FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

April 13, 2005

James Bopp, Jr., Esq.
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1 South 6th Street
Terre Haute, Indiana 47807-3510

RE: MUR 5024R (Council for Responsible Gvt.)

Dear Mr. Bopp:

On November 10, 2003, you were notified that the Federal Election Commission was evenly divided on a vote to find reason to believe that your client, the Council for Responsible Government, Inc. and its Accountability Project ("the Council"), violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in MUR 5024. Consequently, the Commission closed the file in that matter.

The complainants in MUR 5024 subsequently filed suit against the Commission pursuant to 2 U.S.C. § 437g(a)(8) for judicial review of the dismissal of their administrative complaint. *See Kean for Congress Comm. v. FEC*, civil action No. 1:04CV00007 (JDB), United States District Court for the District of Columbia. After various proceedings in that case, the district court remanded the matter to the Commission to reconsider its decision to dismiss the administrative complaint in MUR 5024.

Upon reconsideration, the Commission, on April 11, 2005, found that there is reason to believe that the Council violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report its contributions and expenditures, by knowingly accepting contributions in excess of $5,000, and by knowingly accepting corporate and/or union contributions; or, in the alternative, that the Council violated 2 U.S.C. §§ 441b(a) and 441d(a) by making prohibited corporate independent expenditures that failed to contain a proper disclaimer and that William "Bill" Wilson and Gary Glenn, as corporate officers of the Council, violated 2 U.S.C. § 441b(a) by consenting to prohibited corporate independent expenditures.

The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information. You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter.

Please submit any such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Brant Levine, the attorney assigned to this matter, at (202) 694-1572.

Sincerely,

Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

Respondents: Council for Responsible Government, Inc. and its Accountability Project; Gary Glenn; William "Bill" Wilson

MUR: 5024R

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Anthony S. Cicatiello and Kean for Congress. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that the Council for Responsible Government, Inc. and its Accountability Project, ("the Council"), has violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the Act").

The complaint alleges that the Council is a federal political committee, as defined by the Act, that has failed to register and report with the Commission and failed to comply with the Act's contribution limits and source prohibitions. The complaint also asserts that the Council funded brochures that expressly advocated Tom Kean Jr.'s defeat for the Republican nomination for Congress in New Jersey's Seventh District during the 2000 election cycle. In response to the complaint, the Council denies being a political committee and contends that the brochures constituted issue advocacy, not express advocacy.

The Commission first considered this matter on November 4, 2003, but was evenly divided on a vote to find reason to believe that the Council and two of its officers, Gary Glenn and William Wilson, violated the Act. The Commission subsequently voted to dismiss the complaint and close the file in this matter.

Pursuant to 2 U.S.C. § 437g(a)(8), Complainants filed suit for judicial review of the dismissal of their administrative complaint. *See Kean for Congress Comm. v. FEC*, civil action No. 1:04CV00007 (JDB), United States District Court for the District of Columbia. After the suit was filed, the Commission moved to dismiss the case for lack of standing, but the court denied that motion, allowing the case to proceed on Complainants' previously filed motion for summary judgment on the merits. *See* Order dated January 25, 2005. In their motion for summary judgment, Complainants rely extensively on the Supreme Court's discussion of express advocacy in *McConnell v. FEC*, 124 S.Ct. 619 (2003). However, the Commission's deliberations and vote in this matter took place prior to the Supreme Court's decision in *McConnell*. Thus, in lieu of filing an immediate response to Complainants' motion for summary judgment, the Commission sought a remand from the district court to reconsider its decision in light of *McConnell*.[1] The court granted this request on February 15, 2005.

After considering the matter on remand, the Commission finds reason to believe that the Council violated various provisions of the Act, based on alternative theories, and has opened an investigation to asses all the facts before concluding which theory is more applicable. First, the Council may have failed to register with and report to the Commission as a political committee. Alternatively, the Council may have made prohibited corporate expenditures by funding brochures containing express advocacy, as that term is defined at 11 C.F.R. § 100.22(a) or, if not under section 100.22(a), then as it is defined at section 100.22(b).

