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August 21, 2002

Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Federal Election Commission Notice of Proposed Rulemaking 2002-13: Electioneering Communications

Dear Ms. Dinh:

The Alliance for Justice and the Sierra Club Foundation welcome the opportunity to submit comments in response to the Notice of Proposed Rulemaking ("NPRM") issued on August 7, 2002.[1] We appreciate the effort that the Commission has made to create regulations to implement the electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). The Alliance for Justice requests the opportunity to testify in person before the Commission when it holds a hearing on these proposed regulations.[2]

The Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the justice system. While most of the Alliance's members are charitable organizations, a significant number also work with or are affiliated with social welfare and advocacy organizations that engage in political activity.

Joining the Alliance on these comments is the Sierra Club Foundation, a charity whose mission is to support the Sierra Club and other environmental organizations for tax-deductible work.

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[1] Federal Elections Commission Notice of Proposed Rulemaking on Electioneering Communications, Notice 2002-13, 67 Fed. Reg. 51131 (August 7, 2002) ("NPRM").

[2] If the Alliance is invited to testify, Tim Mooney, Counsel for the Alliance for Justice will present our testimony. The Sierra Club Foundation does not request the opportunity to testify.

In these comments we refrain from raising questions about the underlying constitutionality of the law. These questions are largely beyond the authority of the Commission and will eventually be resolved by the courts. However, we recognize that the Commission can, within its legitimate authority to write implementing regulations, interpret the law in such a way as to encourage the courts to uphold the statute. We appreciate the Commission's apparent efforts in this direction, embodied in the proposed rules. Our comments are an attempt to continue in this regard – to make suggestions that attempt not only to provide clear guidance on BCRA's requirements, but also to resolve any ambiguities in ways that support the constitutionality of the statute.

We concur with the Supreme Court in *FEC v. Massachusetts Citizens for Life* ("*MCFL*") when it wisely advised, "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[3] We believe that the Commission was mindful of this in proposing some regulations, however there are others that would curtail more speech than necessary to address the problems prompting campaign finance reform. Despite these concerns, the Alliance is generally supportive of the Commission's attempt to clarify certain areas in the new law and, more importantly, to utilize the authority Congress specifically granted the Commission under 2 U.S.C. 434(f)(3)(B)(iv) to "ensure the appropriate implementation" of the law by promulgating appropriate exceptions from regulation as electioneering communications. The Commission correctly recognizes that BCRA, as written, left some activities defined as electioneering communications that should not be regulated as a matter of policy as well as constitutional law. It is on this basis that we make the following comments.

I. BCRA'S ELECTIONEERING COMMUNICATIONS PROVISIONS SHOULD NOT APPLY TO SOME CLASSES OF NONPROFITS

BCRA was intended to stem the tide of undue influence of large unregulated contributions that fell outside the scope of federal election law. The theory behind most of the provisions of the law was that Congress could end the corrupting influence of such contributions by regulating activities. The electioneering communications provision in particular was meant to end the existence of unregulated ads broadcast near election time that identify federal candidates, yet that do not use express advocacy. The drafters of the legislation created a bright line definition of electioneering communications that they hoped would capture all such ads.

One result is that the definition is overbroad in that it covers communications outside of the scope of federal elections. Furthermore, BCRA's electioneering communications provision captures a large class of organizations that are already sufficiently regulated. BCRA also impermissibly regulates certain organizations to a degree not permitted by Supreme Court precedent. The drafters wisely included provisions that allow the Commission to correct these issues at the regulatory level. The Alliance urges the Commission to use this authority to correct the problems.

[3] 479 U.S. 238, 265 (1986).

A. The Commission Should Exempt 501(c)(3) Organizations from BCRA's Ban on Electioneering Communications

We urge the Commission to create an exception to BCRA's general rule against electioneering communications for any communication funded by an organization that is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code (IRC). This bright line test provides needed clarity for these organizations, protects speech that BCRA was not intended to reach, and does so without compromising the basic principles of the law. Specifically, we urge the Commission to exempt from the ban on electioneering communications any communication that:

> Is paid for by an organization described in 26 U.S.C. 501(c)(3) if the communication does not constitute participation in, or intervention in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition) to any candidate within the meaning of 26 U.S.C. 501(c)(3).

