FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

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SEP 2 2 2005

Sierra Club, Inc.
c/o Holly Schadler, Esq.
Lichtman, Trister & Ross, PLLC
1666 Connecticut Avenue, N.W., Fifth Floor
Washington, D.C. 20009

RE: MUR 5634
Sierra Club, Inc.

Dear Ms. Schadler:

On January 5, 2005, the Federal Election Commission notified your client, Sierra Club, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, the Commission, on September 20, 2005, found that there is reason to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a), a provision of the Act, in connection with the publication and distribution of the pamphlet entitled "Let your Conscience be your Guide." The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. In addition, the Commission found no reason to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a) in connection with the publication and distribution of the pamphlets entitled "From one friend of our environment to another," "The Environment for Dummies," and "The Dirt."

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 Roy Q. Luckett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

Respondent: Sierra Club, Inc.

MUR 5634

I. INTRODUCTION

The complaint in this matter alleged that the Sierra Club, Inc. ("Sierra Club" or "respondent") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by "advocating the election of Senator John Kerry for the presidency of the United States" through four communications issued prior to the November 2, 2004 General Election. For the reasons set forth below, the Commission finds reason to believe that the Sierra Club violated 2 U.S.C. § 441b(a) with respect to one of the four communications.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The Sierra Club is a non-profit environmental corporation based in California. On its website, the Sierra Club states that it has over 750,000 members and is "America's oldest, largest and most influential grassroots environmental organization." *See* www.sierraclub.org/inside/. In response to the complaint, the Sierra Club acknowledges that it had distributed a pamphlet entitled "LET YOUR CONSCIENCE BE YOUR GUIDE" ("Conscience"), which it described as a "voter guide" "specifically permitted under the Federal Election Commission's regulations at Section 114.4(c)(5) " *See* Response at 2. Respondent asserts that "Conscience" does not encourage the reader to vote for or against any candidate. Rather, according to respondent, it merely

> describe[s] the records and positions of the two Presidential candidates, and . . . the Senate candidates running in Florida, and encourage[s] the recipients to find out more about the candidates before voting. The piece[ ] provide[s] a brief description of the issues and citations to the original sources relied upon regarding the candidates' positions in the event that recipients would like to conduct additional research. Each candidate is credited with his or her positions that, in the view of the Sierra Club, promote or detract from environmental protection. Recipients are left to make their own judgments on the candidates and whose positions they favor.

Id.

The "Conscience" pamphlet prominently leads with the exhortations to the reader to "LET YOUR CONSCIENCE BE YOUR GUIDE," "LET **YOUR VOTE** BE **YOUR VOICE,**" (emphasis in the original) accompanied by pictures of gushing water, picturesque skies, abundant timber, and people enjoying nature. It then compares President Bush's and Senator Kerry's environmental records in three categories: (1) toxic waste cleanup, (2) clean air, and (3) clean water, and, despite the disclaimer on the address page stating that the pamphlet is "not intended to advocate the election or defeat of any candidate," shows a marked preference for Senator Kerry's record. For example, in the toxic waste cleanup category, it touts Kerry as a "leader on cleaning up toxic waste sites" while stating that "President Bush is weakening the law that requires power plants and other factories to install modern pollution controls." In each of three categories, the pamphlet assigns a "checkmark symbol" in one or two boxes next to either one or both candidates; of the two candidates, only Senator Kerry receives checkmarks in every box in all three categories, whereas President Bush receives only one checkmark in a single category (clean air), and in that category, there are two checkmarks for Kerry.

To the right of the comparisons between Kerry and Bush, the "Conscience" pamphlet also compares U.S. Senate candidates from Florida, Mel Martinez and Betty Castor, in three categories: (1) toxic waste cleanup, (2) clean air, and (3) energy. Ms. Castor's environmental

record in all three categories is presented "favorably," with a checkmark in all three boxes next to her position, while Mr. Martinez does not receive any checkmarks.[1] The pamphlet concludes with: "Find out more about the candidates before you vote. Visit www.sierraclubvotes.org."

B. Analysis

The Commission's definition of express advocacy is at 11 C.F.R. § 100.22. The first part of this regulation defines "expressly advocating" as a communication that uses phrases such as "vote for the President," or "'support the Democratic nominee' . . . , or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 C.F.R. § 100.22(a). The second part of this regulation encompasses a communication that, when taken as a whole or with limited reference to external events, "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because" it contains an "electoral portion" that is "unmistakable, unambiguous, and 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).