[1] Although *McConnell* arose from a constitutional challenge to provisions of the Bipartisan Campaign Reform Act of 2002—which does not apply to the activity that predated the enactment of the law—the Commission must consider any effect *McConnell* might have on the law that existed at the time of the activity. When the Supreme Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate ... [the Court's] announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

II. *MCCONNELL V. FEC*

The potential impact in this matter of the Supreme Court's decision in *McConnell* concerns the doctrine of express advocacy, as some violations alleged in the complaint turn on whether the Council made express advocacy communications. Specifically, the key question is whether *McConnell* affects the enforceability or interpretation of the Commission's regulation defining express advocacy, 11 C.F.R. § 100.22. As explained below, the Commission finds that the regulation is consistent with *McConnell.*

The Supreme Court in *McConnell* considered various facial challenges to the Bipartisan Campaign Reform Act of 2002. The Court discussed express advocacy principally to afford context in evaluating the constitutionality of an alternative standard for determining when communications are intended to influence voters' decisions and have that effect. *McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than did the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).[2] Importantly, *McConnell* also did not address the validity of section 100.22(a) or (b), let alone cite the Commission's regulation for any purpose.

McConnell's discussion of express advocacy centered on the proposition that it is a statutory construction, not a constitutional boundary for the regulation of election-related speech. 124 S.Ct. at 688. The Court explained:

> A plain reading of *Buckley*[3] makes clear that the express advocacy limitation ... was the product of statutory interpretation rather than a constitutional command. ... [O]ur decisions in *Buckley* and [*FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986)][4] were

[2] For example, the Court did not illuminate the permissible use of context and timing to discern what speech is or is not express advocacy.

[3] In *Buckley*, to avoid constitutional overbreadth or vagueness problems, the Supreme Court construed certain provisions of the Act "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80.

[4] In *MCFL*, the Supreme Court held that to avoid constitutional overbreadth or vagueness problems, a corporate expenditure for a general public communication, if made independent of a candidate and/or his campaign

> specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.

Id. at 688.

While some circuit courts have held section 100.22(b) to be invalid on constitutional grounds, the alleged violations in this matter occurred in the Third Circuit, which has never addressed the question.[5] Moreover, the circuit courts that have invalidated section 100.22(b) appeared to proceed, at least in part, from an understanding that express advocacy is a constitutional imperative and that accordingly, under the First Amendment, "FEC restriction of election activities was not to be permitted to intrude *in any way* upon the public discussion of issues." *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Maine 1996) (emphasis added), *aff'd*, 98 F.3d 1 (1st Cir. 1996). *See also Virginia Society for Human Life v. FEC*, 263 F.3d 379, 391-92 (4th Cir. 2001) ("*VSHL*"). To that extent, these prior decisions were wrongly reasoned, which at the very least raises a question as to whether these courts would reach the same conclusion today.

Presumably, too, a court now addressing a constitutional challenge to section 100.22(b) would have to account for the Supreme Court's decision upholding the "promote, support, attack, or oppose" standard against a constitutional vagueness challenge, as the Court found that the standard "give[s] [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited." 124 S.Ct. at 675, n. 64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104 108-109 (1972)). Likewise, a court now addressing a constitutional challenge to section 100.22(b) would

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committee, "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249.

[5] Absent a ruling in that circuit that the regulation is invalid, the Commission is bound to apply its regulations to matters before it. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). *Cf. U.S. v. Mendoza*, 464 U.S. 154 (1984) (holding that an adverse ruling against the federal government in one circuit does not prevent the government from litigating the same issue before another circuit court).

have to account for *McConnell's* decision upholding BCRA's electioneering communication provision against a constitutional overbreadth challenge. In upholding that provision, *McConnell* acknowledged that the definition of electioneering communication would cover some ads which have no electioneering purpose, but noted that "whatever the precise percentage [of such ads] may have been in the past, in the future, corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases, by paying for the ad from a segregated fund." *Id.* at 696.

