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

Re: Comments of National Rifle Association, Inc. and National Rifle Association-Political Victory Fund on "electioneering communications"

Dear Ms. Dinh:

Please accept the following comments of the National Rifle Association, Inc. and National Rifle Association-Political Victory Fund on the proposed regulations concerning "electioneering communications" which were published in the Federal Register on August 7, 2002.[1]

At the outset, we would point out that the Commission is proposing regulations of speech "at the core of our electoral process and of the First Amendment freedoms." Federal Election Commission v. Massachusetts Citizens for Life, 107 S.Ct. 616, 624 (1986)(citations and quotation marks omitted). Thus, such regulations must be narrowly tailored and justified by a compelling

[1] The comments herein are not intended to, and do not, suggest that NRA or NRA-PVF acknowledge that the restrictions on speech enacted by the BCRA are consistent with the First Amendment. Quite the contrary, NRA and NRA-PVF continue to maintain, consistent with their Complaint filed in the United States District Court for the District of Columbia, that the BCRA incurably violates citizens' First Amendment rights to engage in political speech without fear of heavy regulatory burdens and the criminal and civil penalties imposed by the BCRA. At the same time, however, NRA and NRA-PVF acknowledge that the Commission may not determine a statute to be in violation of the First Amendment, and may interpret a statute to avoid a constitutional infirmity only if the statute is subject to differing interpretations. Accordingly, NRA and NRA-PVF submit these comments concerning areas of the BCRA where the Commission may attempt to give a narrowing construction.

state interest.

1) Proposed § 100.29(a)(1)(iv): The Commission has attempted to specify that a communication with respect to a candidate for President will not be deemed an "electioneering communication" unless it can be received by 50,000 people in the State in which a primary election is being held within 30 days before the election. But, according to the BCRA, as the Commission itself notes, "Communications that refer to candidates for President and Vice-President do not need to be targeted to be electioneering communications." It, therefore, appears that the Commission's effort to salvage the constitutionality of this provision is likely foreclosed by the statute itself.

2) Proposed § 100.29(b)(1): The Commission proposes to define "refers to a clearly identified candidate," tracking its definition in § 100.17, to mean:

> the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

This definition is not only vague, but too broad to satisfy the First Amendment.

Evidently, the inclusion of a candidate's nickname, no matter how common, or inclusion of the candidate in a photograph in a particular communication, no matter how incidental or subtle the candidate's appearance in that photograph may be, could give rise to a violation.

In addition, reference to a federal candidate solely for purposes of supporting a candidate for state office -- *e.g.*, saying that a candidate for state senate has worked closely with a Senator from that State -- could violate the proposed regulation, demonstrating its overbreadth.

Likewise, a communication that runs nationwide and simply tells voters to consider carefully the voting record of "your Congressman," perhaps in an effort to get out the vote or to encourage voters to inform themselves, could give rise to a violation. Innumerable communications that are not intended to, and realistically could not, impact voting for one candidate versus

another would thus be subject to proscription. Political speakers would have no ready means of determining whether their potential communications would be deemed to have "referred" to a candidate, and the regulation would thereby chill speech protected by the First Amendment.

3) Proposed § 100.29(b)(3): The Commission correctly observes:

> It is not clear from the legislative history of BCRA whether the term "person" in new 2 U.S.C. 434(f)(3)(C) is intended to be restricted to only individuals, households, U.S. citizens, voters, those within the voting age population, or any other category of "person."

Because "electioneering communications" are directed only at registered voters since they are the only persons who can be responsive to such communications, to ensure that the regulation is narrowly tailored and justified by a compelling state interest, the term "person" in new 2 U.S.C. § 434(f)(3)(C) should be restricted to registered voters.

4) Proposed § 100.29(b)(4): The Commission asks whether, if "it cannot be determined whether a particular communication will reach 50,000 or more persons in a relevant district or state, should it be presumed that the communication reaches fewer or more than 50,000 persons?" Because the proposed regulations govern an area protected by the First Amendment, they should be as narrowly tailored as possible. Thus, the proposed regulations *should* include a provision which establishes a presumption that, if it cannot be determined whether a communication will reach 50,000 or more persons in a relevant district or state, the communication reaches fewer than 50,000 persons. The opposite presumption would stand the solicitude shown for the First Amendment and the rights of the criminally accused on its head, stifling political speech in the face of uncertainty and imperiling vital constitutional rights.