The IRC states that groups organized under Section 501(c)(3) such as public charities and private foundations may not "participate in, or intervene in... any political campaign on behalf of (or in opposition to) any candidate for public office."[4] These restrictions against electioneering cover all candidates and include all activity, including communications that fall far short of express advocacy.[5] Since 501(c)(3) organizations are absolutely prohibited by the IRC from engaging in or funding any activity that even insinuates support or opposition to a candidate for public office, they are held to a demonstrably higher regulatory standard than other corporations.

The penalty for engaging in electioneering activity is severe – revocation of tax-exempt status.[6] IRC Sec. 4955 adds other potential penalties, as well, including substantial taxes on the electioneering activity and penalties that *personally* apply to managers of an organization that knowingly violate the prohibition. The Internal Revenue Service (IRS) has additional authority that allows it to immediately enjoin flagrant violators from continuing in their illegal activities.[7] 501(c)(3) organizations are subject to a stricter limits on election-related communication than BCRA's restrictions on electioneering communications, and the enforcement options available to the IRS against the organization and the individuals that run it are sufficient to ensure compliance. Thus, regulating 501(c)(3) activities under BCRA is superfluous.

BCRA's electioneering communications provision, while intended to target election-related broadcast advertisements, prohibits more. Charities would be prohibited from broadcasting fundraising appeals or public service announcements that feature people who are candidates if the appeals run within 30 days of a primary or 60 days of a general election. Documentaries and other educational programming featuring individuals who are candidates would also be banned. In addition, the statutory definition would prohibit nonprofit corporations from broadcasting

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[4] 26 U.S.C. 501(c)(3)

[5] *See* Judith E. Kindell & John F. Reilly, *Exempt Organizations Continuing Professional Technical Instruction Program for Fiscal Year 2002*, "Election Year Issues" 352 (2001), citing *US v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981); *Association of the Bar of New York v. Commissioner*, 858 F.2d 876, 881 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).

[6] IRC Sec. 501(c)(3); 26 C.F.R. 1.501(c)(3)-1.

[7] IRC Sec. 7409.

legitimate lobbying advertisements that encourage viewers to contact their federal representatives within 30 days of a primary and 60 days of a general election if these representatives happen to be running for re-election.[8] Prior to the passage of BCRA, all of the activities would have been allowed.

Unlike other types of nonprofit corporations, 501(c)(3)s could never legally broadcast advertisements that contain even the slightest suggestion of support for or opposition to any candidates due to the substantial restrictions under federal tax law. We know of no examples where 501(c)(3)s have broadcast the so-called "sham issue ads" that BCRA attempts to ban or otherwise regulate. Simply put, BCRA's application to 501(c)(3)s prohibits activity that is already forbidden, plus activity that should not be banned. BCRA's application to 501(c)(3)s, therefore, only serves to stifle their ability to engage in legitimate charitable activities and fails to serve any compelling government interest of quashing the appearance of corruption in elections.

We dismiss the stated fear of some commentators that an exemption for 501(c)(3)s would encourage unscrupulous people to create sham 501(c)(3) organizations to run issue ads, thereby avoiding BCRA's restrictions on electioneering communications. First the penalties described above and aggressively enforced by the Internal Revenue Service should deter this behavior. Particularly effective are the provisions of IRC 4955 that provide for personal liability for organizational managers that knowingly violate the absolute ban on partisan political activity by 501(c)(3)s. Furthermore the dearth of examples of issue ads broadcast by 501(c)(3)s to date suggest that fears of misuse of 501(c)(3)s are overwrought. In theory, the availability of a charitable tax deduction should already provide an incentive to funnel money for issue ads through 501(c)(3)s, and yet there has been no such trend. Given the possible penalties and the historical evidence, an exception for 501(c)(3) activity seems unlikely to lead to abuse.

Nonetheless, to mitigate such fears, we propose that any exception for 501(c)(3)s be limited to communications that do not "constitute participation in, or intervention in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition) to any candidate within the meaning of 26 U.S.C. 501(c)(3)." With this language, any purported 501(c)(3) that attempted to run de facto campaign ads would lose both the protection of their tax-exempt status and the protection of this exception.

The other exceptions the Commission proposes are not sufficient substitutes for a cleaner, easier-to-comprehend safe harbor for 501(c)(3)s. The lobbying exceptions offered by the Commission in the NPRM are limited and do not necessarily cover all of the circumstances in which a public charity could mention a candidate's name in broadcast ads during the blackout periods. Likewise the exceptions (or possible exceptions) for candidate debates, reference to laws by popular name, and public service announcements do not protect all of the nonpartisan, protected speech now available to 501(c)(3)s.

