Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202 719 7000
FAX 202 719 7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703 905 2800
FAX 703 905 2820

www.wrf.com

Jan Witold Baran
202 719 7330
jbaran@wrf.com

November 21, 2006

BY HAND DELIVERY

Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5819 (U.S. Chamber of Commerce)

Dear Mr. Norton:

This office represents the U.S. Chamber of Commerce ("Chamber"). On November 6, 2006, we received a complete copy of a complaint filed against the Chamber in the above-captioned MUR.

For the reasons stated in my October 30, 2006, letter to Mr. Jeff S. Jordan that is incorporated herein by reference and enclosed herewith for your convenience, the Commission must dismiss the MUR because of the FEC's failure to provide notice of the complaint to the Chamber within the statutory five-day period.[1]

[1] On November 6, 2006, this office received a letter from Mr Jordan dated October 31 in response to my October 30 letter. A copy of Mr. Jordan's letter is enclosed. Mr. Jordan explained that the FEC sent the original notification of the complaint to the Chamber on September 22, 2006, but the notification was returned because it did not contain adequate address information Mr Jordan also "apologize[d] for the inconvenience" caused by the FEC's "administrative oversight" when it failed to send a copy of the audio recording that was incorporated with the complaint. A copy of the recording was enclosed with Mr. Jordan's October 31 letter

The FEC's failure to adequately address an envelope does not excuse its obligation to comply with the five-day notice requirement This statutory requirement would be meaningless if it did not hold the FEC to normal standards of conduct when communicating with others. The FEC's failure in this regard is particularly inexcusable given the fact that the FEC has collected contact information from the Chamber during previous FEC enforcement, rulemaking, and litigation matters.

Even if the FEC had properly addressed the envelope, the envelope did not include a copy of the recording upon which the entire complaint is based. As explained in my October 30 letter, this was not merely an "inconvenience," but a prejudicial procedural violation that prevented the Chamber from publicly responding to negative press articles written about it Accordingly, Mr Jordan's October 31 letter does not mitigate or alter the objections I raised in my October 30 letter and the MUR should be dismissed for the reasons stated therein

Alternatively, the Commission should find no reason to believe that the Chamber violated the law by engaging in prohibited express advocacy because the factual representations and legal conclusions contained in the complaint do not describe a violation. The remainder of this letter articulates the reasons why the Commission should take no further action on this basis.

RESPONDENT

The Chamber is the world's largest federation of business companies and associations with an underlying membership of over 3,000,000 businesses and business associations. The Chamber provides various member services and advocates a pro-business agenda in all branches of the federal government.

COMPLAINT

On September 20, 2006, the FEC received a complaint from James J. Bickerton and Barry A. Sullivan alleging that the Chamber violated the prohibition on "the use of corporate funds to finance communications made to the general public that expressly advocate the election or defeat of a federal candidate." The substance of the alleged express advocacy communication was contained on an audio CD as part of the complaint. An accurate transcription of the contents of the CD follows:

> Hello, I'm calling with an important message for absentee voters about Congressman Ed Case.
>
> Ed Case has over twenty years of experience in both the public and private sector, and he has fought hard and delivered on his promises while representing us in the US House the past four years. Ed Case supports tax cuts that have helped put more money in the pockets of Hawaii's families. Ed Case also supports Small Business Health Plans, which would give small businesses and the self-employed greater access to affordable health plans. Ed Case has made the tough decisions that are right for Hawaii, even if it's not popular with partisan politicians.
>
> Please visit www.movehawaiiforward.com to learn more. This message was paid for by the U.S. Chamber of Commerce.

Thank you.

The complaint's only analysis of the text is contained in the following statements:

> The message begins, "Hello, I have an important message for **absentee voters** about **Congressman Ed Case**" (emphasis added). The caller then proceeds to describe Mr. Case in glowing terms and directs the listener to a U.S. Chamber of Commerce website called www.movehawaiiforward.com. The automated message closes with: "This message was paid for by the U.S. Chamber of Commerce. Thank you." [The recipient of the call] appears to have been selected for the call simply because she is a member of the general public who is a potential absentee voter.
>
> The message specifically targets "absentee voters" to hear an "important message about Congressman Ed Case."

