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August 21, 2002

Via E-Mail, Fax and Hand Delivery

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

Re: Notice of Proposed Rulemaking: Electioneering Communications

Dear Ms. Dinh:

American Taxpayers Alliance ("ATA") submits through counsel, the following comments on the Notice of Proposed Rulemaking, 67 Fed. Reg. 51131 (August 7, 2002), to implement certain provisions of the Federal Election Campaign Act of 1971 as amended ("FECA"), as further amended by the Bipartisan Campaign Reform Act of 2002, P.L. 107-55 ("BCRA").

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

ATA appreciates the opportunity to comment on these proposed rules, and requests the opportunity to testify, through undersigned counsel, at the hearings to be conducted on August 28 and 29.

In submitting these comments, ATA does not concede that any of the proposed regulations addressed, or the statutory provisions underlying them, are constitutional. Indeed, ATA strongly believes that many provisions of the BCRA

unconstitutionally regulate protected speech, including direct and grassroots lobbying and issue advocacy, and are not justified by any compelling governmental interest. Furthermore, ATA believes that many provisions of the BCRA will effectively dissuade individuals and non-profit organizations from participating in the political debate.

Nevertheless, ATA is mindful of Congress' directive to the Commission to promulgate rules to implement the BCRA. Furthermore, although the court has the power to rule on the constitutionality of BCRA's provisions currently being challenged, the Commission must exercise its discretion, whenever possible, and promulgate only regulations within Constitutional limits.[1] As officials of the executive branch who have independently taken an oath to uphold the Constitution, the Commission must implement the BCRA in a constitutional fashion regardless of what legislation representatives of a co-equal branch of government have passed. Indeed, if the Commission fails to exercise discretion, whenever possible, and blindly adheres to BCRA's express language, it will not be difficult, if not impossible, to fashion constitutional regulations.

Although these comments generally assume, for purposes of this regulatory process only, that the applicable provisions of the BCRA will survive judicial challenge and that the Commission's regulations will govern ATA, ATA urges the Commission to implement the BCRA in a manner that is least offensive to the First Amendment and that least infringes upon the rights of non-profit organizations to engage in constitutionally protected speech. The Commission's foremost obligation is to the Constitution, which demands no less.

I. Role of Non-Profit Organizations

In implementing these regulations in the least offensive manner possible, it may be helpful to the Commission to understand the role of non-profit organizations in the political process and how the electioneering provisions of the BCRA specifically affect them.

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[1] Courts assume that Congress legislates with constitutional limitations in mind and will speak clearly when it seeks to test those limitations. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Thus, unless Congress clearly states that it intends to test the constitutional waters, courts will not presume that Congress intended to authorize an agency to do so. *See Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997); *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

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

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

Many § 501(c)(4) organizations, including ATA, advocate controversial positions, or at a minimum, positions that are not always held by a majority of elected officials. Rather than risk ostracism, harassment and public criticism that would result if they themselves took these positions, many citizens instead choose to contribute to organizations that share their views. These organizations, including ATA, use the pooled resources of their donors to educate, lobby and persuade members of the public and Congress to adopt certain positions. The importance of anonymity to donors is evidenced by ongoing litigation involving ATA. The Gray Davis Committee has sued ATA in California state court to force ATA to disclose the names of its donors because ATA ran television ads criticizing Governor Davis' energy policies more than eight months before the primary election. *The Governor Gray Davis Committee v. American Taxpayers Alliance*, No. A096658 (Cal. Ct. App. filed Feb. 28, 2002). To protect its donors' anonymity, as well as to avoid compelled disclosure of information which it is not required to disclose, ATA is vigorously litigating the case.

The NPRM affects non-profits in several critical ways. Clearly, the BCRA's requirements that § 501(c)(4) organizations disclose its donors of $1,000 or more if they air electioneering communications will have a significant impact on non-profit organizations. Non-profits that choose to exercise their First Amendment rights before an election will see their donor bases shrink, and/or will see donors refusing to give more than $1,000. Non-profits that receive donations from corporations to promote social welfare and better society will have to make a choice between continued receipt of these funds and speaking or lobbying on issues before an election.

The NPRM also significantly affects the speech and activities of non-profits. If non-profits choose to air grass roots lobbying advertisements before an election, non-profits will have to structure their communications so that they are not targeted and, therefore, banned electioneering communications, thus significantly reducing the effectiveness of their ads in influencing the position of named Members of Congress, and their ability to educate and lobby the public.