Even if the Commission were to draft broader exceptions for specific types of speech, the fact that federal tax law places an absolute prohibition on any electioneering activity by 501(c)(3)s means that BCRA's regulation would be duplicative in the areas where it was intended to cover. It is worth noting that Congress excluded independent expenditures from the

[8] 2 U.S.C. 434(f)(3)(A).

definition of electioneering communications, in part because independent expenditures are already regulated by federal law and "would subject such communications to duplicative and often conflicting reporting requirements."[9] The same principle should apply to communications funded by 501(c)(3)s.

We strongly urge the Commission create this safe harbor to protect organizations that are tax-exempt under 26 U.S.C. 501(c)(3).

B. The Commission Should Exempt "Qualified Nonprofit Corporations" from BCRA's Ban on Electioneering Communications

1. Proposed Exemption

The Alliance supports the Commission's proposed regulation that permits "qualified nonprofit corporations" to make electioneering communications.[10]

In *MCFL*, the Supreme Court ruled that certain organizations, later regulated by the Commission as qualified nonprofits, could make independent expenditures for or against federal candidates because federal election laws could not constitutionally forbid such communications.[11] Under BCRA's statutory definition of electioneering communications, qualified nonprofits would be unable to engage in electioneering communications. This leads to the curious result that a qualified nonprofit could air an ad that expressly advocates for the election or defeat of a federal candidate, yet could not advocate for the candidate in a less direct manner that did not use express advocacy. The Commission tried to address this incongruity in drafting proposed 11 C.F.R. 114.2(b)(2).

The Commission has properly noted that the statute "may go further than allowed by *MCFL*" and is using the authority granted by BCRA to bring the law back into compliance with the *MCFL* and the Constitution.[12] BCRA would unconstitutionally prohibit qualified nonprofits from airing electioneering communication ads, despite the fact that the government has a weaker interest in regulating non-express advocacy, such as electioneering communications, than express advocacy independent expenditure ads. Since the Supreme Court held that qualified nonprofits had the right to make independent expenditures in *MCFL*, the Commission is correct to find that the same constitutional rights would extend to electioneering communications.

2. Application of *Minnesota Citizens Concerned for Life*

The Commission has requested comments regarding how it should regulate qualified nonprofits in the wake of the ruling in *Minnesota Citizens Concerned for Life v. FEC* ("*Minnesota Citizens*").[13] In this case, the 8th Circuit held that organizations that accepted a *de*

[9] NPRM at 51135.
[10] Proposed 11 C.F.R. 114.2(b)(2).
[11] *Supra*, note 2.
[12] NPRM at 51137.
[13] 936 F.Supp. 633 (D.Minn. 1996), *aff'd*, 113 F.3d 129 (8th Cir. 1997). *See also, Beaumont v. FEC*, No. 01-1348 (4th Cir. 2002) (holding that a 501(c)(4) that received *de minimis* corporate contributions may make independent expenditures and contributions to a candidate).

minimis amount of corporate or labor organization funds could still be qualified nonprofits and, therefore, had the right to make independent expenditures without violating 2 U.S.C. 441b. This ruling expands the reach of *MCFL* but it is constitutionally consistent with the *MCFL* ruling, which did not attempt to exhaustively define the class of organizations constitutionally entitled to make independent expenditures. In apparent contrast with *Minnesota Citizens*, the Commission has noted that BCRA does not allow use of corporate or labor money to fund electioneering communications.[14]

The Alliance urges the Commission to apply the *Minnesota Citizens* standard for qualified nonprofits in the electioneering communications regulations.[15] Without such a rule, organizations that accept a small amount of corporate or labor funding would face uncertainty about their status as qualified nonprofits and the right to make communications that fall within the basic definition of electioneering communications. The Commission should consider reasonable alternatives that do not conflict with the *Minnesota Citizens* holding in promulgating regulations.

C. Organizations Permitted to Make Electioneering Communications May Be Affiliated with Organizations Not Permitted to Make Such Communications

The Commission requests comments on whether BCRA forbids an entity permitted to make electioneering communications from being affiliated with an organization prohibited from making such communications. The Alliance finds no such restriction in the law, and we believe that existing precedent requires that these affiliations is supported by existing be permitted.

