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Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments to Notice of Proposed Rulemaking (Electioneering Communications)

Dear Ms. Dinh:

The Chamber of Commerce of the United States ("Chamber") respectfully submits these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on August 7, 2002.[1]

The Chamber is the world's largest not-for-profit business federation, representing over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and industries, 96 percent of which are small businesses with 100 or fewer employees. The Chamber furnishes a myriad of services for its members including: research, issue briefings, policy forums, small business resources, government and grass roots lobbying, litigation, and electoral activity.[2]

In particular, the Chamber sponsors television advertisements to inform its members, as well as the public at-large, about political and policy issues of interest to the business community and the position that various officeholders and candidates for public office have taken on those issues.[3] Oftentimes, the Chamber

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1 67 Fed. Reg. 51,131 (Aug. 7, 2002) (to be codified at 11 C.F.R. pts. 100, 104, 105, & 114).

2 The Chamber's Internet site (www.uschamber.com) provides a comprehensive view of these services as well as other relevant information.

3 *E.g.*, *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002).

will air these advertisements in close proximity to an election to reach people at a time when they are attuned to political discussion and debate.[4]

This NPRM has been instituted to implement the "electioneering communication" provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[5] The BCRA prohibits corporations from sponsoring advertisements via broadcast, cable, or satellite that refer to a clearly identified candidate for federal office and are targeted to the relevant electorate within 60 days of a general, special, or runoff election or within 30 days of a primary election or a convention.[6]

The Chamber is currently challenging the constitutionality of the "electioneering communication" provision of the BCRA in federal court.[7] The Chamber maintains in these comments that the "electioneering communication" provision is facially unconstitutional. The Chamber submits these comments to assure that the NPRM's proposed regulations do not further violate the constitutional rights of the Chamber or its members.

I. Promulgation of Constitutional Regulations

The Supreme Court of the United States has allowed administrative agencies to address constitutional considerations when engaging in agency proceedings. As stated in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, "even if [the] law is such that the [agency] may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine ... to say that the [agency] could not construe its own statutory mandate in the light of federal constitutional principles."[8]

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4 *See Mills v. Alabama*, 384 U.S. 214, 219 (1966).

5 Pub. L. No. 107-155, 116 Stat. 83 (2002) ("BCRA") Title II, Subtitle A.

6 BCRA §§ 201 (to be codified at 2 U.S.C. § 434(f)(3)) & 203 (to be codified at 2 U.SC. § 441b(c)).

7 *Chamber of Commerce v. FEC*, No. 02-0751 (D.D.C. filed Apr. 22, 2002) (consolidated with *McConnell v. FEC*, No. 02-0582).

8 477 U.S. 619, 629 (1986). *See also Fieger v. Thomas*, 74 F.3d 740, 749 (6th Cir. 1996) (citing *Dayton Christian Schools* to state: "Even if the Board could not declare a Rule of Professional Conduct unconstitutional--a proposition about which we are not convinced--.... The

An agency taking constitutional considerations into account can be important. When the constitutionality of the underlying statute is challenged, a reviewing court may defer to a proper narrowing construction provided in an agency's implementing regulations.[9] "In evaluating a facial challenge to a ... law, a federal court must ... consider any limiting construction that a[n] ... enforcement agency has proffered."[10] The court reviewing the constitutionality of the BCRA has explicitly stated that FEC regulations applying a "narrowing 'construction'" will be "relevant because only by understanding to what extent the statute, implemented through the regulations, interferes with protected speech can the Court make a determination of whether BCRA 'suppress[es] substantially more speech than ... necessary.'"[11]

In addition, a court reviewing the constitutionality of the FEC's regulations will defer to the judgment of the agency only if the regulations do not raise "grave and doubtful constitutional questions."[12]

However, it is doubtful that an administrative agency has the authority to alter otherwise clear statutory language through regulation, even if constitutional considerations are at stake.[13] Thus, the FEC's request for comments regarding the constitutionality of various proposed rules that vary seemingly clear language contained in the BCRA is problematic.[14] To the extent that the Commission elects to advance such regulations, it should, at minimum clearly explain why the plain meaning is unconstitutional.

Board could, short of declaring a Rule unconstitutional, refuse to enforce it or, perhaps, narrowly construe it.").

9 *See Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989).

10 *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982).