By its very terms, section 100.22 is a carefully tailored provision,[6] and everything that the Supreme Court said in *McConnell* about the nature of express advocacy applies to this regulation. In particular, section 100.22 is consistent with *McConnell's* emphasis on the language contained in express advocacy communications. Section 100.22(a), for example, contains the specific phrases from *Buckley* that *McConnell* noted are "examples of words of express advocacy ... that eventually gave rise to what is now known as the 'magic words' requirement." *McConnell*, 124 S.Ct. at 687. Section 100.22(a) also covers words "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. Similarly, section 100.22(b) covers communications that contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate. These restricting terms ensure that section 100.22(b) will encompass only a "tiny fraction of the

[6] Express advocacy, in addition to being used as a narrowing construction applied by the Supreme Court in *Buckley* and *MCFL*, is also itself a statutory term. *See* 2 U.S.C. §§ 431(17) (definition of "independent expenditure"); 441d (disclaimer requirements). Accordingly, the Commission possesses broad authority to interpret the term, to "formulate policy" on it, 2 U.S.C. § 437c(b)(1), and "to make, amend, and repeal such rules ... as are necessary" regarding it, 2 U.S.C. § 437d(a)(8). *See also* 2 U.S.C. §§ 438(a)(8), 438(d).

political communications made for the purpose of electing or defeating candidates during a campaign."[7] 124 S.Ct. at 702.

In considering this matter on remand, the Commission concludes that there is reason to believe a violation has occurred based on alternative grounds: (1) that the Council is a political committee, and (2) that because the brochures distributed by the Council contain express advocacy, the Council made prohibited independent expenditures. As shown below, the brochures at issue here constitute express advocacy because they urge Kean's defeat in the upcoming primary election, they contain an unmistakable electoral portion, and they address no public issue. Reason to believe findings do not represent final legal conclusions as to the facts or law bearing on a matter.[8] In the course of its investigation and further proceedings, the Commission will gather facts and consider those facts and further legal arguments bearing on both alternative grounds.

III. FACTUAL AND LEGAL ANALYSIS[9]

A. Factual Background

The Council incorporated in Virginia on May 2, 2000, and is organized under Section 527 of the Internal Revenue Code. The Council has not registered as a political committee with the Commission, nor does it appear to be affiliated or associated with any registered political

[7] The Court found that the express advocacy test is easily evaded by advertisers, and in that respect it has become "functionally meaningless." 124 S.Ct. at 689. This observation was nothing new. The limits of the express advocacy test were acknowledged in *Buckley* and have been noted by courts ever since. *See id.*

[8] Moreover, in a matter such as this in which the reason to believe findings are based on alternative theories, not every Commissioner voting to find reason to believe necessarily agrees with each of the theories advanced.

[9] All of the events relevant to this matter occurred prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all references or statements of law in this factual and legal analysis regarding the Federal Election Campaign Act of 1971, as amended, pertain to that statute as it existed prior to the effective date of BCRA. Similarly, all references or statements of law regarding the Commission's regulations pertain to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

committee. In press reports attached to the complaint, Bill Wilson, a director of the Council, stated that the organization had spent $65,000 in Kean's congressional district and planned to spend $100,000 more there and $3 million overall in 2000 for primary and general election campaigns. Although the precise nature and amounts of its receipts and disbursements during the first half of 2000 are unknown because the Council was not required to file reports with the IRS until July 1, 2000,[10] during the reporting period after the New Jersey primary election, i.e., from July 1, 2000 through December 31, 2000, the Council reported in its IRS reports that it received no receipts and made only $2,627 in disbursements. In 2001, the Council reported $50,000 in receipts and no disbursements. In 2002, the last year for which the Council filed reports, it reported $265,000 in receipts—of which $250,000 was from Club for Growth—and made $261,343 in disbursements, of which $250,000 was spent on a media buy.[11]

The Council's activities and public statements have been geared toward influencing elections. Gary Glenn, Chairman or Vice Chairman of the Council's Board of Directors, is quoted in a media report attached to the complaint as stating, "The very purpose of our group is to influence the outcome of elections." Specifically regarding New Jersey's Seventh Congressional District, Glenn reportedly stated, "The outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy. Clearly, we believe [Kean opponent Michael] Ferguson is a candidate whose record and philosophy is consistent with our philosophy."

[10] The law requiring Section 527 organizations to notify the IRS of their status and to file reports became effective on July 1, 2000, after the activities described in the complaint relating to Thomas Kean Jr.'s New Jersey congressional primary election had occurred.

[11] It is unknown whether these reports detail all of the Council's receipts, as IRS regulations would allow the Council to avoid disclosing receipts by paying taxes on them.