The Supreme Court has, on at least one occasion, allowed Congress to restrict constitutionally protected speech while noting that the organization subject to the restriction was permitted to create an affiliate organization that was not subject to the restriction. In *Regan v. Taxation With Representation*, the Court upheld statutory limits on lobbying by charitable organizations.[16] In doing so however, the Court explicitly noted the charity's option of creating an affiliated 501(c)(4), which could engage in unlimited lobbying.[17] Following *Regan*, numerous affiliations of tax-exempt organizations – 501(c)(3)s, 501(c)(4)s, 527s – have been created to allow these separate organizations working toward common goals to engage in different types of activities most appropriate to their tax-exempt status. The practice has become so common and so accepted that the IRS has prepared training materials for its field staff on the topic.[18]

Beyond this mere support for affiliated organizations, there is at least one case – *MCFL* – the Supreme Court found that even the requirement that an organization create an affiliate to engage

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[14] NPRM at 51138; 2 U.S.C. 441b(c)(2).

[15] In fact, we believe that the Commission should generally expand the provisions of 11 C.F.R. 114.10 to allow the broader class of qualified nonprofit corporations as described in *Minnesota Citizens* and *Beaumont* to make independent expenditures. However we recognize that this rulemaking is concerned only with implementing the electioneering communications of BCRA.

[16] 461 U.S. 540 (1983).

[17] *Id.* At 544.

[18] *See* Ward L. Thomas & Judith E. Kindell, *Exempt Organizations Continuing Professional Technical Instruction Program for Fiscal Year 2000*, "Affiliations Among Political, Lobbying and Educational Organizations" (1999).

in certain activities was too burdensome. The Court in *MCFL* held that requiring Massachusetts Citizens for Life to create a Separate Segregated Fund would place unconstitutional burdens on its ability to engage in express advocacy communications.[19] While this case, as suggested above, has other implications for BCRA, it also demonstrates the Court's reluctance to burden protected speech, and, at the very least, suggests that the Court would reject any restriction on organizations affiliating to expand the scope of permissible communications.

The Alliance urges the Commission not to prohibit organizations forbidden from engaging in electioneering communications from establishing affiliates permitted to make such communications.

D. BCRA's Electioneering Communications Ban Does Not Apply to Unincorporated 501(c)(4) Organizations

The Alliance supports the Commission's interpretation that unincorporated 501(c)(4)s and 527 organizations are not covered by BCRA's electioneering communications provisions.[20] A plain language reading of the statute's structure in relation to existing federal law shows that only incorporated organizations are subject to regulation by the Act.

II. THE COMMISSION SHOULD PROMULGATE EXCEPTIONS TO THE DEFINITION OF ELECTIONEERING COMMUNICATIONS

The Commission has suggested throughout the NPRM that BCRA has some areas that need clarification and some that need regulations to pull the law back into constitutional compliance. To that end, the Commission has asked for guidance on a variety of exceptions, including some not yet proposed in the regulations as drafted. The Alliance urges that in each instance, the Commission consider exceptions for "electioneering communications" that primarily protect activity that is non-electoral in nature rather than run the risk of an overbroad interpretation of the statute.

A. Exceptions Proposed in the NPRM

1. Pending legislation, executive action or other matters

The Alliance strongly supports an exception for lobbying as proposed by the Commission in the NPRM. As we have stated previously, BCRA's electioneering communication provision could be interpreted in ways that are constitutionally overbroad. The Commission recognizes the problems with this and has crafted several regulatory fixes that may save the law from its legal shortcomings. This is particularly true regarding the rule exempting broadcast lobbying communications from regulation. The ability for individuals to associate themselves with organizations that represent their interests is a fundamental right guaranteed by the Constitution. The collective voices of these people through the organizations on issues relating to how the government operates and on what it spends its resources is perhaps the most crucial aspect of our democracy.

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[19] *MCFL at 253-257.*
[20] NPRM at 51137.