By applying the definition of "expressly advocating" contained at 11 C.F.R. § 100.22(b) to the above-quoted content, the complaint concludes:

> Because the call, taken as a whole, is "unmistakable, unambiguous, and suggestive of only one meaning" – to encourage absentee voters to cast their ballots in favor of Mr. Case – it clearly meets the express advocacy standard.

For your convenience, we are enclosing a copy of the material that was available at www.movehawaiiforward.com. The content consisted of biographical information about Ed Case and Daniel Akaka as well as their positions on issues relating to "Jobs & the Economy" and "Protecting Small Business."

LAW

It is unlawful for a corporation to make an "expenditure in connection with any election." 2 U.S.C. § 441b. The term "expenditure" is defined as "anything of

value ... for the purpose of influencing any election for Federal office." *Id.* § 431(9)(A)(i); 11 C.F.R. § 100.111(a).

The phrase "for the purpose of influencing" an election has been narrowed by Supreme Court precedent to only include disbursements "for communications that expressly advocate[108] the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *see also FEC v Massachusetts Citizens for Life, Inc* , 479 U.S. 238, 248-49 (1986) ("*MCFL*"). The text of footnote 108 in the quote above references *Buckley*'s footnote 52 which reads: "This construction would restrict ... application ... to communications containing 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.'" 424 U.S. at 44 n.52. *MCFL* similarly held that advocacy that is marginally less direct can still be express advocacy provided that the words identified in *Buckley*, or their near synonyms, are used. 479 U.S. at 249 ("The publication not only urges voters to vote for 'pro-life' candidates, but also identifies and provides photographs of specific candidates fitting that description.").[2]

The Court's "expressly advocating" standard has since been codified at 11 C.F.R. § 100.22 of the Commission's regulations. Subsection (a) of this regulation generally follows the above-quoted *Buckley/MCFL* formulation to include any communication that:

> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of

---

[2] The Supreme Court's decision in *McConnell v FEC*, 540 U.S. 93 (2003), did not affect the Court's narrowing construction of the phrase "for the purpose of influencing" in *Buckley* and *MCFL*. *See Ctr for Individual Freedom v Carmouche*, 449 F.3d 655, 664-65 (5th Cir. 2006), *petition for cert filed* (U.S. Oct 3, 2006) (No. 06-494); *Anderson v Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

> campaign slogan(s) 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!"

Subsection (b) is more broad to include any communication that:

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, 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—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) 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.

Subsection (b) has been held unconstitutional pursuant to *Buckley* and *MCFL* by every federal court that has addressed it. *See Virginia Soc'y for Human Life, Inc v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998).

In addition, present and former members of the Commission have agreed that subsection (b) is unconstitutional and have refused to apply it in MUR proceedings. *See, e.g.*, Statement Of Reasons, MUR 4922, Commissioners Mason & Smith (Dec. 7, 2000); Statement Of Reasons, MUR 5154, Vice Chairman Smith, Commissioners Mason & Toner (Dec. 6, 2003).[3]

---

[3] The Commission's November 15, 2006, Conciliation Agreement in MUR 5634 is not to the contrary. The express advocacy determination there did not require a finding under subsection (b) given the fact that the communication at issue satisfied subsection (a) However, various documents

Lastly, the U.S. Court of Appeals for the Ninth Circuit case that served as the model for subsection (b), *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987),[4] has been roundly rejected by every sister circuit to have addressed it. *See Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 193-95 (5th Cir. 2002) (collecting cases). Indeed, the Ninth Circuit itself has reined in the reach of its *Furgatch* decision. In *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003), after describing *Furgatch* as "standing apart from other circuit precedent," the panel sought to reduce the disharmony by ruling that *Furgatch* actually holds that "express advocacy must contain some explicit words of advocacy." The panel also noted that "introducing context and ... not tethering express advocacy to explicit words of advocacy ... raises serious First Amendment concerns." 328 F.3d at 1097-98.