The reach of the definition of electioneering communication to ads run 30 or 60 days before an election significantly hamstrings ATA and other non-profits in their lobbying and education efforts, especially if Congress is still in session. The timing of ATA's speech and lobbying on these public issues is largely dictated by Congress. Assuming funds are available, ATA's issue advertisements are driven by whether the issue is being debated, about to be debated, or should be debated, by Congress. Therefore, to avoid being on the sidelines during an important debate in Congress before an upcoming election, ATA would be forced to dilute its speech to avoid it falling within the definition of "targeted."

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

II. Specific Comments on Proposed Regulations

These Proposed Regulations are lengthy and detailed, and for that reason, ATA will not attempt to comment on every issue raised in the NPRM. The BCRA, including the electioneering provision of the statute which the Commission is tasked with implementing, is currently being challenged in court, and therefore, ATA generally will not discuss the constitutionality of the BCRA. However, no implication should be drawn from its failure to comment on particular issues raised by the Commission, or its choice not to debate the Act's constitutionality. ATA submits these comments to aid the Commission in upholding its oath to the Constitution to implement regulations that are least offensive to the First Amendment and most protective of the rights of non-profit organizations to engage

in free speech. ATA would welcome the opportunity to comment on, or expand upon, any of these issues at the hearing later this month.

What is an Electioneering Communication?

Definition of "Broadcast, Cable or Satellite Communication"

ATA agrees that the legislative history of the BCRA indicates that this regulation should be limited to television and radio. ATA would urge the Commission to adopt a definition which is a traditional reading of television and radio, i.e., one that excludes simultaneous webcasts over the Internet, web TV and digital audio radio satellite.

Definition of "Targeted to the Relevant Electorate"

ATA again urges the Commission, in implementing a definition of "targeted to the relevant electorate," to adopt a definition that most protects non-profits' First Amendment rights. Therefore, ATA agrees with the Commission's approach in construing the term "person" as applying to natural persons residing in a given jurisdiction. Census information is one way to determine the number of natural persons residing in a given jurisdiction. A more narrow definition of person would include only registered voters or individuals eligible to serve on juries, and could also easily be measured.

Although cognizant of the difficulties of measuring 50,000 persons in a relevant area, ATA believes that the least offensive definition to its free speech rights must ensure that each natural person is counted only once and that persons from irrelevant electorates are not included within the total. To the greatest extent possible, any data obtained to measure 50,000 persons must exclude businesses, schools, organizations, and any other entity that is not a natural person. Any audience data obtained from the FCC must also be able to be segregated by congressional district or state. To ensure that each natural person is counted only once and in the proper district or state, ATA requests that the Commission not adopt an approach that would aggregate communications or which would aggregate recipients of the same communication from multiple outlets.

Presidential Primary Candidates

ATA urges the Commission to adopt the alternative interpretation of BCRA which removes communications that refer to a Presidential or Vice-Presidential candidate from the definition of targeted communication. However, assuming

arguendo the Commission does not adopt this interpretation, ATA concurs with the Commission's proposed definition of "publicly distributed" in Alternative 1-B to ensure that there is not a 240 day nationwide blackout on communications mentioning a Presidential candidate. This definition would have far less impact on fundamental First Amendment rights than the nationwide blackout.

What is Not an Electioneering Communication?

Other Exceptions

The exceptions listed in proposed 11 CFR 100.29(c)(1), (c)(5), (c)(6) and (c)(7) are a good start at ensuring that the Proposed Regulations are least offensive to the constitutional rights of non-profits. As noted above, Congress dictates when nonprofits air most ads. If Congress is in session 30 or 60 days before an election, non-profits are prevented from airing targeted grass roots lobbying ads that merely mention a federal candidate. To prevent such a significant infringement of non-profits' First Amendment rights, a broad exception for direct and grassroots lobbying ads should be included in the final rules.