The right of the people to petition the government for a redress of grievances is among the first rights guaranteed in the Bill of Rights.[21] Any law that purports to limit this type of activity must serve a compelling governmental purpose and be narrowly tailored to avoid regulating speech outside of the interest. Here, the claimed compelling interest for government is to create a campaign finance system that does not have the appearance of corruption. In *Buckley* and its progeny the courts have allowed the government to limit some activities because of this compelling interest, however the courts have been extremely reluctant to limit the First Amendment rights of people and organizations to express their opinions on how the government operates.[22]

The Alliance supports Alternative 3-C as the most appropriate exemption for lobbying communications.[23] The rationale behind the Alliance's position is that any regulation in this area should cover the least amount of speech possible while still meeting its goals of regulating the so-called sham issue ads. We believe that any lobbying exception must cover issues that can be dealt with by legislative or administrative action and must permit communications that contain discussion of the candidate's position on the matter. Alternative 3-C meets this standard because it clearly protects attempts to inform the general public on genuine public policy issues, whether legislative or administrative and does not silence organizations from stating the positions of incumbents.[24]

Without this exception, the electioneering communication restrictions impede the ability of organizations, including the incorporated nonprofits that comprise the Alliance's membership, to effectively address the public on policy matters through broadcast because it forces them to comply with burdensome organizational requirements or dilute their message. Certainly any interpretation of BCRA would permit organizations to run broadcast ads mentioning candidates outside of the 30- or 60-day time windows, but many legislative issues reach their peak at the end of the congressional session, just before the election, and organizations would be denied a key lobbying tool. Likewise organizations could simply refrain from identifying candidates in broadcast ads, but lobbying ads are far less effective when they do not urge supporters to focus their attention on the few swing legislators who will decide the issue. Organizations might also create a separate organization or account not subject to the electioneering communications restriction, but the Supreme Court in *MCFL* found that forcing an ideological 501(c)(4) to create a separate segregated account was too great a burden on core constitutional speech, and there the speech was electoral in nature, arguably less protected than legislative advocacy.[25]

The other alternative lobbying exemptions proposed in the NPRM would allow only communications that do not mention the position that the candidate has taken on the legislation. Again the restriction is too burdensome. In virtually all instances of lobbying, it is crucial for organizations to let the public know how an officeholder has historically acted on a given matter to underscore the likelihood of that official acting in the same manner and to emphasize the need to contact the official in this case.

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[21] U.S. Const. amend I.
[22] *See generally, Buckley v. Valeo*, 424 U.S. 1 (1976).
[23] NPRM at 51145.
[24] Proposed Alternative 3-C at 11 C.F.R. 100.29(b)(6).
[25] 479 U.S. at 263.

If the Commission is not convinced that Alternative 3-C as written has sufficient restrictions to deter abuse, the Alliance would support additional limiting language (suggested in Alternative 3-B) that would exclude ads that refer to a candidate's "qualifications, or fitness for an office or to an election, candidacy or voting."

2. Popular name reference

The Alliance supports the exception for references to bills by their popular name at proposed 11 C.F.R. 100.29(c)(5). Ironically, BCRA, as written, would have regulated an advertisement supporting the "McCain-Feingold bill" while its chief sponsor Senator McCain was running for President in 2000. The Commission properly recognizes that such communications should not be subject to regulation under federal election law.

3. Candidate debates and forums

The Alliance supports the exception for candidate debates and forums at proposed 11 C.F.R. 100.29(c)(4).

4. Expenditures and independent expenditures

The Alliance supports the Alternative 2-A exception for expenditures and independent expenditures at proposed 11 C.F.R. 100.29(c)(3). Since these communications by definition contain express advocacy, FECA already regulates them.[26] BCRA's electioneering communications provisions were intended to apply to previously unregulated communications. By creating this exception, the Commission honors BCRA's legislative purpose and avoids burdensome and confusing double-reporting.

5. Specific non-broadcast exclusions

The Alliance supports the list of non-broadcast communications excluded from the definition of electioneering communications at proposed 11 C.F.R. 100.29(c)(1). The Alliance believes that the Commission should more explicitly indicate that the examples listed are not intended to be an exhaustive list of exempted communications.

6. News stories and editorials

The Alliance supports the exception for news stories, commentaries, and editorials at proposed 11 C.F.R. 100.29(c)(2).

[26] NPRM at 51135 and 2 U.S.C. 434(b)(4)(A).

B. Additional Exceptions

1. Ballot initiatives and referenda

The Commission has asked for comments on whether it should create an exemption for communications related to ballot initiatives and referenda. The Alliance supports this idea and urges the Commission to adopt an exception for any communication that:

> Urges support or opposition to a ballot initiative, referendum, or a proposal for a ballot initiative or referendum even if the communication includes or refers to a clearly identified candidate.