FEC regulations do, however, specifically allow corporations to engage in other types of voting-related communications provided that they do not expressly advocate the election or defeat of a clearly identified candidate. Examples include the following:

> *Registration and voting communications.* A corporation ... may make registration and get-out-the-

---

(Continued . . .)
filed by the General Counsel in that MUR suggest that subsection (b) has been somehow resurrected by *McConnell* even though the General Counsel admitted that "*McConnell* shed no new light on how much more speech could be regulated under section 441b" and that *McConnell* did not "purport to determine the precise contours of express advocacy to any greater degree than it did in *Buckley*." General Counsel's Report #2 at 10 (July 3, 2006)

The General Counsel is correct, *McConnell* construed *Buckley* to control the construction of vague campaign finance regulation of independent speech. *McConnell* held that Congress's definition of a new category of regulated election-related speech – which laid out in detail the media, time, speakers, and content regulated – was at least as precise as *Buckley*'s express advocacy standard. 540 U.S. at 194. Thus, there was no unconstitutional vagueness to be cured, and there was no occasion to alter *Buckley*'s holding. Accordingly, *McConnell* did not disturb "the continuing relevance of the magic words requirement" of the express advocacy standard and leaves the circuit court cases rejecting *Furgatch* and subsection (b) in full effect. *Carmouche*, 449 F.3d at 665 n 7. The General Counsel's conclusion that "neither *Buckley*, *MCFL*, nor *McConnell* held that express advocacy by definition is limited to 'magic words'" is, therefore, incorrect and contrary to the holdings in those cases. General Counsel's Report #2 at 11.

[4] *See* 60 Fed Reg. 35,292, 35,295 (July 6, 1995).

> vote communications to the general public, provided that the communications do not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party....

11 C.F.R. § 114.4(c)(2).

> *Voting records.* A corporation ... may prepare and distribute to the general public the voting records of Members of Congress, provided that the voting record and all communications distributed with it do not expressly advocate the election or defeat of any clearly identified candidate, clearly identified group of candidates or candidates of a clearly identified political party.

Id § 114.4(c)(4).

> *Voter guides.* A corporation ... may prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues.... The sponsor may include in the voter guide biographical information on each candidate, such as education, employment positions, offices held, and community involvement.... [N]o portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.

Id. § 114.4(c)(5).

In addition, the United States Court of Appeals for the Fifth Circuit has held that speech by the Chamber of the sort alleged in the complaint does not constitute regulated express advocacy. *See Chamber of Commerce of the U S v. Moore*, 288 F.3d 187 (5th Cir. 2002). The court addressed advertisements sponsored by the Chamber that "identified ... candidate[s] and described in general terms [each] candidate's judicial philosophy, background, qualifications, and other positive qualities." *Id* at 190. "The advertisements concluded by displaying the address of

an Internet web site, www.LitigationFairness.org, that contain[ed] a page with links to the campaign web sites ... and to pages containing biographical information...." *Id.* at 191.

The court rejected the *Furgatch* test to hold that the Chamber's speech was not subject to regulation as express advocacy because:

> There is no question that the Chamber's advertisements do not contain any of the phrases that *Buckley* cites as examples of "express advocacy." Nor do the advertisements contain other explicit words advocating the election of the featured candidates or exhorting viewers to take specific electoral action during the elections.

Id at 196. The court also rejected an argument that the link to the website could be grounds for treating the advertisements as express advocacy based on the fact that "the LitigationFairness.org site did not itself contain any statements advocating the election or defeat of candidates." *Id.* at 198. The court concluded that "favorable statements about a candidate do not constitute express advocacy, even if the statements amount to an endorsement of the candidate." *Id.* "[T]he First Amendment protects the Chamber's advertisements, and consequently the advertisements are not subject to regulation...." *Id.* at 199.

DISCUSSION

The Commission should find no reason to believe that the Chamber violated the corporate prohibition on expenditures because the content of the call does not contain express advocacy. First, the complaint does not – nor could it – allege that the call contained express advocacy pursuant to the *Buckley/MCFL* formulation of 11 C.F.R. § 100.22(a) because there is no unambiguous exhortation to vote for a clearly identified candidate. Second, the complaint's application of the faulty *Furgatch* formulation contained in 11 C.F.R. § 100.22(b) is not only legally untenable, but fails to make out an express advocacy claim even under that standard. Lastly, the Chamber's right to engage in speech like that contained in the call has been affirmed by case law.