11 *McConnell v. FEC*, No. 02-582 (D.D.C. Aug. 15, 2002) (order denying in part and granting in part plaintiffs' motions to compel interrogatory responses) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (omission in original)).

12 *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *United States ex re. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

13 *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984) ("If the intent of Congress is clear, that is the end of the matter").

14 *See e.g.*, 67 Fed. Reg. 51131, 51134, 51136, 51137, 51138, 51141 (Aug. 7, 2002).

Alternatively, if the Commission concludes that the BCRA does not permit the Commission to formulate constitutional regulations, the Commission could let the statute speak for itself. Although, as discussed above, the Commission may not be empowered to reach out and declare the BCRA unconstitutional, the Commission surely has no duty to affirmatively craft and promulgate regulations that violate either the BCRA or the Constitution.[15]

II. The Treatment of "Electioneering Communications" in Federal Court

The FEC need not begin with a blank slate when assessing the constitutional parameters of regulations implementing the BCRA's "electioneering communication" provision. The Supreme Court has previously addressed the constitutional issues implicated by the "electioneering communication" provision. In addition, lower federal courts have already expressed their disapproval of state laws that regulate political speech in almost the same manner as the "electioneering communication" provision.

A. The Supreme Court

The Supreme Court has twice found that the regulation of issue-oriented political speech, including that which contains discussion of particular candidates, is constitutionally untenable, especially when it is restricted by proximity to an election.

First, in *Mills v. Alabama*, the Court established the bedrock First Amendment principle that:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of government affairs. This of course includes *discussions of candidates*, structures and forms of government, the manner in

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[15] *See, e.g., Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. U.S. Const. Art. VI, cl. 3.").

> which government is operated or should be operated, and all such matters relating to political processes.[16]

The Court went on to hold that an election day prohibition on electoral advocacy was unconstitutional.[17] The Court reasoned that the prohibition was an "obvious and flagrant abridgement" of First Amendment rights because it silenced speech "at a time when it can be most effective."[18]

The Court also explained that regulation of the content of political speech that is based upon proximity to an election did not serve the government's proffered interest in regulating the speech.[19] Whatever the arguably noxious effect of the content of the speech, the effect cannot be mitigated by allowing it on one day and prohibiting it on the next. The Court determined that such regulation did not even pass constitutional muster at the threshold "reasonableness" level.[20]

Second, the Court in *Buckley v. Valeo* explicitly recognized that the First Amendment requires that the discussion of social and political issues, even that which includes discussion of political candidates, be shielded from regulation.[21] The Court observed: "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."[22] In order to avoid regulating constitutionally protected issue discussion, including that which is

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16 384 U.S. 214, 218-19 (1966) (emphasis added).

17 *Id.* at 218-20.

18 *Id.* at 219.

19 *Id.* at 220.

20 *Id.*

21 424 U.S. 1 (1976).

22 *Id.* at 42 (the Court also quoted the lower court's finding that: "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussion of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.").

intertwined with candidate discussion, the Court crafted the "express advocacy" standard to govern the regulation of political speech.

The "express advocacy" standard limits regulation of political speech only to that which includes explicit words of advocacy of the election or defeat of a clearly identified candidate.[23] In developing this bright-line standard, the Court sought to protect all discussion of public issues by circumscribing the regulation of political speech to "err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."[24]

Importantly, the "express advocacy" standard was *not* adopted simply to cure vagueness, as some have recently claimed. Instead, it also was employed to prevent overbreadth.[25]

The *Buckley* Court went on to find that a year-long $1,000 limitation on independent expenditures for political speech, even if limited to that which contained "express advocacy," was unconstitutional. It relied on *Mills*, and its holding that the regulation in that case could not even pass a "test of reasonableness," to state that the one-day restriction invalidated in *Mills* "is clearly a lesser intrusion on constitutional freedom than a $1,000 limitation on the amount of money any person or association can spend during an entire election year in advocating the election or defeat of a candidate for public office."[26] Therefore, the $1,000 limitation on independent expenditures was struck down.