The rationale behind our position is the same as our reasons for supporting an exemption for lobbying communications. Ballot initiatives and referenda are legislative in nature. The public votes directly on making law just as their representatives in Congress and the state legislatures do when considering proposed bills. Indeed Congress has chosen to treat a charity's support for or opposition to an initiative or referendum as a lobbying activity for this reason.[27] Communications directly related to support or opposition for specific policy proposals must be protected, whether in the context of legislative lobbying or ballot measures.

Furthermore, ballot initiatives and referenda are purely local in nature and have no direct impact on federal elections. It is, however, certainly true that people who are candidates for federal office are sometimes critical figures in these campaigns, whether as incumbents or as other prominent citizens. Without this exemption, broadcast communications unrelated to any federal election might run afoul of BCRA's restrictions on electioneering communications.

Should the Commission agree with the Alliance that such an exception is necessary, the exception should include ads that oppose ballot initiatives or referenda. There is no compelling reason to limit the exception to advertisements in support of initiatives or referenda, as the NPRM might seem to suggest.[28]

2. Unpaid advertisements

The Commission has asked whether the electioneering communication restrictions should apply only to paid advertisements.[29] The Alliance supports this concept and urges the Commission to include language to this effect in the general definition in 11 C.F.R. § 100.29(a)(1). While it is possible to include such language in some of the proposed exceptions to the definition, such as some of the proposed legislative lobbying exceptions at 11 C.F.R. § 100.29(c)(6), it would make better policy sense to place this limiting language in the definition.

The entire purpose of BCRA, particularly the electioneering communications provision, is to stem the corrosive tide of unregulated monetary influence in federal elections. However that corrosive influence in lacking when the communications involve unpaid ads. It is common to

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[27] 26 U.S.C. 4911(e)(2).
[28] NPRM at 51136.
[29] NPRM at 51136.

see a wide variety of communications such as public service announcements (PSAs), community television and radio, and others that use unpaid airtime and that feature a federal candidate and that run within BCRA's 30- or 60-day time windows. A PSA featuring a person promoting cancer awareness should not face any broadcast restriction simply because two years after taping the spot, that spokesperson is running for federal office when it is aired. The Commission recognizes that unpaid ads are different by considering exceptions for PSAs and other similar communications. The Alliance feels that any communications broadcast at no cost fail to demonstrate the potential for improper influence that would permit the government to restrict such communications. Any unpaid communication is substantially more akin to a PSA than to a so-called "sham issue ad," and as such, only paid communications should be included in the electioneering communications definition.

3. Promoting tourism

The Commission has asked for comments on whether it should draft additional regulations that would exempt ads that promote local tourism.[30] The Alliance supports this proposal. Given that advertisements promoting local tourism generally have no electoral purpose, they should be broadly exempted from regulation.

4. Public service announcements

We also support an exemption that includes any form of public service announcements. Even though a federal official may gain some benefit to having an advertisement advocating prevention of illness, promoting a safer society, or supporting other positive social causes, the public benefits of these spots far outweigh the insignificant electoral benefits that might be realized by candidates. This is particularly true when the ads are produced months or even years before the candidate has even considered making the run for a federal office.

5. "Promote, support, attack, or oppose"

The Commission has inquired whether it should limit any of the electioneering communication exemptions in the NPRM to ads that "do not promote, support, attack, or oppose any clearly identified candidate."[31] The Alliance urges the Commission to avoid such overbroad and vague language in any of the exceptions it promulgates in the electioneering communication regulations. While there are instances in which such limitations might seem to close perceived loopholes in the exceptions, there are an infinite number of non-electoral situations when an organization will have a legitimate non-electoral reason to criticize or support a person who is a federal candidate. The Commission has recognized this in at least one context in its proposed legislative lobbying exceptions at 11 C.F.R. § 100.29(c)(6). To broadly exclude organizations from criticizing elected officials who also happen to be running for federal office is an area of constitutional concern that the Commission can avoid if it does not add this language to any of the exceptions.

[30] NPRM at 51136.
[31] NPRM at 51136.