The Commission also seeks comments on whether the regulations should address the situation where one advertisement is "publically 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."

Again, because the proposed regulations govern an area protected by the First Amendment, they should be as narrowly tailored as possible. Thus, because the BCRA uses the singular term "a communication," the proposed regulations should *not* require aggregation of recipients of the same ad from multiple outlets.

Further, the proposed regulations should not aggregate substantially similar ads. Indeed, it is even more critical that the proposed regulations not aggregate substantially similar ads because the term "substantially similar" would introduce an element of vagueness which would make the regulations impossible to comprehend and apply.

The term "similar" means "nearly but not exactly the same or alike . . . ." Webster's New World College Dictionary.

The standard for vagueness was established in Grayned v. City of Rockford, 408 U.S. 104 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. (footnotes omitted).

408 U.S. at 108-109.

Subsequently, the Court wrote:

> These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498-99 (1982).

In the case of the proposed "substantially similar" language, there are no explicit standards allowing a man of ordinary intelligence to know what is prohibited; for it is not clear what, or how many, elements of an ad must be present in another ad for the two to be similar, let alone substantially similar. Moreover, the proposed regulation is not an economic regulation subject to a less strict vagueness test nor does it involve civil rather than criminal penalties.[2]

The Commission seeks comments on whether the information on the FCC website should serve as definitive evidence of whether a communication could have been received by 50,000 or more persons and, if so, whether it should be explicitly referenced in the FEC's regulations.

Because the proposed regulations govern in an area protected by the First Amendment, there should be a "safe harbor" in the regulations. Thus, while a person should be able to rely on the FCC website to prove that a communication could *not* have been received by fewer than 50,000 persons, where the FCC website reveals that a communication could have been received by 50,000 or more persons, a person should not be prevented from demonstrating that the FCC website was in error as to the number of persons who could have been received a communication. To do otherwise would permit the FCC to decide the circumstances under which a person could exercise his right to speech, a result plainly at odds with the First Amendment.

5) Proposed § 100.29(c)(1): The Commission seeks comment on

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[2] The Commission could not cure the vagueness of the proposed regulation in a particular case by alleging the specifics of the ads:

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.

Lanzetta v. State of New Jersey, 306 U.S. 451, 453 (1939).

its proposed exemptions from what constitutes an "electioneering communication." Although the Commission purports to exempt all "communications over the Internet" in § 100.29(c)(1), it also qualifies that exemption by saying, in its commentary, that "webcasts" over the internet will not be exempted if they occur simultaneously with television or radio broadcasts or if such broadcasts are archived on the internet. The Commission has not promulgated any regulation to codify its differing treatment of some internet communications versus others and offers no basis to explain it. As such, the Commission's purported carve-out of "communications over the internet" remains vague, arbitrary, and incapable of withstanding scrutiny under the First Amendment.

6) Proposed § 100.29(c)(6): The Commission proffers four (4) alternative versions of Exemption 6 (Alternatives 1-A through 1-D) in an effort to cure the unconstitutionality of BCRA's broad definition of "electioneering communications" by carving out an exemption that:

> would exempt communications that are devoted to urging support for or opposition to particular pending legislation or other matters, where the communication requests recipients to contact a named Senator or Member of the House of Representatives regarding the issue.

We respectfully submit that this effort is misguided and unavailing.

None of these alternatives would cure one of the fundamental constitutional defects in BCRA's definition of "electioneering communications," which is that it prohibits core political speech, including speech beyond express advocacy. According to the Supreme Court, the only expenditures that Congress can regulate are those that constitute "express advocacy," meaning that they "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976). Yet the Commission's proposed regulations defining "electioneering communications," even as limited by the Commission's alternative exemptions, reach expenditures for speech that does not constitute "express advocacy."