These Supreme Court cases provide the relevant backdrop against which regulation of "electioneering communications" must be examined. First and foremost, the cases stand for the proposition that discussion of political issues may not be restricted, even if such discussion is intimately entwined with discussion of political candidates. Second, regulation of political speech by proximity to election day is

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23 *Id.* at 43; *see also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

24 *Me. Right to Life Comm., Inc. v. FEC*, 914 F.Supp. 8 (D. Me. 1996) *aff'd*, 98 F.3d 1 (1st Cir. 1996) (construing *Buckley*); *see also FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1055 (4th Cir. 1997).

25 *Id.* at 79-80.

26 *Buckley*, 424 U.S. at 50.

not "reasonable" because it results in under-inclusive regulation of speech that the government claims to have an interest in regulating. In addition, regulation by proximity to election day exacerbates First Amendment concerns by limiting the flow of valuable information at a time when it is crucially important.

B. Lower Federal Courts

Two federal district courts have held that a Michigan administrative regulation similar to the BCRA's "electioneering communication" provision is unconstitutional.[27] The regulation at issue in those cases prohibited corporations and labor unions from using general treasury funds to pay for communications that contained the name or likeness of a candidate and were made within forty-five days prior to an election.

Both courts ruled that the regulation violated the First Amendment because it was overbroad in its application to issue discussion in contravention of *Buckley*. One of the courts noted that the regulation "reaches non advocacy speech which is merely informational in nature."[28] The other court explained that even though there may be some debate regarding the exact contours of the "express advocacy" standard, the Michigan regulation "clearly impacts protected issue advocacy" because it "prohibits a corporation from naming a candidate within 45 days of an election without regard to the content in which the name is found."[29] Thus, both courts determined that regulation of political speech by proximity to election day does not adequately take into account the constitutional protection that must be afforded issue discussion.

The United States Court of Appeals for the Second Circuit struck down a Vermont statute that was similarly overbroad because the law required reporting of any expenditure in excess of $500 for mass media activities within thirty days of an election that contained the name or likeness of a candidate.[30] The court based its

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27 *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F.Supp.2d 740 (E.D. Mich. 1998); *Right to Life of Mich., Inc. v. Miller*, 23 F.Supp.2d 766 (W.D. Mich. 1998).

28 *Planned Parenthood Affiliates of Mich., Inc.*, 21 F.Supp.2d at 746.

29 *Right to Life of Mich., Inc.*, 23 F.Supp.2d at 768-69.

30 *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000).

decision on the fact that the statute "requires reporting of expenditures on radio or television advertisements devoted to pure issue advocacy in violation of the clear command of *Buckley*."[31]

A similar statute in West Virginia was struck down because it required reporting by any person who, within sixty days of an election, disseminated any scorecard, voter guide or other written analysis of a candidate's position or votes on specific issues.[32] Again, the reasoning was that the statute "imposes the same requirements on an organization engaging in issue advocacy as it does on an organization engaging in express advocacy."[33]

III. The NPRM

A. What is Not an Electioneering Communication?

The NPRM seeks comment on possible exceptions to the definition of "electioneering communication." In particular, the NPRM requests comment on whether constitutional overbreadth concerns necessitate that the definition exempt ads that: "(1) Do not include express advocacy; and (2) include both a telephone number and a reference to a specific piece of legislation either by formal name (for example, the 'Bipartisan Campaign Reform Act of 2002'), popular name (for example 'Shays-Meehan'), or bill number (for example, 'H.R. 2356')."[34]

For the reasons discussed above, the attempt to regulate non-express advocacy, including such advocacy that includes a telephone number and bill name, is overbroad and unconstitutional. The Commission should so find. However, the clear language of the statute suggests that Congress intended to regulate all political speech, including issue advocacy, that simply "refers" to a federal candidate. Although the BCRA gives the Commission power to craft exceptions to the definition of "electioneering communication" such power is circumscribed to the point of nonexistence because any exception must "be consistent with the

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31 *Id.* at 389 (footnote omitted).

32 *W. Virginians for Life, Inc. v. Smith*, 960 F.Supp. 1036 (S.D. W. Va. 1996).

33 *Id.* at 1039.

34 67 Fed. Reg. at 51136.

requirements of [the definition of electioneering communication]" and may not exempt a communication that "promotes or supports" or "attacks or opposes" a candidate.[35] The NPRM also notes that statements by the BCRA's congressional sponsors confirm that their intent was to not allow exceptions as broad as the one described in the preceding paragraph.[36] Therefore, it is doubtful that the FEC has the authority to alter Congress's mandate to regulate all communications that "refer" to a federal candidate.

