FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: December 8, 2000

SUBJECT: Statement of Reasons for MUR 4922

Attached is a copy of the Statement of Reasons for MUR 4922 signed by Commissioner David M. Mason, and Commissioner Bradley A. Smith.

This was received in the Commission Secretary's Office on Thursday, December 7, 2000 at 4:20 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Disclosure

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In re Suburban O'Hare Commission	)	**MUR 4922**

STATEMENT OF REASONS

On November 7, 2000, the Commission rejected the General Counsel's recommendation in MUR 4922 that it find Reason to Believe that respondent Suburban O'Hare Commission violated 2 U.S.C. Sections 441(b), 434(c), and 441d. Instead, the Commission divided 3-3 on whether to find Reason to Believe, and accordingly closed its file.[1] We believe that the Complaint fails to allege a violation of the Act, as the Respondent did not engage in the express advocacy necessary to subject its activities to the terms of the Federal Election Campaign Act (FECA); alternatively, even if the Act were violated, we would have voted to dismiss this matter as an exercise of our prosecutorial discretion.

I. Complaint and Response

The Complaint[2] alleges that the Suburban O'Hare Commission, a consortium of approximately 15 Illinois municipal corporations organized to represent the interests of citizens affected by O'Hare International Airport, and funded by assessments levied upon its member municipalities and grants from the state of Illinois, engaged in express advocacy on behalf of U.S. Representative Henry Hyde in the 1998 general election.[3] This alleged express advocacy took the form of a publication entitled "SOC News, distributed on or about October 30, 1998. A partial copy of the publication was attached to the Complaint, and a full copy to the Response. It's contents are also discussed at

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[1] Vice Chairman McDonald and Commissioners Thomas and Sandstrom voted in favor of the General Counsel's recommendations. Chairman Wold and Commissioners Mason and Smith voted against the recommendations.

[2] The complaint was filed on September 3, 1999, by Brent Christensen, U.S. Representative Henry Hyde's opponent in the 2000 election. Another complaint filed by Mr. Christensen against the Suburban O'Hare Commission, MUR 4896, was dismissed by the Commission in February 2000, using its prosecutorial discretion.

[3] Complaint, Para. 1-2, 4, 8-9.

length in the First General Counsel's Report.[4] Respondent argues that the SOC News did not rise to the level of express advocacy under any standard. It further argues that even if it did engage in express advocacy as defined in 11 C.F.R. 100.22(b), that section of the Commission's regulations is unconstitutional.[5]

II. Analysis

A. Express Advocacy

1. General Standards

As the First General Counsel's Report notes,[6] Section 441d, by its terms, and Sections 434(c) and 441b, as interpreted by the Supreme Court,[7] apply to independent expenditures only when they include "express words of advocacy," of the election or defeat of a clearly identified candidate.[8] In *Buckley v. Valeo*, 424 U.S. 1 at 44, n. 52, the Supreme Court indicated that "express words of advocacy" would be limited to expressions "such as 'vote for,' 'elect,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"

Following the Supreme Court's decisions in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 at 249 ("*MCFL*"), the Commission's regulations define "expressly advocating" as 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 campaign slogan(s) or individual words(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

[4] MUR 4922, First General Counsel's Report filed October 23, 2000, at 14-16 (hereinafter "First General Counsel's Report").
[5] Response at 10-15.
[6] First General Counsel's Report at 4, 9.
[7] *Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).
[8] We need not address in this MUR whether or not *coordinated* expenditures which do *not* contain express advocacy are subject to these provisions of the Act, as there is no claim or evidence of coordination.

> 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush,' or 'Mondale!'" ...[9]

However, the Commission's regulations go on to offer a second, alternative definition of "expressly advocating" at 11 C.F.R. 100.22(b). This section defines as "expressly advocating" any communications 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."[10]

On its face, the complaint in this MUR seems to allege that the communication at issue included express advocacy as defined in part (b) of the regulation. The complaint does not cite to this or any other specific section of the Act or our Regulations, but paragraph eight of the complaint states, "'SOC News' as herein alleged, when read in its totality and drawing all reasonable inferences, expressly advocated the election of several candidates including Henry Hyde ...," a standard which seems to suggest an analysis under 11 C.F.R. 100.22(b). Thus we consider it first.

