this instance, the legislation had been introduced in both the House and Senate, and we were working with our partners in tobacco control to secure cosponsors and support for the bill. Unfortunately, leadership in the Congress opposed the bill, so the measure stalled. However, the political situation changed quickly and fortuitously after the President made certain remarks that afforded an opportunity for the FDA legislation to be linked with the buyout of tobacco farmers.

Were it not for the very strong working relationships we had with key Members and their staffs, we would not have been able to refine the legislative proposal and implement a complex legislative strategy. Along with other health groups that act as our partners in tobacco control, we met frequently with key Members and their staffs to discuss the effort, including all elements of strategy. This strategy included media, employing grassroots networks, and targeting certain Members who needed to understand the merits of the proposal. In some cases, we asked Members to join us for press events in their districts, and used those opportunities to publicize the legislation.

As part of this campaign, we ran advertisements urging constituents to call on their Members of Congress to support the bill (see attached Exhibit B). These advertisements ran at the end of August recess, and were geared towards notifying lawmakers of our priority issue during the upcoming session of Congress, and providing an opportunity to energize our volunteer base at the beginning of the new legislative session. We also wanted constituents to speak with their Members of Congress while those Members were home on recess. Although this sample advertisement does not include reference to an individual lawmaker, there are instances in which we would want the ability to target the message in this manner.

C. Budget Amendment

As part of the 2004 fight to ensure sufficient federal dollars for cancer research and programs, ACS CAN worked on an amendment to the Senate budget resolution that would have paid for higher levels of public health spending with an increase in the federal tobacco excise. Although the measure did not pass, it helped lay the groundwork going forward as federal funds become scarce and deficits continue to grow.

ACS CAN was integrally involved in working with Senators to write the amendment itself, and our lobbyists were in direct contact with the staffs of the lead sponsors about the language of the amendment, and the structure (which would impact the legislative process itself). We met with Senators and their staffs to discuss prospects of the bill, and the most effective means to get it passed, including grassroots and media efforts to urge every Senator to support the bill. As part of this campaign, ACS CAN placed five advertisements urging constituents to contact key legislators to support the amendment, and afterwards placed follow up advertisements indicating what the lawmaker had done. See attached Exhibit C. These advertisements were run in mid-March to correspond with the legislative vote. The follow-up would have run in every market where the initial ads ran to report on how the targeted legislators voted, whether yes or no. This element of public follow-up is a critical element of many effective lobbying campaigns. The promise in advance to inform constituents of a legislator's vote gives real impact to the grass roots lobbying messages before the vote.

In an election year, such a campaign would face additional administrative burdens under the proposed 120 day rule. We would have had to research each target state to ensure that the primary was not within 120 days of the communication, despite the fact that the communications are not geared towards influencing the election. For this reason we strongly support the development of an appropriate safe harbor provision to protect lobbying communications from being incorrectly treated as campaign contributions.

III. Conclusion

The Commission faces a difficult task in drafting its regulations on coordination. Government can only maintain trust if it has a transparent campaign finance process that requires disclosure of expenditures to influence elections. At the same time, we are concerned that nonpartisan lobbying activities will be adversely affected by rules that do not contain a safe harbor for such communications. We urge the Commission to adopt such a safe harbor. The new regulations should allow organizations to mobilize their members and the public for mission work that includes legislation, understanding that the timing of elections is but one component of the overall public policy process.

EXHIBIT A



**Thank you Senator Kay Bailey Hutchison
and Representative Joe Barton
for leading the effort to pass legislation
that will help people who need it most
navigate our health care system.**

This new law, the Patient Navigator, Outreach and Chronic Disease Prevention Act of 2005, will improve access to prevention, early detection, and other health care services necessary to combat cancer and other serious illnesses. The navigator programs will assist people in Texas and nationwide – especially those without health insurance, with low incomes, in rural areas, or of a racial or ethnic minority.

We are grateful to Senator Hutchison and Representative Barton for their leadership and support of this program, which brings us one step closer to the ultimate goal of eliminating suffering and death due to cancer by 2015.

Working together, we can continue making progress toward this essential goal.