B. Alternative Definition to "Electioneering Communication"

The NPRM seeks comment on whether it should promulgate regulations implementing the BCRA's alternative definition of "electioneering communication" if the primary definition is held to be constitutionally insufficient "by final judicial decision."[37] The alternative definition is:

> [A]ny broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.[38]

The Chamber agrees with the suggestion in the NPRM that the FEC should not promulgate rules under this alternative definition at the present time.[39] A court decision reviewing the constitutionality of the primary definition of "electioneering communication" may provide relevant guidance as to the parameters of regulation in this area of highly protected political speech.

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35 BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(3)(B)(iv)).

36 67 Fed. Reg. at 51132 (citing 148 Cong. Rec. S2117-18 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords) and S2135-37 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) ("Senators Snowe and Jeffords stated that, because the electioneering communications provisions focus on the key elements of when, how, and to whom a communication is made, rather than relying on the express advocacy test....").

37 *Id.* at 51132.

38 BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(3)(A)(ii)).

39 67 Fed. Reg. at 51132.

To the extent that the alternative definition is considered, it clearly is both overbroad and vague and, hence, unconstitutional. The only possible cure would be to construe it to mean express advocacy. The alternative definition allows regulation of issue discussion based upon a third party's subjective understanding of the "meaning" of the communication. As noted in *Buckley*, regulation of political speech as determined by the interpretations of others will chill speech because it "puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning."[40] Such regulation "offers no security for free discussion."[41]

However, as discussed in the context of the primary definition of "electioneering communication," the Chamber questions whether the FEC has the authority to promulgate regulations that alter the unconstitutional effect of the BCRA.

C. Definition of "Broadcast, Cable or Satellite Communication"/What is Not an Electioneering Communication?

The NPRM seeks comment on the definition of "broadcast, cable or satellite communication" as that term is used in the definition of "electioneering communication." Specifically, the NPRM requests comment on whether "broadcast, cable or satellite communications" are the exclusive means by which an "electioneering communication" may be delivered to the public, and whether communications by print media, billboards, telephones, and the Internet should be explicitly exempted.[42]

The plain language of the BCRA limits the definition of "electioneering communication" to "any broadcast, cable, or satellite communication." As discussed in the NPRM, the legislative history of the BCRA also "makes it clear that this regulation should be limited to television and radio."[43] Therefore, the

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40 *Thomas v. Collins*, 323 U.S. 516, 535 (1945), *quoted in Buckley*, 424 U.S. at 43.

41 *Id.*

42 67 Fed. Reg. at 51133, 51135.

43 *Id.*

regulations should clearly exempt all other modes of communication that are not distributed by a television station, a radio station, a cable television system, or a satellite television system. This exemption should include, but not be limited to: print media, including newspapers or magazines, handbills, brochures, yard signs, posters, billboards, mailings, and other written materials; communications over the Internet, including electronic mail; and telephone communications. We recognize that some electronic mail and telephone communications may travel part of their path over the broadcast airwaves, by cable, or by satellite. But this is not typically knowable to the user, has no possible relevance to any objective of the BCRA, and does not justify regulating such communications.

Furthermore, this exception should apply to all uses of these non-broadcast, non-cable, and non-satellite communications. The NPRM suggests that this exception include "webcasts" or other Internet communications that are distributed *only* over the Internet, and not include radio or television commercials that are archived for listening or viewing over the Internet.[44]

Yet, to regulate "archived" Internet communications in this regard would violate the intent of Congress in two ways. First, the legislative history cited in the NPRM unequivocally exempts *all* Internet activity from regulation under the "electioneering communication" provision.[45] Second, the NPRM states that the focus of this regulation is on the means of "dissemination."[46] Even if advertisements are first disseminated via radio and television, once they are subsequently archived on the Internet, the only manner in which they will be disseminated will be over the Internet itself. Therefore, all communications delivered over the Internet should be exempt from regulation as "electioneering communications."

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[44] *Id.* at 51133.

[45] *Id.* at 51135 (citing 144 Cong. Rec. S973 and S974 (daily ed. Feb. 25, 1998) (statement of Sen. Snowe) ("Senator Snowe was asked whether the definition of electioneering communication would 'apply to the Internet.' She replied, 'No. Television and radio.'")).