The media reports attached to the complaint also noted that the Council distributed brochures in New Jersey's Seventh Congressional District that attacked Kean and another Republican congressional candidate, New Jersey State Assemblyman Joel Weingarten. Complainants provided copies of two brochures that attacked Kean. The first page of one of the brochures ("Brochure 1") shows two apparently identical photographs of Tom Kean Jr., one large photograph covering the whole page and a much smaller photograph superimposed on the larger one. In both photographs, Tom Kean Jr. is wearing a business suit with a campaign button or sticker on the left breast pocket of his suit jacket that states "Tom Kean Jr. for Congress." The following statement is superimposed over the photographs:

TOM KEAN, JR.
No experience. Hasn't lived in New Jersey for 10 years.
It takes more than a name to get things done.

It continues, without photos, on the second page:

> **NEVER.** Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean Jr. may be a nice young man and you may have liked his dad a lot—but he needs more experience dealing with local issues and concerns. For the last 5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean Jr. . . **New Jersey needs New Jersey leaders.**

(Emphasis in original.) The following disclaimer appears at the bottom of the second page of Brochure 1: "Paid for by the Accountability Project of the CRG."

The other brochure ("Brochure 2") shows a full-page photograph of Tom Kean Jr. on the first page. The photograph appears to be the same photograph with the "Tom Kean Jr. for Congress" campaign button or sticker used in Brochure 1. The following text is superimposed over the photograph:

> For the last 5 years Tom Kean Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress—Tom never paid property taxes. No experience. **TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrisey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**

(Emphasis in original.) The following disclaimer appears on the bottom of the page: "Paid for by the Accountability Project of the CRG."

The second page of Brochure 2 shows four photographs almost evenly distributed over the full face of the brochure. The photographs are of former professional basketball player Larry Bird, of the Boston Celtics; Senator Edward Kennedy; what appears to be a statue of a Revolutionary War "Minuteman"; and what appears to be the same photograph of Tom Kean Jr. with the "Tom Kean Jr. for Congress" campaign button or sticker. Superimposed over the photographs is the following statement: "What do all these things have in common? They all have homes in Massachusetts."

B. Political Committee Status

The Council appears to be a political committee under the Act, and as such, is subject to the Act's contribution limitations, source prohibitions, and reporting requirements. *See* 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A).

The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). *See, e.g., FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation "leaves no doubt that the funds contributed would be used to advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year," proceeds from that solicitation are contributions). The term "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

As a Section 527 organization, the Council is by law "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the "function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections or appointments of one kind or another.[12]

The Council claims in its response to the complaint that it is not a political committee and cites its articles of incorporation, which state that its mission includes encouraging support

[12] *Cf. McConnell*, 124 S.Ct. at 678, n.68 (noting the existence of tax-exempt organizations that "engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives.").

among the general public for traditional moral and cultural values, free market economics, and greater accountability of elected officials in government. The articles of incorporation also explicitly prohibit the organization from expressly advocating the election or defeat of any clearly identified candidate for public office, or making any contribution to any candidate for public office.

Yet as detailed in the prior section, the Council's public statements and brochures evidence an attempt to influence elections, especially the congressional primary election in New Jersey's Seventh Congressional District. For example, one of the Council's leaders, Gary Glenn, reportedly acknowledged that the Council's purpose was to influence elections and that it sought to elect a congressman whose values were consistent with the Council's philosophy. *See supra*, pg. 8. In addition, to further its goals, the Council funded and distributed brochures that stated, **"TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS. ... NEW JERSEY NEEDS NEW JERSEY LEADERS,"** or that featured a picture of Kean wearing a campaign emblem followed by the word **"NEVER."** In addition, the Council may have attempted to influence other elections, evidenced by media reports and a disbursement for a $250,000 "media buy" in 2002.[13]

Overall, publicly available information demonstrates that the Council's objective was to influence federal elections, including the congressional primary election in Kean's district. The Council has apparently raised and spent hundreds of thousands of dollars in furtherance of that objective. Accordingly, it is appropriate for the Commission to investigate whether the Council has, among the funds it has spent and received, made $1,000 in "expenditures," or received $1,000 in "contributions," and thus is a political committee. If the Council is a political

[13] For example, the Council reportedly aired advertisements in Idaho in 2000, attacking a Republican candidate in a congressional primary there.

committee, then it is subject to the contribution limitations, source prohibitions, and reporting requirements of the Act.[14] *See* 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. Here, the Council may have financed its activities with funds raised outside the limitations and prohibitions of the Act.