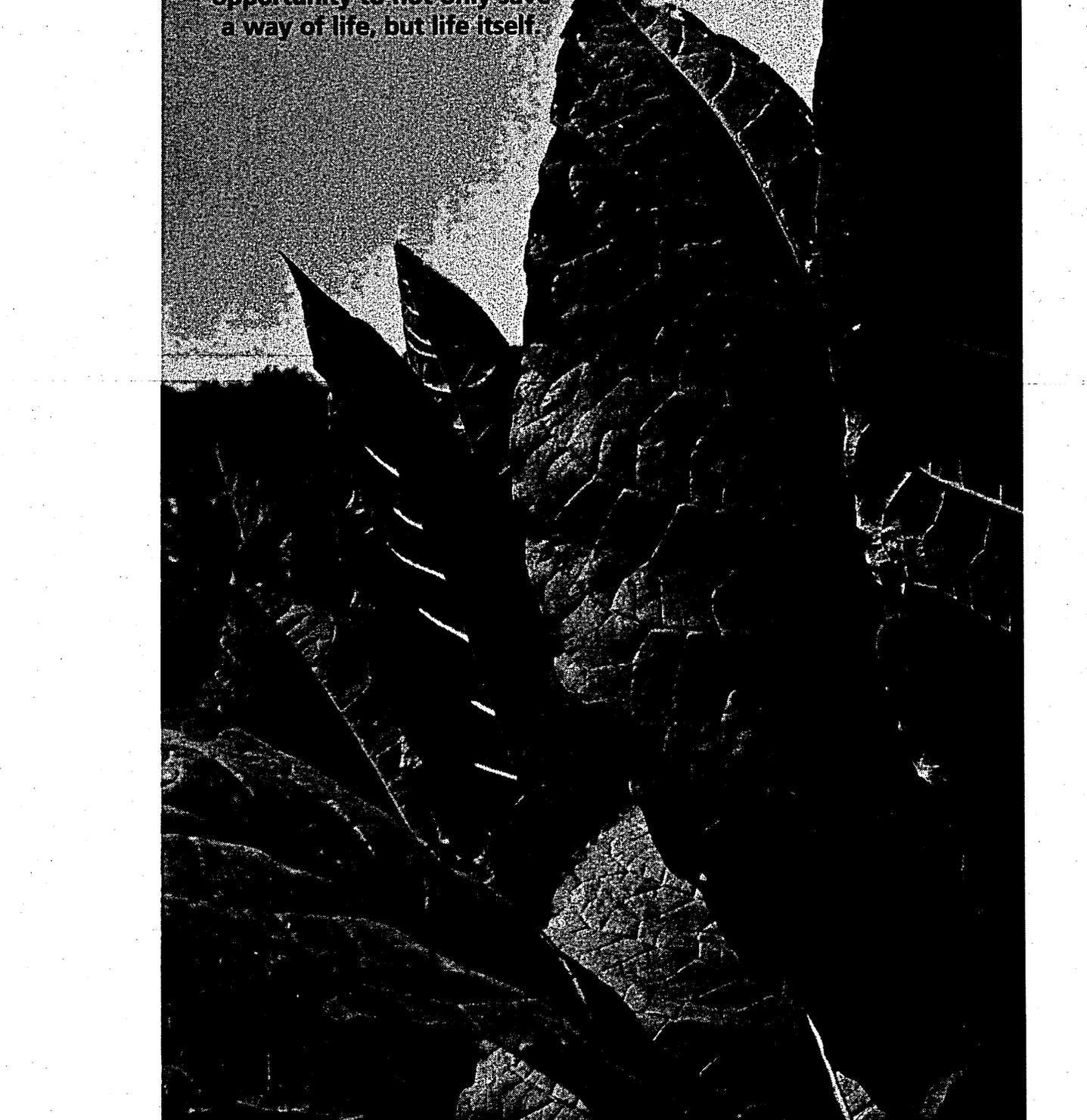
We also applaud Representatives Gonzalez, Green, Hall, Hinojosa, Jackson Lee, Reyes, and Sessions whose support has helped make this legislation a reality.



www.cancer.org / 1.800.ACS.2345

Paid for by the American Cancer Society, Inc.