The "Conscience" pamphlet contains express advocacy. With respect to 100.22(a), as in *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238, 249 (1986) (*"MCFL"*) and *FEC v.*

[1] In the "toxic waste cleanup" and "clean air" categories, the Sierra Club simply stated that for Mr Martinez there was "no stance on record " Mr Martinez's record in the "energy" category is described negatively.

Christian Coalition, 52 F. Supp. 2d 45,62 (D.D.C 1999) ("*Christian Coalition*"),[2] the pamphlet provides "in effect" an explicit directive to vote for those candidates whose positions have been identified as in accord with those of the sponsoring organization. Specifically, the pamphlet portrays protecting the environment as a matter of conscience, with the words "LET YOUR CONSCIENCE BE YOUR GUIDE," accompanied by images extolling a healthy environment; and it highlights by means of checkmarks those candidates whose pro-environment records meet the dictates of conscience and directs voters to "LET **YOUR VOTE** BE **YOUR VOICE**." As in *MCFL*, although the pamphlet's message is "marginally less direct than vote for" Kerry and Castor, that "does not change its essential nature." *MCFL* at 249. Although the pamphlet includes some discussion of issues, in *MCFL*, the Supreme Court, in considering a newsletter that contained some discussion of issues, found that it could not "be regarded as a mere discussion of public issues that by their nature raises the names of certain politicians." *Id.* Rather, the newsletter went "beyond issue discussion to express advocacy. The disclaimer of endorsement cannot negate this fact." *Id.* Similarly, in the instant MUR, despite addressing environmental issues, the "Conscience" pamphlet cannot "be regarded as a mere discussion of public issues that by their nature raises the names of certain politicians." Instead, by also urging "LET YOUR CONSCIENCE BE YOUR GUIDE and LET **YOUR VOTE BE YOUR VOICE**," accompanied by images and checkmarks that "in effect" direct voters to vote for particular candidates, the "Conscience" pamphlet crosses the line into express advocacy. The disclaimer contained therein does not alter this conclusion. The "Conscience" pamphlet is also similar to

[2] In *MCFL*, the Supreme Court found that a newsletter that set out the positions of the candidates, highlighting and identifying those candidates whose pro-life views were consistent with those of MCFL, and then urged voters to "VOTE PRO-LIFE!" provided "in effect an explicit directive" to vote for the candidates favored by MCFL, and hence, contained express advocacy. In *Christian Coalition*, a district court found that a mailing that identified Newt Gingrich as a "Christian Coalition 100 percenter" and encouraged the reader to "take [an enclosed Congressional scorecard] to the voting booth," in effect explicitly told the reader to vote for Gingrich, and therefore constituted an express advocacy communication.

the mailing in *Christian Coalition* because, with the use of checkmarks, it identifies Senator Kerry and Betty Castor as the conscience "100 percenters" that voters should vote for. *See Christian Coalition*, 52 F.Supp.2d. at 65.

The "Conscience" pamphlet also contains express advocacy under section 100.22(b). It was distributed before the November 2, 2004 General Election and identifies the two leading candidates for President and U.S. Senate in Florida, respectively. With limited reference to these factors, as well as to the Sierra Club's well-known stance promoting environmental regulation, the electoral portion of this communication—"LET YOUR CONSCIENCE BE YOUR GUIDE and LET **YOUR VOTE** BE **YOUR VOICE**"—is "unmistakable, unambiguous, and suggestive of only one meaning": vote for Senator Kerry and Betty Castor. Moreover, reasonable minds could not differ as to whether the pamphlet encourages readers to vote for Senator Kerry and Betty Castor or encourages some other kind of action. Although the pamphlet concludes by directing the reader to "Find out more about the candidates before you vote. Visit www.sierraclubvotes.org.," this tag-line, viewed in the context of the whole communication, does not convert the pamphlet into a mere starting point for further information.[3]

We are mindful that one could argue that the "reasonable mind" of a voter favoring relaxed or loose environmental regulation could regard the words "LET YOUR CONSCIENCE BE YOUR GUIDE and LET **YOUR VOTE** BE **YOUR VOICE**," with the accompanying voting records and checkmarks, as encouragement to vote for President Bush and Mel Martinez. However, even in that case, the action encouraged is voting in a particular way. The "reasonable mind" standard need not encompass every possible explanation that a creative individual might

[3] When accessed, the "sierraclubvotes" website contains the same type of information as the pamphlet, with a focus on President Bush's "negative" environmental record and Senator Kerry's "favorable" environmental stance.

conjure. Courts routinely apply "reasonable person" tests as objective tests that do not depend upon the preference of any one person or group, including the specific people involved in the lawsuit at issue. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992). We think the "reasonable mind" viewing the "Conscience" pamphlet "could only []interpret[]" this pamphlet "as containing advocacy of the election" of Senator Kerry and Betty Castor. *See* 11 C.F.R. § 100.22(b).