2. Analysis Under 11 C.F.R. 100.22(b)

11 C.F.R. 100.22(b) has been a source of controversy since it was promulgated. The specific regulation has been found to be unconstitutional by the U.S. Court of Appeals for the First Circuit and in effect by the U.S. Court of Appeals for the Fourth Circuit,[11] and by a Federal District Court in the Second Circuit.[12] Additionally, an Iowa state statute using identical language has been held to be unconstitutional by the U.S. Court of Appeals for the Eighth Circuit.[13] Indeed, in January of 2000, the United States District Court for the Eastern District of Virginia issued a nationwide injunction

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[9] 11 C.F.R. 100.22(a).
[10] 11 C.F.R. 100.22(b)
[11] *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).
[12] *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998).
[13] *Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963 (8th Cir. 1999).

prohibiting the Commission from enforcing Section (b).[14] It is tempting to argue that the existence of this nationwide injunction should settle any question of proceeding under Section (b)'s definition of express advocacy. However, we believe it best not to end there. The injunction is presently under appeal before the U.S. Court of Appeals for the Fourth Circuit. Thus, the injunction could be lifted before the statute of limitations would run in this case.[15] The injunction prohibits the Commission from "enforcing" the regulation;[16] however, a mere finding of Reason to Believe based on Section (b) may be proper in facilitating internal administration of the caseload during the pendency of the Commission's appeal, without amounting to "enforc[ment]" of the regulation. Thus we believe it appropriate to address Section 110.22(b).

We are in agreement with those courts which have held that 11 C.F.R. 100.22(b) is unconstitutional. The regulation purports to be based on the decision of the U.S. Court of Appeals for the Ninth Circuit in *FEC v. Furgatch,* 807 F. 2d 857 (9th Cir. 1987). However, in fact the regulation is based on an incomplete and selective interpretation of *Furgatch*. In *Furgatch*, the Court held that:

> We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated.[17]

Section 100.22(b), however, omits *Furgatch's* requirement that there be a "clear plea for action,"[18] and, unlike *Furgatch,* fails to exempt speech that is "merely informative." Thus, it goes quite further than *Furgatch* itself, providing for the regulation of much

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[14] *Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp.2d 668 (E.D. Va. 2000).

[15] The General Counsel has calculated that the statute of limitations would run on October 30, 2003. First General Counsel's Report at 1. We note that it would not be necessary for the Fourth Circuit to reverse its prior holding in *FEC v. Christian Action Network,* 110 F. 3d 1049 (4th Cir. 1997), finding that section (b) is an unconstitutional infringement on First Amendment rights, for it to lift the nationwide injunction, thereby allowing enforcement of the regulation in other circuits.

[16] 83 F. Supp. 2d at 677.

[17] 807 F. 2d at 864.

[18] *See Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp.2d 677.

speech that does not expressly advocate the election or defeat of a clearly identified candidate. We believe that if *Furgatch* remains good law, it cannot justify this broad regulation. As the Fourth Circuit has stated:

> "[T]he simple holding of *Furgatch* was that, *in those instances where political communications do include an explicit directive to voters to take some course of action,* but that course of action is unclear, "context" – including the timing of the communication in relation to the events of the day – may be considered in determining whether the action urged is the election or defeat of a particular candidate for public office.[19]

No federal appellate court has cited *Furgatch* approvingly for anything more. Some federal courts have argued that *Furgatch* was wrongly decided under any circumstances.[20] However, if *Furgatch* has any validity, such validity is contingent, it appears, on this narrow reading. Section 100.22(b), however, goes much further. The regulation includes within the broad sweep of "express advocacy" all communications clearly understood to be for or against one or more candidates. This goes beyond the language of *Furgatch* and beyond the constitutional constraints set out by the Supreme Court in *Buckley* and *Massachusetts Citizens for Life.*