EXHIBIT B



**Congress has the historic
opportunity to not only save
a way of life, but life itself.**

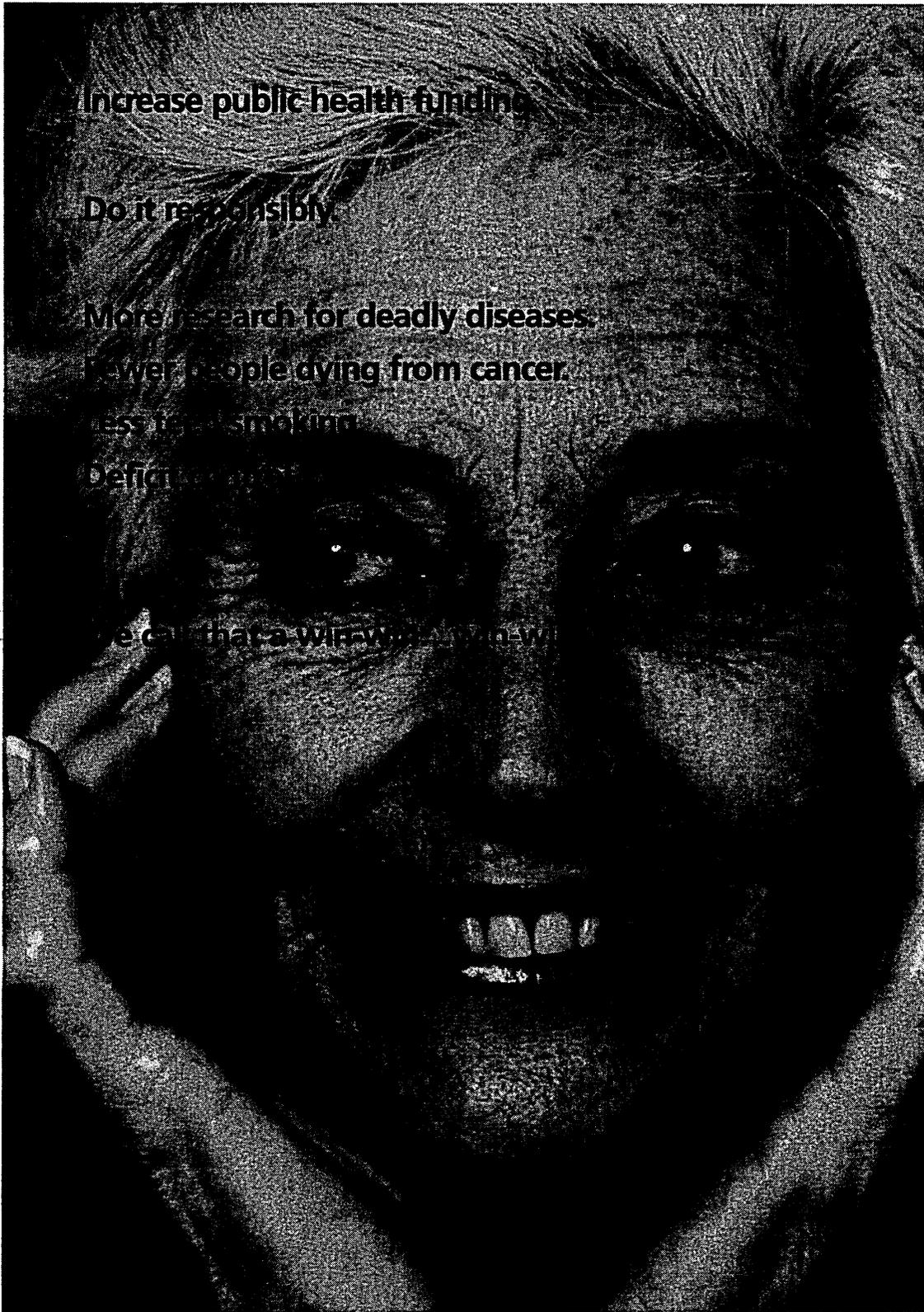
Tobacco growers and health groups such as the American Cancer Society have joined in an historic agreement that will help protect tobacco farmers and save lives. Now, Congress has the chance to make the agreement a reality by supporting a tobacco farmer buyout along with strong, fair and effective FDA regulation of tobacco products.

Call 1-888-NOW-I-CAN, a toll-free legislative phone number, and ask your Senators and Representatives to support effective tobacco legislation and policies that protect our farmers and our lives.