C. Corporate Expenditures

Alternatively, the facts may show that the more appropriate basis on which to resolve this matter is that the Council violated 2 U.S.C. § 441b(a). If the brochures the Council funded and distributed were express advocacy, as the complaint alleges, then the disbursements for them were expenditures made in connection with an election to political office, which the Act prohibits corporations from making. 2 U.S.C. § 441b(a). As discussed previously, the Supreme Court held in *MCFL* that a corporate expenditure for a general public communication, if made independent of a candidate and/or his campaign committee, "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249; *supra*, at n.4.

The Commission promulgated 11 C.F.R. § 100.22 to define "expressly advocating" consistent with judicial interpretations, including *Buckley* and *MCFL*. The first part of this regulation, tracking *Buckley* and *MCFL*, defines "expressly advocating" as a communication that uses phrases such as "vote for the President," or "'support the Democratic nominee' . . . , which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s) . . . ." 11 C.F.R. § 100.22(a). The second part of this regulation encompasses communications that, when taken as a whole or with limited reference to external events, contain an "electoral portion" that is "unmistakable, unambiguous, and

[14] To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. Here, the Council's activities and public statements indicate that its major purpose is to engage in federal campaign activity.

suggestive of only one meaning" and one as to which "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b). In this matter, the brochures constitute express advocacy either under section 100.22(a) or 100.22(b).

1. The Brochures Are Express Advocacy Under 11 C.F.R. § 100.22(a)

The brochures are express advocacy under section 100.22(a) of the Commission's regulations because they use words which in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. 11 C.F.R. § 100.22(a). In particular, both brochures prominently display a photograph of Tom Kean Jr. with his campaign button or sticker stating "Tom Kean Jr. for Congress." The photograph and the words on the campaign button or sticker on Kean's jacket clearly identify Kean as a congressional candidate. Brochure 1 has the photograph and campaign button or sticker "Tom Kean Jr. for Congress" on the first page of the two-page brochure, along with language charging that Kean has no experience and has not lived in New Jersey for 10 years. This display is immediately followed by the highlighted word "**NEVER.**" on top of the following page.

The photograph of Kean wearing the campaign button or sticker, which contains words expressly advocating Kean's election, when read in conjunction with the highlighted word "**NEVER.**" (followed by a period) in context has no other reasonable meaning than to advocate Kean's defeat. Seen in close juxtaposition to the picture of Kean wearing his own campaign button or sticker, "**NEVER**" can be read as the equivalent of drawing an "X", or a circle with a slash, over the campaign button or sticker, thereby urging the defeat of Kean in the upcoming primary election.

Similarly, Brochure 2 contains words and phrases which have no other reasonable meaning than to urge Kean's defeat. *See* 11 C.F.R. § 100.22(a). Brochure 2 specifically refers

to Kean's candidacy in stating, "**TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS,**" and later on the same page, in the same prominent typeface, it declares, "**NEW JERSEY NEEDS NEW JERSEY LEADERS.**" In between these statements, Brochure 2's text casts Kean as an interloper who had not lived in New Jersey for over five years, who lacked political experience, and who, "until he decided to run for Congress . . . never paid property taxes." After identifying certain issues facing New Jersey (schools, taxes, overdevelopment, congestion), Brochure 2 compares Kean's asserted lack of experience unfavorably to the experience of one of Kean's opponents in the primary election by stating, "Pat Morrisey has experience dealing with important issues."

In short, Brochure 2 clearly identifies Kean as a candidate for Congress; it prominently describes him as not being from New Jersey and as being inexperienced, rather than a leader, and then uses the campaign slogan, "**NEW JERSEY NEEDS NEW JERSEY LEADERS.**" This is no different than identifying Kean as "pro-choice" or "pro-life" and then telling the reader to "vote pro-choice" or "vote pro-life." 11 C.F.R. § 100.22(a). In addition, the main text of Brochure 2 is superimposed on the same photograph of Kean wearing his own campaign button or sticker that was used in Brochure 1. Thus, this language is also the equivalent of drawing an "X" over the "Tom Kean Jr. for Congress" campaign button or sticker, urging the defeat of Kean in the upcoming primary election.