[46] *Id.* at 51133.

D. Presidential Primaries

1. Nationwide Blackout for Presidential Primaries

The Commission is correct to state that the BCRA does not require a communication to be "targeted to the relevant area" in order to be an "electioneering communication" when mentioning a Presidential or Vice Presidential candidate.[47] Therefore, a communication during the relevant time periods mentioning members of a Presidential ticket would not need to be targeted in order to be regulated as an "electioneering communication." The Chamber shares the Commission's concern that "such a sweeping impact on communications would be insufficiently linked to pending primary elections, may not have been contemplated by Congress and could raise constitutional concerns."[48] The result is a nationwide blackout on "any broadcast, cable, or satellite communication" referring to a clearly identified candidate made within the relevant timeframe.[49] Unfortunately, this interpretation is the only interpretation that can be gleaned from the plain language of the statute. As a result, "the restrictions on electioneering communications would take effect even if an ad were aired only in a State that has already held its primary, and thus would restrict ads more than 60 days before a general election."[50]

The Chamber believes that the proposals put forward in Alternative 1-B in proposed 11 C.F.R. § 100.29,[51] would be narrower in application and would mitigate constitutional concerns. Nevertheless, the Chamber cautions the Commission about its authority to choose alternatives to the clear language of a statute that is unambiguous on its face.

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47 *Id.* at 51134.

48 *Id.*

49 BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(3)(A)).

50 67 Fed. Reg. at 51134.

51 *Id.* at 51144-51145.

2. Application to Presidential Primaries and Conventions

As for the Commission's suggestion that the presidential primaries may not be elections in which candidates for President and Vice President are nominated,[52] it appears that such a distinction is irrelevant. The BCRA's "electioneering communication" definition applies, in pertinent part, to communications made thirty days before "a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate for the office sought by the candidate."[53] The Federal Election Campaign Act ("FECA") defines "election" as, among other things,

> (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
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> (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.[54]

As a result, the fact that Presidential primaries do not actually nominate candidates for office is already taken into account by the inclusion of "preference elections" in both the BCRA and the FECA. The BCRA's thirty day ban, although constitutionally suspect in breadth in many ways, is applicable to Presidential primaries. Similarly, the thirty day ban applies to the national party convention where candidates for President and Vice President are, in fact, nominated.

E. Definition of "Targeted to the Relevant Electorate"

1. Data to be Maintained by the FEC and FCC

The most important aspect of promulgating regulatory definitions in the implementation of the BCRA is the creation of certainty. As explained throughout these comments, the Chamber contends that the statute itself, and many of the

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52 *Id.* at 51135.

53 BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)(II)(bb)).

54 2 U.S.C. § 431(1)(D).

regulations considered in this NPRM, violate the constitution. Accordingly, it is extremely important to set the boundaries beyond which all participants know and understand that the heavy burden of investigations and penalties will not fall. One of the more important places for clarity in this regard is the definition of "targeted to the relevant electorate" because such targeting is determinative of what is an "electioneering communication."

Whatever the Commission's decisions regarding the substance of regulations explaining "targeted to the relevant electorate," the Commission must make the cumulative effect of these decisions known on the Internet. Speakers must be able to easily determine whether their broadcast, cable, or satellite communication will reach 50,000 or more persons "in the district the candidate seeks to represent" or "in the state in which the candidate seeks to represent."[55] And for speakers to find such a database reliable and useful, the database must be determinative evidence of communications that reach more or less than 50,000 persons.

Anything less than what is described above will chill the speech of any entity that might wish to make a broadcast, cable, or satellite communication arguably reaching 50,000 or more persons in the relevant area. Anything less than a bright-line rule that the FCC-provided data is determinative evidence as to the audience size will chill speech. Congress, in the BCRA, implicitly stated that not all speech by corporations that refers to "clearly identified candidates for Federal office"[56] was problematic. The BCRA only targets such speech by corporations when the speech, by means of broadcast, cable, or satellite communication, reaches 50,000 or more persons. The Commission, in implementing its regulations, cannot, directly or indirectly, take this little sliver of speech away from affected speakers.