In concluding that the "Conscience" pamphlet contains express advocacy, the Commission also considered MUR 5154 ("Sierra Club I"), a case concluded in 2003, and the accompanying Statements of Reasons. In Sierra Club I, the Commission considered whether a mailer distributed by the Sierra Club before the 2000 General Election contained express advocacy. The top of the mailer carried the statement: "Before you vote on November 7 Know Their Record on the Environment." The mailer then pictured and identified Senator Robb as the incumbent, and his opponent, George Allen, as a "candidate for Virginia Senate," and underneath their pictures described each candidate's record on a number of environmental issues. Robb's record received three checkmarks, indicating that as to those issues, he "supports Sierra Club position," and Allen received one checkmark and two "thumbs down," the latter indicating that as to those issues, he "opposes Sierra Club position." The mailer also provided a percentage rating (77% for Robb, 13.5% for Allen) based on the candidate's environmental voting records in Congress. At the bottom of the page, the Sierra Club I voting guide stated "Sierra Club. Protect Virginia's environment, for our families, for the future."

The Office of General Counsel concluded that this mailer contained express advocacy pursuant to 100.22(a), based largely on the reasoning found in *MCFL* and *Christian Coalition,* and therefore recommended that the Commission find reason to believe that the Sierra Club

violated the Act by making prohibited corporate expenditures. In Sierra Club I, after voting 3-3 on the substantive recommendations, the Commission voted 6-0 to dismiss the matter. Those Commissioners voting to approve the substantive recommendations and those voting not to approve them then issued separate Statements of Reason.

In analyzing the communication in Sierra Club I, those Commissioners who concluded there was no express advocacy considered only 100.22(a), noting that 100.22(b) had been declared unconstitutional by courts in the First and Fourth Circuits, and they also cited cases defining "express advocacy" narrowly to include only communications with explicit words of advocacy (*i.e.*, magic words). *See* Statement of Reasons by Commissioners Smith, Mason, and Toner in MUR 5154 (Sierra Club), at 2. According to those Commissioners, "The better view is to conclude that [the communication in Sierra Club I] does not fall within the narrow confines of "express advocacy" as articulated in cases and our regulations." *Id.* at 3. Their determination also rested in part on their concern that

> [w]ere we to adopt the approach set forth in the General Counsel's report... then any group's voter guide that announced an upcoming election, set forth the records of candidates, and set forth the group's issue preferences would seem to become "express advocacy." This approach would effectively make it impossible for any group to publish a meaningful voter guide.

Id.

Subsequent to the issuance of that Statement of Reasons, the Supreme Court decided *McConnell v. FEC*, 124 S.Ct. 619 (2003). In discussing express advocacy for another purpose, the Court concluded that express advocacy is a statutory construction, not a constitutional

boundary for the regulation of election-related speech.[4] 124 S.Ct. at 688. The Court explained:

> A plain reading of *Buckley*[5] makes clear that the express advocacy limitation ... was the product of statutory interpretation rather than a constitutional command. ... [O]ur decisions in *Buckley* and *MCFL*[6] were 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.

The circuit courts cited in the Statement of Reasons as having found section 100.22(b) invalid 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). 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

[4] The *McConnell* 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). For example, the Court did not illuminate the permissible use of context and timing to discern what speech is or is not express advocacy. Such considerations are unavoidable The phrase "Support President Bush," for example, had a vastly different meaning two days before Election Day than it did two days after Election Day. Importantly, *McConnell* also did not address the validity of section 100.22(a) or (b), nor cite the Commission's regulation for any purpose.

[5] 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.

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

same conclusion today.[7]

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 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,[8] 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,

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[7] In any event, the "Conscience" pamphlet was distributed in the Eleventh Circuit, which has never addressed the question of the constitutionality of section 100.22(b). 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)

[8] 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).

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 political communications made for the purpose of electing or defeating candidates during a campaign."[9] 124 S.Ct. at 702.

Finally, the concern expressed in the Statement of Reasons that the recommended approach in Sierra Club I "would effectively make it impossible for any group to publish a meaningful voter guide," has proven to be unfounded in view of the Commission's determination that the Sierra Club's pamphlet entitled "The Dirt," also challenged by the complaint in MUR 5634, did not contain express advocacy. Thus, corporations are in fact able to publish genuine and meaningful voter guides, even ones showing preferences for particular candidates' records, without crossing the line into express advocacy.

Therefore, there is reason to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a) in connection with the publication and distribution of the pamphlet entitled "Let your Conscience be your Guide."

[9] 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.*