III. THE COMMISSION SHOULD DEFINE "ELECTIONEERING COMMUNICATIONS" TO RESTRICT COMMUNICATIONS ONLY AS NECESSARY

A. The Commission Should Narrowly Tailor the Elements of "Electioneering Communications"

The Commission should be mindful of the principle from *Buckley v. Valeo* that any restrictions on political speech must be narrowly tailored.[32] To that end, the Alliance urges the Commission to adopt regulations that properly avoid regulating more communications than necessary to achieve Congressional goals in regulating electoral speech.

1. "Publicly distributed"

The Commission's definition of "publicly distributed" at 11 C.F.R. § 100.29(b)(5) largely solves the statutory problem of determining when an electioneering communication is made.[33] The Alliance commends the Commission's determination that the electioneering communication is not made when the disbursement is made, but rather when the broadcast is aired. However, the Commission can make a simple change that adds more clarity to the definition without wounding the intent of BCRA. There are rare instances when an advertisement is broadcast at a different time than was intended by an organization, despite contractual obligations on the part of the broadcast outlet. Broadcast stations sometimes replay an advertisement after its original contracted air date, either to fill ad time or to compensate the organization for some earlier mistake in the broadcast. It is also conceivable that an advertisement could be aired prior to its intended air date. A change in the broadcast dates due to the independent action of a broadcast outlet should not impact the organization responsible for the communication. A change in broadcast dates could put an organization into a 30 or 60-day period prior to an election, thereby making an ad an unintentional electioneering communication. An early airing could subject an organization unaware of the early airing to fines for failure to file reports within the 24-hour requirement. We urge the Commission to amend the definition at 11 C.F.R. 100.29(b)(5) to include the following language:

> However, should a broadcast facility publicly distribute a communication, without prior approval or notice, on a date other than the dates provided for in the contract between the broadcast facility and the person paying the cost of the communication, the communication shall be treated to be publicly distributed on the date or dates provided in the contract.

2. "Broadcast cable or satellite communication"

The Alliance generally supports the carefully considered definition of "broadcast cable or satellite communication" at proposed 11 C.F.R. § 100.29(b)(2). In general, the Alliance is more

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[32] *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). *See also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) ("When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest").

[33] NPRM at 51132.

supportive of regulations for media where there is high cost, limited bandwidth, or other barriers to speech by many voices. With this as our touchstone, we offer a few comments in response to questions the Commission has regarding specific forms of media.

Because they are designed to be available to many citizens, the Alliance supports the general exclusion of CB radio and low power television and radio from the definition.[34] We also support the Commission's decision to except Internet communications from the definition for the same reasons we outlined in comments to the Commission's previous rulemaking on Internet regulations.[35]

However, we disagree with the interpretation that archived television or radio broadcasts that are streamed on the Internet should constitute broadcast communications under this definition.[36] Certainly the original airing of such communications could constitute an electioneering communication, but on the Internet the original source of the content should not void the general exception for Internet communications. This protects both those communicating on the Internet and those creating broadcast communications to run outside the BCRA's 30- or 60-day timeframe for electioneering communications. It would be unfair to penalize an organization for running an electioneering communication if an old broadcast created with the organization's funds were to be posted on an unrelated website by a well-meaning individual unassociated with the organization.

The Commission asks whether Web TV should be treated as broadcasts under this definition. Because Web TV is, for most purposes, simply another method for accessing the Internet we believe that the Commission should exclude it from the definition.

3. "Targeted to the relevant electorate" for Presidential primaries

The Alliance supports the Commission's proposal to clarify the targeting definition as it applies to presidential primaries. As the NPRM lays out, there is an interpretation of BCRA that would have regulated advertisements throughout the country as electioneering communications even if the ad was broadcast in a state that was not holding a primary at the time of the communication. This interpretation would dictate that ads mentioning the name of a presidential candidate would be regulated as electioneering communications for the entire election year.[37] This would muzzle many organizations, restricting their ability to broadcast lobbying advertisements that mention the incumbent President or any challengers that hold other public offices. Likewise a great deal of non-lobbying and entertainment programming would be silenced for effectively an entire year. The Commission's proposed regulation properly interprets the law to consider a broadcast ad to be covered as an electioneering communication only if it can be received by 50,000 or more persons in a state in which a primary is occurring.[38]

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[34] NPRM at 51133 and Proposed 11 C.F.R. 100.29(b)(2).

[35] *See* December 3, 2001 comments of the Alliance for Justice to FEC Notice of Proposed Rulemaking 2001-14: Use of the Internet for Campaign Activity; *See also*, January 4, 2000 comments, to FEC Notice of Inquiry 1999-24.