Furthermore, to the extent that these alternatives create substantial exceptions to the definition of "electioneering communications" contained in the BCRA, they likely will fail review under the first step of Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

In BCRA, Congress delegated to the Commission the power to make further exemptions to the definition of "electioneering communications" for the purpose of "ensur[ing] the appropriate implementation" of the statutory provisions; at the same time, however, Congress conditioned the FEC's authority by providing that a communication *may not be exempted* if it "refers to a clearly identified candidate for Federal office . . . and . . . promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." 2 U.S.C. § 431(20)(A)(iii); new 2 U.S.C. § 434(f)(3)(B)(iv).

The various alternatives proposed by the Commission arguably violate these provisions because they may be interpreted to exempt from the definition of "electioneering communications" certain communications that "promote or support" or "attack or oppose" candidates for office. Even if BCRA did not clearly proscribe the exemptions now proferred by the Commission, the proposed alternatives could well be deemed unreasonable under step two of Chevron. 467 U.S. at 842-43.

Moreover, each of the proposed alternatives suffers from separate constitutional defects. Each has elements which are vague, thereby leaving potential political speakers without adequate guidance and chilling their exercise of what the Commission properly acknowledges as "fundamental First Amendment rights."

Alternative 1-A requires that a particular communication be "devoted *exclusively* to urging support for or opposition to particular pending legislation." Thus, if the Commission characterized a particular communication as, in addition to urging support or opposition to legislation, also seeking to entertain the audience, or to increase the visibility of a particular issue or organization, or to advance a particular ideology, the communication might not be exempted.

The exemption similarly fails to offer any reasonable guidance regarding when a communication will be viewed as "indicating the Member's past or current position on the legislation." Would an exhortation for listeners to ask a Member to oppose particular legislation perhaps "indicate" that the Member otherwise supports it? Would a picture of the Member previously meeting with prominent supporters of the legislation "indicate" the Member's position?

The same is true of the terms used in Alternative 1-B. It is impossible to know what constitutes a sufficiently "brief

suggestion" or how that will be determined. Nor is there the requisite guidance as to what constitutes a "reference to the candidate's record, position, statement, character, qualifications, or fitness for an office."

Alternative 1-C would exempt a communication which "refers to a general public policy issue capable of redress by legislation or executive action"; that determination turns upon the potential capability and limitations of legislative and executive action, and the applicability of such action to a particular issue. The distinction between "public policy" issues and other (perhaps "private policy"?) issues is likewise squarely implicated but left unaddressed by the proposed regulation.[3]

Finally, Alternative 1-D will require a determination of whether an ad "urges support of or opposition to" any legislation or policy proposal, whether the ad "refer[s] to any of the [incumbent] legislator's past or present positions," and whether it does so without "referring to any of the legislator's past or present positions." It does so without defining the critical terms "urges," "past or present positions," and "referring." It seems quite possible, for instance, that mere reference to the legislator would refer to that person's "present position" as a legislator, or a reference to that legislator's previous occupation as an actor would refer to the person's "past position."

7) Exemption from "targeted communication": The Commission also seeks comment on whether it should propose a regulation which "would remove communications that refer to a candidate for the office of President or Vice-President from the definition of "targeted communication" so that incorporated section 501(c)(4) and section 527 organizations:

> that accept corporate and labor organization funds would be able to make electioneering communications with respect to Presidential and Vice-Presidential elections . . . using funds that do not come from corporations, labor organizations or foreign nationals.

Because such a construction of the BCRA will narrow its scope, and thus make it less offensive to the First Amendment, such a construction should be proposed.

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[3] If the above language were to be removed, Alternative 1-C would be the least objectionable alternative and should be the one, if any, that the Commission adopts.

8) Proposed § 104.19(a): The BCRA requires disbursements, and contracts to make disbursements, for the direct costs of producing and airing electioneering communications to be reported within 24 hours of the "disclosure date." 2 U.S.C. § 434(f)(1). In apparent contradiction of the reporting requirement, the BCRA also defines "disclosure date" as the date on which the direct costs of producing or airing exceed $10,000. 2 U.S.C. § 434(f)(4).