In fashioning a necessary exemption for lobbying communications, the Commission should be mindful of the IRC definitions under which non-profits operate. Section 4911(d) of the IRC defines grassroots lobbying as any attempt to influence any legislation through an effort to affect the opinions of the general public or any segment thereof. A communication is treated as a grass roots lobbying communication only if the communication refers to specific legislation, reflects a view on such legislation, and encourages the recipient of the communication to take action with respect to such legislation. Reg § 56.4911-2(b)(2)(ii). A communication encourages a recipient to take action with respect to legislation if the communication (Reg § 56.4911-2(b)(2)(iii)): (1) states that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact with the government official or employee is to influence legislation); (2) states the address, telephone number, or similar information of a legislator or an employee of a legislative body; (3) or specifically identifies one or more legislators who will vote on the legislation as: opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee that will consider the legislation.

A communication may encourage the recipient to take action with respect to legislation, but it would not "directly" encourage such action under (3) above, if the communication does no more than identify one or more legislators who will vote on legislation and how they will vote. Reg § 56.4911-2(b)(2)(iv). A communication that encourages the recipient to take action with respect to legislation but that does not "directly" encourage the recipient to take such action may be within the exception for nonpartisan analysis, study or research. Reg § 56.4911-2(b)(3). With one exception, the grass roots definition of lobbying is also applicable to mass media communications. Reg § 56.4911-2(b)(5).[2]

Any communication that meets the IRC definition of grass roots lobbying should automatically be exempted from the definition of electioneering communication. However, because grass roots lobbying is any attempt to influence any legislation through an effort to affect the opinions of the general public or any segment thereof, the IRC's definition of lobbying should not be the only criterion in formulating an exception.

An exception that requires non-profits to meet all the requirements of the IRC's definition of grass roots lobbying would still exclude a substantial amount of speech that is intended to influence legislative outcomes rather than electoral outcomes. ATA, as well as other non-profits, frequently do grass roots lobbying ads to influence public opinion on general issues, rather than specific pending legislation. There are several reasons for this. First, there may be several competing pieces of legislation, none of which completely reflect the non-profit's position. Second, there may be proposals being bandied about, but none formally introduced. Third, a non-profit may want to air an ad that generally discusses a Member's proposal, not yet formally introduced, regarding a particular issue. Fourth, a non-profit may not yet be ready to take a position on particular legislation

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[2] A communication is presumed to be grass roots lobbying if the communication is in the mass media within two weeks before a vote by a legislative body, or by a legislative committee, on a highly publicized piece of legislation, if the communication reflects a view on the general subject of the legislation or encourages the public to communicate with legislators on the general subject of the legislation. Reg § 56.4911-2(b)(5)(ii). The organization can rebut the presumption by demonstrating that the communication is a type of communication regularly made by the organization in the mass media without regard to the timing of legislation or that the timing of the communication was unrelated to the upcoming legislative action. Reg § 56.4911-2(b)(5).

but may want to lobby generally on the issue. The exception should not be so narrowly drawn that it would force non-profits to take a stand on one particular piece of legislation, and prohibit them from lobbying the public generally on an issue. For example, a non-profit should be able to air ads on the prescription drug issue without being forced to take a position on a specific piece of legislation merely to fall within a narrowly drafted exception. Because of the way in which the political process works, with multiple pieces of legislation introduced and numerous amendments offered, many non-profits have found that sometimes it is easier and more effective to educate and lobby generally on the issue and let the viewer, armed with this knowledge, decide how best to lobby, rather than try to address specific bills. Therefore, any exception the Commission adopts should not rigidly require that ads mention a specific piece of legislation and contain a telephone number.

Whatever exceptions the Commission creates, the Commission must avoid drafting ambiguous exceptions that place the power in the hands of bureaucrats to determine whether a communication is issue advocacy or a so-called "sham issue ad." Furthermore, any exception must permit non-profits to determine at the outset whether their proposed communications fall outside the definition of electioneering communication.

Who May Not Make or Fund Electioneering Communications? Effect of the Snowe-Jeffords and Wellstone Amendments on 501(c)(4) and 527 Organizations

Although not set out in the proposed rules, the Commission seeks comment on an alternative interpretation of BCRA which would remove communications that refer to a candidate for the office of President or Vice-President from the definition of "targeted communication." This interpretation is supported by § 441b(c)(6)(B), and, because such an interpretation would construe and implement BCRA in a way least likely to raise constitutional concerns, and in fact, would remove some constitutional issues, the Commission should adopt it.

Are Amounts Given to Persons Making Electioneering Communication Contributions?