Cancer Action Network

EXHIBIT C



Increase public health funding

Do it responsibly

More research for deadly diseases

Fewer people dying from cancer

Less teen smoking

Deficit reduction

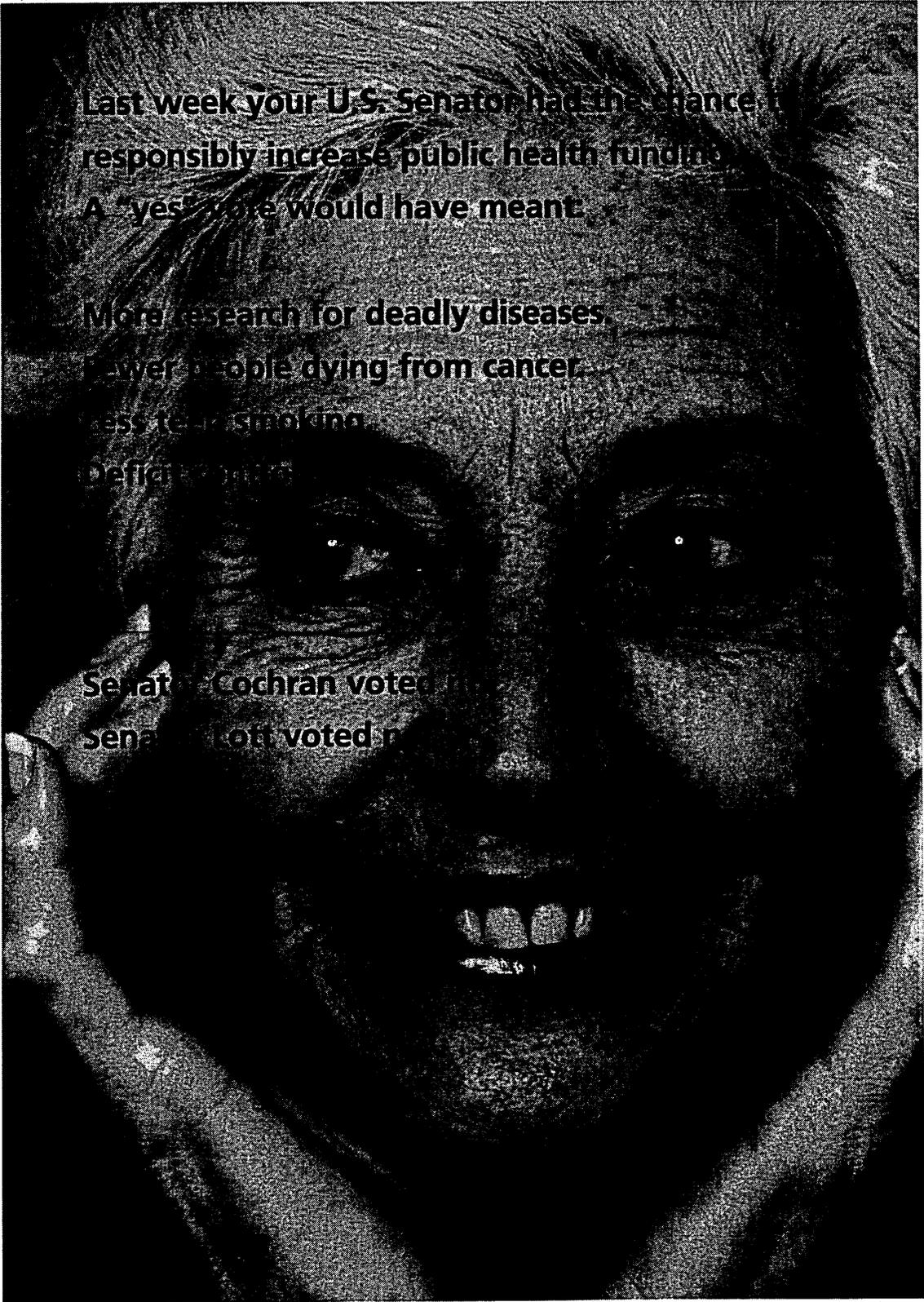
We call that a Win-Win-Win-Win-Win

This week, your Senators have the chance to increase health funding, save lives and decrease the deficit. Make sure they say "yes!" Tell your U.S. Senators to support the Harkin-Feinstein amendment to fund public health and decrease the deficit by increasing the tobacco tax. Take action now! Call Senators Lott and Cochran at 202-224-3121 or visit www.cancer.org/takeaction.



Stay tuned... we'll let you know how they voted.

Cancer Action Network



Last week your U.S. Senator had the chance to responsibly increase public health funding.

A "yes" vote would have meant:

More research for deadly diseases.

Fewer people dying from cancer.

Less teen smoking.

Deficit control.

Senator Cochran voted no.

Senator Lott voted no.

Last week, your Senators had the chance to improve the lives of Americans by funding public health and decreasing the deficit with an increase in the tobacco tax. Unfortunately, the amendment failed. We promised to report the results. Are you satisfied with the outcome? Call Senator Cochran at 601/965-4459 and Senator Lott at 601/965-4644 to let them know what you think.



Cancer is a national priority. Shouldn't cancer funding be one too? **Cancer Action Network**