2. The Brochures Are Express Advocacy Under 11 C.F.R. § 100.22(b)

If the brochures are not express advocacy under 11 C.F.R. § 100.22(a), then they are express advocacy under 11 C.F.R. § 100.22(b). The brochures were distributed in Kean's congressional district after he announced his candidacy and during the months immediately preceding the primary election. With limited reference to these events, the electoral portions of the brochures are "unmistakable, unambiguous, and suggestive of only one meaning"—to vote

against Kean. 11 C.F.R. § 100.22(b)(1). Both brochures also are subject to only one reasonable interpretation of their call to action—to vote against Kean. *See* 11 C.F.R. § 100.22(b)(2). Indeed, outside the context of the upcoming election, the brochures are virtually meaningless.

Brochure 1 does not even mention any public issues. It only criticizes Kean's qualifications to serve in office and places the boldfaced term "**NEVER**" directly after a picture of Kean wearing a campaign emblem stating "Tom Kean Jr. for Congress." Likewise, Brochure 2 directly references Kean's campaign for Congress and attacks his lack of political experience. Due to these references to Kean's congressional campaign, combined with the lack of any other message, the brochures are exclusively and unmistakably electoral in content. In addition, both communications use words that effectively direct readers to vote against Kean. For example, after criticizing Kean's character and qualifications for federal office, the brochures tell people "**NEVER**" and "Tell Tom Kean Jr. ... **NEW JERSEY NEEDS NEW JERSEY LEADERS.**"

These brochures represent the type of communications that the Commission envisioned when it promulgated section 100.22. *See* 60 Fed. Reg. 35292, July 6, 1995. In its discussion of then-newly promulgated section 100.22, the Commission stated that "communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Id.* at 35295. Here, there is not even a pretense that the brochures are about anything other than Kean's fitness for Federal office; the only thing a reader can do to ensure that New Jersey *has* New Jersey leaders is to vote against Kean.

As discussed above, the Commission initially failed to find reason to believe to investigate the express advocacy allegations. The Commission now concludes that further

investigation of these allegations, including additional consideration of the appropriate applicable legal standards, is warranted.

3. Corporate Officers Consented to the Corporate Expenditures

Just as the Act prohibits corporations from making expenditures in connection with elections for public office, it similarly prohibits officers of corporations from consenting to such expenditures. *See* 2 U.S.C. § 441b(a). Two of the Council's officers, Gary Glenn and William Wilson, may have consented to the apparent prohibited expenditures in this matter. Glenn and Wilson were members of the Council's Board of Directors at the time of the expenditures, and newspaper articles discussing the brochures at issue included statements from Glenn and Wilson that appear to support the distribution of the brochures.[15] These reported statements thus provide a basis for investigating whether Glenn and Wilson may have consented to prohibited corporate expenditures.

D. Disclaimers

If the Council distributed brochures that expressly advocated the election or defeat of clearly identified federal candidates, then in addition to failing to register and report as a political committee or making prohibited corporate expenditures, the Council also may have violated the Act's disclaimer requirements. The Act provides that any person making an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through any outdoor advertising facility or any other type of general public political advertising, if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state whether the communication is authorized by any candidate or

[15] *See supra*, pg. 6-8. Wilson is also quoted as stating, "All we have done is used our First Amendment right (to free speech) to inject our ideas into the debate."

candidate's committee. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1). Here, however, neither of the brochures stated whether it was authorized by a candidate or candidate's committee. Instead, the brochures stated only that they were "Paid for by the Accountability Project of the CRG."

E. Apparent Violations

For the reasons stated herein, the Commission finds that there is reason to believe that that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report its contributions and expenditures, by knowingly accepting contributions in excess of $5,000, and by knowingly accepting corporate and/or union contributions; or, in the alternative, that the Council for Responsible Government, Inc. and its Accountability Project violated 2 U.S.C. §§ 441b(a) and 441d(a) by making prohibited corporate independent expenditures that failed to contain a proper disclaimer and that William "Bill" Wilson and Gary Glenn, as corporate officers of the Council, violated 2 U.S.C. § 441b(a) by consenting to prohibited corporate independent expenditures.