The Commission asks whether "the $10,000 threshold include[s] the costs for producing electioneering communications, or for airing electioneering communications, or both?" Further, the Commission asks whether the electioneering communications "be reported at the time the disbursements exceed $10,000 in a calendar year, or not until the disbursements exceed $10,000 and the communications have been aired?"

Because § 434(f)(1) only establishes the classes of activity which are reportable and does not purport to establish the *timing* for their disclosure, the timing question must be determined from the language of § 434(f)(4). Thus, the BCRA intends for persons to report only if the aggregate production costs or the aggregate airing costs exceed $10,000: "if Person K pays $7,000 to produce an electioneering communication and $7,000 to air the communication," he would not have any reporting requirements at all. This construction is not only consistent with the express words of the BCRA, but would also narrowly tailor the BCRA and is thus consistent with the mandates of the First Amendment.

The Commission next asks whether the definition of "direct costs" should exclude other types of costs than those listed. Because the statutory term is "direct costs," the definition in proposed § 104.19(a)(2)(i) must, to avoid vagueness and constitutional overbreadth, be limited to the immediate costs attributable only to the production of a specific communication. Thus, proposed § 104.19(a)(2)(i) must be amended to narrow it.

The Commission also asks whether the lists should be exhaustive. If by that, the Commission means that only the costs listed expressly in § 104.19(a)(2)(i) would be "direct costs," the lists should be exhaustive to avoid any potential for vagueness and to narrow the scope of the BCRA.

The Commission seeks comments on whether, in light of constitutional and policy concerns, it should consider construing BCRA's electioneering communication reporting requirements to apply only when an electioneering communication is actually aired. This question hardly seems to need to be asked in light of the concerns set out by the Commission; the Commission should construe the

BCRA's electioneering communication reporting requirements to apply *only* when an electioneering communication is actually aired.

9) Proposed § 104.10(d)(2): The Commission has proposed regulations that would exempt "MCFL" corporations from the ban on "electioneering communications" by corporations and labor unions.[4] *See* proposed § 114.10(d)(2)(iii). It does so based upon the Supreme Court's holding that certain § 501(c)(4) corporations may engage in express advocacy as well as issue advocacy.

The Commission's effort to create an MCFL exemption from the prohibition against "electioneering communications" is constitutionally defective in crucial respects: first, it appears to run counter to the BCRA itself; second, it fails to codify a proper view of the right of non-profit corporations to engage in political speech; and, third, it fails to broaden the scope of the exception consistent with the greater burden BCRA imposes in regulating a larger and more attenuated category of speech than the express advocacy addressed by MCFL.

The Commission's effort to create a regulatory exception for MCFL corporations is at odds with the plain language of new 2 U.S.C. § 441b(c)(6), which sweeps *all* §§ 501(c)(4) and 527 corporations within the prohibition on expenditures for "electioneering communications."

The sponsor of the relevant provision of the BCRA, Senator Wellstone, stressed that the purpose of the provision was to close a "loophole" that would allow all "interest groups," regardless of their status, to run "sham issue ads." *See, e.g.*, 147 Cong. Rec. S2846 (Mar. 26, 2001) (statement of Sen. Wellstone). Notably, even *supporters* of the BCRA recognized that the Wellstone Amendment would present constitutional problems in the wake of MCFL. *See, e.g.*, 147 Cong. Rec. S2883 (Mar. 26, 2001) (statement of Sen.

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[4] Without purporting to define the universe of corporate speakers that could engage in express advocacy, the Supreme Court held that MCFL could engage in express advocacy because (i) it was formed for the express purpose of promoting political ideas, as opposed to engaging in business activities; (ii) it had no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and (iii) it was not established by a business corporation or a labor union, and did not accept contributions from such entities. See FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 263 (1986).

Edwards). Congress nevertheless passed the Wellstone Amendment and subsequently enacted it into law with the rest of the BCRA. It is therefore apparent under Chevron that Congress intended to ban even MCFL corporations from making expenditures for "electioneering communications." The Commission's proposed regulation might therefore fail review under step one of Chevron; or, alternatively, under step two of Chevron as unreasonable.