[36] NPRM at 51133.

[37] The regulated period would last approximately 240 days and stretch from mid-December of the year prior to the election, through the election itself. *See* NPRM at 51134.

[38] Proposed 11 C.F.R. 100.29(a)(1)(iv)(A).

IV. THE ELECTIONEERING COMMUNICATIONS' REPORTING REQUIREMENTS SHOULD BE NARROWLY TAILORED TO AVOID UNNECESSARY BURDENS ON NONPROFITS

A. Disbursing Funds for an Electioneering Communication Should Not be a Contribution Under FECA

The NPRM suggests that payments to people for electioneering communications are reportable contributions under FECA, subject to the same rules that apply to hard money contributions.[39] The Alliance opposes this interpretation and asserts that giving money for electioneering communications should not be considered a contribution under federal election law. Even with the exceptions the Commission is considering, there are a host of additional possible communications covered by the definition that are not in any way meant to impact a federal election. Perhaps the most compelling argument against this interpretation is the fact that BCRA does not redefine the definition of contribution at 2 U.S.C. 431(8) to include money given for electioneering communications, despite the redefinition of several other sections of the law to take the new concept into account. The Commission should defer to Congressional silence on the matter rather than presume this result.

B. Electioneering Communications' Reporting Requirements Should be Required After the Planned Broadcast

The Alliance believes that the BCRA reporting requirements require an organization to make a single report to the Commission after the communication is broadcast rather than on a rolling basis. BCRA requires organizations making electioneering communications to report the broadcast within 24 hours of spending $10,000 for the direct costs of producing or airing the electioneering communication. The Commission has asked for comments on whether this should be interpreted as an ongoing reporting requirement (i.e. reporting could conceivably be required prior to airing if the costs for producing go over $10,000) or if the organization is required to report all expenditures after the broadcast.

A rolling reporting requirement would be unnecessarily burdensome and would not achieve the aims of BCRA any more successfully than a one-time, post broadcast reporting requirement. The Commission already acknowledges several policy and legal reasons to reject the rolling requirement that we will not specifically detail here.[40] Due to these and other reasons, the Alliance supports a single reporting requirement that would have to be filed within 24 hours after the broadcast of an electioneering communication that meets the $10,000 expenditure threshold. As we noted above, the reporting standard should recognize the realities of the industry. In some circumstances ads are aired outside of the date that they were contracted to air. If an ad is inadvertently run within a 30 or 60-day blackout period, then the organization paying for the communication should not be subject to penalties for making an electioneering communication

[39] NPRM at 51139.

[40] *See* NPRM at 51141. The Commission noted the difficulty of determining if a communication is regulated prior to broadcast, the possibility that a communication may not be aired at all even after $10,000 in disbursements are made, and the constitutional problem of compelling disclosure of campaign-sensitive information in advance of a strategic action like an electioneering communication.

due to the independent mistake of the television or radio outlet. Nor should an organization face penalties for failure to file a timely report with the Commission due to the broadcast station's mistake. The Alliance urges the Commission to make these additional changes to the regulations proposed at 11 C.F.R. 104.5(j) and 11 C.F.R. 104.19.

V. CONCLUSION

We applaud the Commission for the careful consideration it has taken in drafting the proposed electioneering communication regulations. The speed with which Congress has mandated these regulations and the uncertainty of the outcome of the court proceedings surrounding BCRA has created a difficult task for the Commission and its staff. The Alliance is mindful that the Commission is attempting to create regulations quickly with the expectation that future enforcement actions and court proceedings will help to clarify areas of uncertainty. We fear that if the Commission fails to create some clear safe harbors, it will create confusion and over-cautious behavior that will have long-term ramifications for candidates and nonprofit organizations. We urge the Commission, wherever possible, to include language in the regulations that affirmatively permits legitimate activities and provides clear guidance to the people and organizations that BCRA seeks to regulate.

Thank you for the opportunity to comment on these proposed regulations. We would be happy to provide whatever additional information or thoughts the Commission would find helpful in its consideration of this rule. We look forward to testifying at the upcoming hearing and look forward to the opportunity to expand on our views.

Sincerely,

Nan Aron,
President
Alliance for Justice

John DeCock,
Executive Director,
Sierra Club Foundation