1. The call does not contain – and the complaint does not allege – express advocacy as defined by 11 C.F.R. § 100.22(a).

After reviewing the content of the call, it is clear that it does not contain any of the express words of advocacy required by *Buckley* or *MCFL* codified at 11 C.F.R. § 100.22(a). This regulation contemplates three means by which words can constitute express advocacy: (1) a direct exhortation to vote for or against a clearly identified candidate; (2) a direct exhortation to vote for or against a position followed by an identification of a candidate that has taken that position; and (3) publication of a campaign slogan, or words to that effect, that include a candidate's name.

The only exhortation contained in the call is to visit a website "to learn more." There is no exhortation to vote for or against a candidate. Thus, the content of the call cannot be considered express advocacy under classifications (1) and (2) of the preceding paragraph. The only phrase in the call that might be considered a campaign slogan is the phrase movehawaiiforward. However, that phrase does not include a candidate's name and there has been no claim that it was used by a candidate as a campaign slogan. Accordingly, the content of the call does not qualify as express advocacy under classification (3) either.

The call clearly does not contain words of express advocacy as required by 11 C.F.R. § 100.22(a). The complaint concedes as much by failing to even allege satisfaction of the 11 C.F.R. § 100.22(a) express advocacy standard.

2. The complaint's reliance on the definition of express advocacy contained in 11 C.F.R. § 100.22(b) is not legally justifiable, but even if it is, the content of the call does not contain express advocacy under this vague and overly broad standard.

By limiting its express advocacy allegation to only that defined by 11 C.F.R. § 100.22(b), the complaint puts all of its eggs in a legally unsound basket. As discussed above, every federal court to have addressed subsection (b) has determined that it is not constitutionally valid.[5] Members of the Commission have

[5] As also described above, the *Furgatch* decision that was the model for subsection (b) has been rejected by every circuit court to have addressed it and has, in fact, been subsequently curtailed by the Ninth Circuit to regulate even less speech than subsection (b) by requiring "explicit words of advocacy." 328 F 3d at 1098.

agreed and have refused to apply subsection (b) when evaluating whether a communication contains express advocacy.

Though the Commission's General Counsel recently suggested in documents submitted in MUR 5634 that *McConnell* has breathed new life into subsection (b), he is incorrect. *McConnell* did nothing more than approve an "electioneering communication" standard that was neither vague nor overbroad. It applied *Buckley* to determine that the electioneering communication provision "raise[d] none of the vagueness concerns that drove [the] analysis in *Buckley*." 540 U.S. at 194. When *McConnell* explained that *Buckley*'s express advocacy restriction was "an endpoint of statutory interpretation, not a first principle of constitutional law," the Court was addressing only the efficacy of applying the express advocacy standard to the otherwise precise statutory language of the electioneering communication provision. *Id.* at 190. *McConnell* did not open the traditional understanding and application of express advocacy to reexamination.

In fact, *McConnell* reaffirmed the legal basis for limiting the definition of "expenditure" to the so-called "magic words" of express advocacy contained in subsection (a). *McConnell* explained that "the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities." *Id.* at 192 (emphasis added). "Consistent with that principle, our decisions in *Buckley* and *MCFL* were specific to the statutory language before us," the definition of the term "expenditure." *Id.* That statutory definition has not changed. Accordingly, the express advocacy standard embodied by subsection (a) continues to apply as does the reasoning of the circuit court cases striking down subsection (b) and other similarly vague and overbroad standards.[6]

The Commission should not subject speech to a legal standard that has been so thoroughly discredited. Accordingly, the Commission should find no reason to believe that a violation has been committed based on 11 C.F.R. § 100.22(b) because of the regulation's lack of legal authority.