The proposed regulation also defines a qualified § 501(c)(4) corporation too narrowly by reaffirming the existing, and unconstitutionally narrow, definition of what constitutes an exempt corporation for purposes of MCFL. *See* proposed § 114.10(d)(2) (incorporating § 114.10(c)).

In relevant part, the incorporated regulation defines a qualified § 501(c)(4) corporation as one that "[d]oes not directly or indirectly accept donations of anything of value from business corporations, or labor organizations," § 114.10(c)(4)(ii), and that does not "engage in business activities," § 114.10(c)(2), where such activities are defined as, *inter alia*, "[a]ny provision of goods or services that results in income to the corporation," 11 C.F.R. 114.10(b)(3)(i)(A).

But a corporation deserves First Amendment protection under MCFL even if it receives a small percentage of its revenues from corporations or funds a small percentage of its political speech with money from corporations. FEC v. NRA, 254 F.3d 173 (D.C. Cir 2001), North Carolina Right To Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999), FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2nd Cir. 1995), and Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

Contrary to the Commission's view, engaging in certain incidental "business activities," such as the sale of magazines and fraternal items or the promotion of affinity programs, does not deprive a § 501(c)(4) corporation of MCFL protection. FEC v. NRA, 254 F.3d at 190; Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129, 130-31 (8th Cir. 1997).

Apparently recognizing the need to broaden the existing exemption to bring into line with the appellate courts' application of MCFL, the Commission seeks comment on whether the conclusions of the courts:

> regarding acceptance of de minimis amounts of corporate or labor organization general treasury funds is appropriate and likely to survive constitutional scrutiny and, if so, whether it should be stated in the rule.

Because it has been the consensus view of the courts of appeals that have considered the question[5], the Commission should revise its existing § 114.10(b) and (c) to reflect the courts' application of the First Amendment, and it should adopt the percentage test with respect to corporate and labor contributions that was articulated by the Fourth Circuit in North Carolina Right To Life, Inc. v. Bartlett, supra.

Moreover, the Commission should not treat identically *all* payments from corporations to non-profits. For instance, affinity programs -- such as credit card plans and memorabilia sales -- often exist so that non-profit membership organizations may keep basic membership rates at a low level by offering members the option to purchase products or services as a means of donating financial support to the organization in addition to membership dues. In such instances, corporations make payments to non-profits only because of members' payments to the corporation because of its support for the mission of their chosen non-profit; in such instances, the resulting financial support clearly should not qualify as a corporate donation that disqualifies the non-profit from MCFL status.

Furthermore, the MCFL exemption should be *broader still* for it to be constitutional with respect to regulating *electioneering communications*. The Commission has failed to appreciate that the MCFL exemption must be expanded even further in response to the greater speech burden at issue in the context of "electioneering communications" versus express advocacy.

With respect to express advocacy, the Government's regulatory interest (however weak) is at its zenith, and the category of speech that is burdened is strictly defined. "Electioneering communications," however, constitute a much larger category of political expression that is further removed from advocating for a particular candidate; the Government's regulatory interest is therefore even more attenuated and the burden upon political speakers' expression is heightened. It follows that some corporations that do not qualify for the MCFL exemption and are not entitled to engage in express advocacy -- for instance, corporations that engage in substantial "business activities" or accept *some* "donations from business corporations or labor

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[5] FEC v. NRA, supra, North Carolina Right To Life, Inc. v. Bartlett, supra, FEC v. Survival Education Fund, Inc., supra, and Day v. Holahan, supra.

organizations," but are organized around a political mission -- nonetheless have a right under the First Amendment to engage in "electioneering communications."

Because the proposed regulation fails to account for this, and simply applies the preexisting MCFL exemption to "electioneering communications" without regard for the different balance that must be struck, the regulation is inadequate to satisfy the First Amendment.

We would be pleased to respond to any question the Commission might have.

Sincerely yours,

Richard E. Gardiner