2. Aggregation of Multiple Ads or Multiple Outlets

The Commission seeks comment on whether ads "publicly distributed via several small outlets, each of which reaches fewer than 50,000 persons in the relevant area, but in the aggregate reach 50,000 or more persons in the relevant area" should be aggregated and whether substantially similar ads should be likewise aggregated.[57]

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55 BCRA § 201 (to be codified at 2 U.S.C. §§ 434(f)(3)(C)(i) & (ii)).

56 *Id.* (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)(I)).

57 67 Fed. Reg. at 51133.

The proposal by the Commission is problematic in that it seems to assume that all ads on a given outlet (whether broadcast, cable, or satellite) are aggregated for purposes of the electioneering communication ban. This cannot be the case because Congress, even with the blunt instrument of the BCRA, still allows corporations to make a communication that "refers to a clearly identified candidate for Federal office,"[58] as long as the communication cannot be received by 50,000 or more persons in the relevant area.[59] For the few broadcast, cable, and satellite communication providers that reach fewer than 50,000 persons in a relevant congressional district or state, aggregating the audience of one communication with other such communications, whether the same or similar ads, would eliminate the type of speech Congress left unregulated.

In short, the prohibition in the BCRA only refers to "any applicable electioneering communication" and not to aggregations.[60] "Electioneering communication" is singular as are the exceptions to an "electioneering communication"—"a communication appearing in a news story, commentary, or editorial," and "a candidate debate of forum" are referred to in the singular.[61]

An ad appearing, for example, on afternoon radio might not reach 50,000 persons in the relevant area but might do so on the same station in the morning drive time. Accordingly, the FCC and the FEC must treat each airing separately.

3. Definition of "Person"

As for the definition of "person," the Chamber respectfully points out to the Commission that in the BCRA the word "person" is used in the context of "targeted to the relevant electorate."[62] The word "electorate" remains undefined, but common

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58 BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)(I)).

59 *Id.* (to be codified at § 434(f)(C)).

60 BCRA § 203 (to be codified at 2 U.S.C. § 441b(b)(2)).

61 BCRA § 201 (to be codified at 2 U.S.C. §§ 434(f)(3)(B)(i) & (iii)).

62 *Id.* (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)(III)).

usage suggests that it means the persons who, even if they are not registered, are eligible to vote for federal candidates.[63]

Thus, the Chamber sees little utility in defining "person" for the purposes of "electioneering communications" to be "natural persons residing in a given jurisdiction regardless of their citizenship status or whether they are of voting age," as suggested in the NPRM,[64] much less as currently defined in the regulations which include corporations, associations, and political committees.[65] The "relevant electorate" for federal candidates does not include non-natural persons, non-citizens, or those not of voting age.

Of course the Chamber understands that it may be difficult for the FEC and the FCC to gather data in relation to the audiences of broadcast, cable, and satellite communication providers regardless of the definition of "person" used in the regulations. Nevertheless, the Chamber urges the FEC to adjust any such audience data so that only "persons" as described above are counted for purposes of determining what is an "electioneering communication."

4. Applying the 50,000 Person Threshold

Once the Commission has taken into account the above comments and has settled on the definition of person and whether to treat each advertisement separately, its only choice in regard to the 50,000 person threshold is to follow the plain language of the BCRA. If a qualified communication can be received by 50,000 or more persons in a relevant congressional district or state, then such a communication is an "electioneering communication."[66] If such a communication can be received by fewer than 50,000 persons, then the communication is not an "electioneering communication." If the audience of the communication cannot be readily determined, then the Commission has failed to provide the regulated community with sufficient information to exercise its remaining unencumbered speech rights, and the Commission should assume that the communication does not reach 50,000.

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63 *See Merriam-Webster's Collegiate Dictionary* 370 (10th ed. 2000) (defining "electorate" as "a body of people entitled to vote").

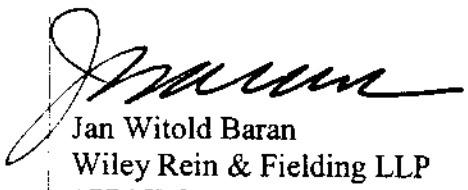
64 67 Fed. Reg. at 51133.

65 11 C.F.R. § 100.10.

66 BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(3)(C)).

or more persons. The Commission cannot take into account any other recipients or possible recipients of a communication because the BCRA is not concerned with any persons outside the relevant congressional district or state.

Respectfully submitted,



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