---

[6] In MUR 5634, the General Counsel attempted to discredit the circuit court cases that declared subsection (b) unconstitutional because they "appeared to proceed, at least in part, from an understanding that express advocacy is a constitutional imperative" General Counsel's Brief at 9 (Dec. 14, 2005) (emphasis added). The use of the caveat "at least in part" is telling Those cases thoroughly examine and accept the underlying rationale of *Buckley* that, as explained above, still applies after *McConnell*. *See Maine Right to Life Comm , Inc v FEC*, 914 F. Supp 8, 12 (D Maine 1996), *aff'd*, 98 F 3d 1 (1st Cir. 1996); *Virginia Soc'y for Human Life, Inc* , 263 F.3d at 391-92.

Even if it applied subsection (b) to the call, the Commission would quickly see that it does not contain express advocacy under this standard either. 11 C.F.R. § 100.22(b) requires that the communication contain an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" upon which "[r]easonable 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." The complaint suggests that the salutation to "'absentee voters' to hear an 'important message about Congressman Ed Case'" is an "electoral portion" that when coupled with a description of Mr. Case's background and positions is "unmistakable, unambiguous, and suggestive of only one meaning," that absentee voters "cast their ballots in favor of Mr. Case."

However, the "electoral portion" of the call is simply a reference to absentee voters along with information about a federal candidate that the Commission's rules specifically permit and cannot, without more, be grounds for a finding of express advocacy. Furthermore, the complaint misses the obvious "meaning" of the call – to provide information about Mr. Case – and the fact that the information might encourage listeners to vote against, not for, Mr. Case.

a. The "electoral portion" of the call is specifically allowed by FEC rules and does not trigger regulation.

The only portion of the call that is related to voting or an election is the salutation to absentee voters. Contrary to the assertion in the complaint, mentioning voting, voters, or elections in a communication that describes a candidate's background and positions on issues does not constitute express advocacy. The Commission's regulations specifically permit communications of this sort and require that express advocacy be based on something more.

The Commission's regulations permit corporate-funded "voting communications," "voting recordings," and "voter guides" that mention voting, voters, or elections, and provide additional information about specific candidates. 11 C.F.R. § 114.4(b)(2), (4), (5). Each of these regulatory provisions include the caveat that the communications may not expressly advocate the election or defeat of a clearly identified candidate. Accordingly, the communications themselves do not, without more, constitute express advocacy.

The phone call at issue here fits comfortably within the structure of these regulatory provisions. Commission regulations specifically allow corporations to direct

communications about federal candidates to voters and do not treat them as express advocacy.[7] To accept the complaint's suggestion to the contrary would render the regulations nugatory.

b. The call is not "unmistakable, unambiguous, and suggestive of only one meaning" – to vote for Ed Case – upon which "[r]easonable minds could not differ."

The only meaning that can be clearly ascribed to the call is that it provides information about Mr. Case and encourages individuals to learn more about him. It does not urge people to vote for Mr. Case. This is not only obvious from the plain text of the call, but from news stories published about the complaint. *See* Derrick DePledge, *FEC to investigate calls for Case*, Honolulu Advertiser, Sept. 19, 2006 ("The chamber's calls describe Case as supporting tax cuts that help Hawai'i families and expanding small-business healthcare plans. The calls direct voters to a chamber Web site...."); Jerry Burris, *Awkward campaign bumps could unhinge Case's efforts*, Honolulu Advertiser, Sept. 20, 2006 ("[T]he Chamber's telephone calls do not directly urge people to vote for Case...."). Accordingly, the complaint's conclusion that the call's "unmistakable ... one meaning" – that absentee voters "cast their ballots in favor of Mr. Case" – is belied by the content of the call and the "reasonable minds" that authored the above-quoted press articles.[8]

The call's "unmistakable ... one meaning" is simply to provide information and encourage voters to learn more about Mr. Case. The express advocacy inquiry must end there. But for the sake of argument – and to disprove the complaint's suggestion to the contrary – it is worth noting that simply providing voters with

---

[7] *See also* Statement Of Reasons, MUR 5154, Vice Chairman Smith, Commissioners Mason & Toner (Dec 6, 2003) ("Were we to adopt the approach set forth in the General Counsel's report, however, 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. The better view is to conclude that this message does not fall within the narrow confines of 'express advocacy' as articulated in cases and in our regulations ")