ATA agrees with the Commission's approach in the Proposed Regulations in not treating donations to persons that are not political committees as contributions. Non-profits, particularly § 501(c)(4) organizations, donations to which are not tax deductible, already face multiple difficulties in raising money and should not be required to assume PAC-like limitations as well. As the Wellstone Amendment

effectively nullifies any exception to the ban on non-profit targeted electioneering communications 30 or 60 days before an election, there is no compelling need to impose contribution limits on non-profits.

When Must Electioneering Communications Be Reported?

Does the $10,000 Reporting Threshold Include the Direct Costs of Both Producing and Airing Electioneering Communications, or Does It Include Only One or the Other?

BCRA defines "disclosure date" as the date on which the direct costs of producing *or* airing exceed $10,000. 2 U.S.C. 434(f)(1). Thus, the final rules should not aggregate the direct costs of producing and airing, but rather, require reporting only when the direct costs of producing or airing exceed $10,000. This interpretation is supported by the definition of "or." Black's Law Dictionary defines "or," in part, as a "disjunctive particle used to express an alternative or to give a choice of one among two or more things." Black's Law Dictionary 756 (abridged 6th ed. 1991). This meaning of "or" as a connector of alternative choices has been interpreted by courts disjunctively. *See Kustom Signals, Inc. v. Applied Concepts, Inc.*, 995 F. Supp. 1229, 1236 (D. Kansas 1998); *Hull v. State Farm Mutual Automobile Insurance Co.*, 586 N.W.2d 863, 867 (Wis. 1998); *State v. Bolar*, 917 P.2d 125 (Wash. 1996); *Beauregard-Bezou v. Pierce*, 487 N.W.2d 792, 795 (Mich. Ct. App. 1992). Presumably, Congress knew this and if it had intended to use "and," it would have done so.

Must Reports Be Filed When the Disbursements Exceed the Threshold, or When the Electioneering Communication is Aired?

BCRA's sponsors have explained that the electioneering communications provisions are designed to ensure that campaign advertisements do not circumvent FECA's prohibition on the use of union and corporate treasury funds in connection with Federal elections, which prohibition is to prevent corruption and its appearance.

The Commission notes several practical difficulties, as well as potential constitutional issues with compelling disclosure of potential electioneering communications before they are finalized and aired. These difficulties and issues are real, but do not even need to be addressed because there is no justification for requiring reports to be filed at any time other than when the communication is aired. Until the communication airs, there can be no corruption or the appearance

of corruption, and therefore, no compelling governmental interest. Until a corporation or union airs the communication, they cannot "corrupt" the political system. Therefore, reports should not be required to be filed until after the advertisement has aired. Such an approach would be carefully circumscribed to reach no more speech than necessary.

What Information Must Be Reported About Electioneering Communications?

The Commission has proposed to require the identification of any person sharing or exercising direction or control over the activities of the person making the disbursement. ATA believes that this provision is unnecessary, intrusive and burdensome. Proposed § 114.14 already restricts corporations or labor organizations from providing funds to another to pay for an electioneering communication, and the proposed regulations also require disclosure of all donors of over $1,000.

Although this information is not required of political committees or other organizations making independent or coordinated expenditures, the Commission has proposed to delve into the decisionmaking processes of non-profits and require them to disclose confidential strategic information by requiring under proposed § 114.14, that the name of any officer, director, employee, volunteer, or donor that shares or exercises direction or control over the activities of the non-profit making the disbursement be disclosed. Competitors and opponents will be able to see who makes the non-profit's decisions. Not only is this requirement incredibly burdensome by requiring non-profits to keep track of every individual who participates in decisionmaking, it is intrusive and serves no compelling purpose. It will further harm non-profits by eroding individual involvement in non-profit activities. Individuals who do not want their names disclosed if they donate more than $1,000, will be even further dissuaded from becoming involved with a non-profit if they know that their volunteering will be disclosed. Therefore, ATA urges the Commission to except non-profit corporations from this requirement.

III. Conclusion

Although the Commission is constrained to implement the BCRA, there exist opportunities for the Commission to exercise its discretion and remove some of the constitutional deficiencies of the Act. While portions of the BCRA will chill free speech and association, the Act should be implemented in a way that is least

offensive to the First Amendment rights of corporations, and in particular, non-profit organizations.

Respectfully submitted,

Heidi K. Abegg

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Taxpayers Alliance