[8] In addition, the true meaning of the call – to provide information about Mr. Case – is consistent with the Commission's previously discussed regulations encouraging corporate speech that provides information about candidates *See* 11 C.F R. § 114.4(b)(2) ("*Registration and voting communications*"), (4) ("*Voting records*"), (5) ("*Voting guides*") The call, like any other communication contemplated by these regulations, was an attempt to advance the general societal interest in informing the electorate.

information about Mr. Case cannot be "unmistakable ... and suggestive of only one meaning," that voters "cast their ballots in favor of Mr. Case." Commentators in Hawaii have taken some of the same information contained in the call and have concluded that it was a basis for voting against Mr. Case, not for him.

The call explains:

> Ed Case supports tax cuts that have helped put more money in the pockets of Hawaii's families. Ed Case also supports Small Business Health Plans, which would give small businesses and the self-employed greater access to affordable health plans. Ed Case has made the tough decisions that are right for Hawaii, even if it's not popular with partisan politicians.

A commentator on The Honolulu Advertiser Discussion Board noted the three issues raised in the above-quoted portion of the call, i.e., tax cuts, health care, and party loyalty, as reasons why Hawaii voters voted against Mr. Case. *See* Posting of Justin Thyme to The Honolulu Advertiser Discussion Board > Local News Forums > Primary election forum, http://the.honoluluadvertiser.com/board/showthread.php?threadid=8788 (Oct. 2, 2006, 2:50 AM) ("In Ed Case many Hawaii voters saw an opportunistic candidate who posed as a Democrat but actually supported pro-GOP positions on virtually every issue that matters – for instance, ... taxes ... and health care.... Case voted with Republicans in favor of tax breaks for the super-rich. Repeatedly.")

Nonetheless, the complaint suggests that the call's presentation of the information "in glowing terms" is enough to be "unmistakable ... and suggestive of only one meaning," to vote for Mr. Case. The U.S. Court of Appeals for the Fifth Circuit has explicitly rejected this claim stating that "communications that discuss in glowing terms the record and philosophy of specific candidates ... do not constitute express advocacy." *Chamber of Commerce*, 288 F.3d at 197-98 (emphasis added). Furthermore, members of the Commission have acknowledged that presenting information with a particular bias is not enough for a finding of express advocacy. *See* Statement Of Reasons, MUR 5154, Vice Chairman Smith, Commissioners Mason & Toner (Dec. 6, 2003) ("We acknowledge that the Sierra Club's guide contains a message that the environment is an important issue, and suggests to the reader that Robb's record is better from the Sierra Club's perspective. It also

mentions voting, as would most (if not all) permissible voter guides.... [T]his message does not fall within the narrow confines of 'express advocacy'....").

Accordingly, the "unmistakable ... one meaning" of the call is to provide information to voters. Such speech by corporations is encouraged by the Commission's regulations. The call cannot be rightly construed to have any other "unmistakable ... one meaning."

3. The Chamber's right to engage in speech like that contained in the call has been firmly established by case law.

The conduct complained of is almost identical to that which the U.S. Court of Appeals for the Fifth Circuit determined could not be regulated as express advocacy. Like the Chamber's advertising at issue in the Fifth Circuit, the call identified an individual who was a candidate for elected office and provided information about the individual. Similarly, the call encouraged the listener to learn more by visiting a website. The website contained biographical information about Mr. Case and Mr. Akaka and their positions on various issues and did not expressly advocate the election or defeat of either individual.[9]

Though the precise content of the speech at issue before the Fifth Circuit and here was different, the structure of the communications was the same. The communications provided information about candidates without using explicit words exhorting specific electoral action. The Fifth Circuit has vindicated the Chamber's right to engage in such speech. The FEC should do the same.

CONCLUSION

This complaint must be dismissed due to the statutory procedural violations committed by the FEC when initiating this MUR. Alternatively, the Commission

---

[9] The material on the website fits firmly within the FEC's regulatory allowance at 11 C F R § 114.4(c)(5) for corporate "voter guides "

should find no reason to believe that the call constituted prohibited corporate express advocacy by the Chamber.

Sincerely,

Jan Witold Baran
Caleb P. Burns

Enclosures