Proponents of a more expansive definition of express advocacy, such as that provided in Section 100.22(b), assert that such a test is needed in the "real world" in order to separate "sham issue advocacy" from "real issue advocacy." We believe that this misinterprets the purpose of the express advocacy test. The test does not exist to provide guidelines for government officials to separate "sham" speech from authentic issue speech. It is not intended to be a carefully wielded regulatory scalpel. Rather, the purpose of the express advocacy test is to provide groups and individuals with a bright line for determining in advance, with a very high level of certainty, whether their speech is protected, or whether their intended speech might subject them to expensive litigation. The absence of such a bright line distinction, said the Court in *Buckley:*

> "puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty

[19] *FEC v. Christian Action Network,* 110 F.3d at 1054 (emphasis in original).
[20] *FEC v. Christian Action Network,* 110 F. 3d 1049; *Virginia Society for Human Life, Inc. v. FEC,* 83 F.Supp.2d at 668

> whatever may be said. It compels the speaker to hedge and trim."[21]

The *Buckley* Court was well aware that the express advocacy test would allow much speech which might influence federal elections to go unregulated, adding, "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign."[22]

Section 100.22(b) attempts to put in place a reasonable person standard that we think is untenable under the constitutional principles of *Buckley* and *Massachusetts Citizens for Life*. The purpose of the express advocacy standard announced in those cases was to avoid such subjectivity. Thus we agree with the First, Fourth, and Eighth Circuits, and the Southern District of New York, that Section 100.22(b) is unconstitutional.

We do not take lightly our obligation to enforce regulations, even those that seem to us to be misguided, so long as they remain on the books. However, we, too, have taken an oath to uphold the Constitution. Where a regulation appears to us to be unconstitutional, and where our interpretation has found unanimous support from each of those federal courts which have ruled on the issue,[23] we believe it a betrayal of our public trust to continue to enforce that regulation.

Finally, even if 11 C.F.R. 100.22(b) were a constitutional standard for defining express advocacy, we are not convinced that the standard has been met. The standard calls for reading the communication "as a whole," among other things, and requires that "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates." We recognize that the SOC News favorably describes Rep. Hyde's proposal for a new airport, and refers to the congressman as a "tenacious and aggressive fighter on our behalf on the issues of O'Hare expansion." It also urges the reader, at the bottom of each page, "Vote on Nov. 3." However, nowhere does the newsletter urge specific action as it regards Rep. Hyde. Rather, it states only that "it is essential that we have a strong and knowledgeable advocate on this issue as our Congressman," a description not necessarily limited to Rep. Hyde, nor denied to his opponent. If we are to read the communication as a "whole," we note that page 4 of the publication prominently features a scorecard of "candidates' positions on O'Hare Expansion (New Runways) and New Regional Airport." The scorecard does not even list

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[21] *Buckley v. Valeo*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516 (1945)).
[22] Id. at 45.
[23] Several other federal courts have issued rulings which, while not ruling on the specific language of 11 C.F.R. Sec. 100.22(b), support a standard for determining express advocacy which we believe is incompatible with Sec. 100.22(b). *See e.g. FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F. 2d 45 (2d Cir. 1980); *FEC v. Survival Education Fund, Inc.*, 1994 U.S. Dist. Lexis 210 (S.D.N.Y. 1994), *affirmed in part and reversed in part on other grounds*, 59 F. 3d 1015 (10th Cir. 1995); *FEC v. American Federation of State, County & Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979).

candidates for Congress, neither Rep. Hyde nor others. It also includes a disclaimer stating that the SOC "does not endorse any particular candidate." The letter states that, "we believe it is critical that you know the positions of the major candidates on these issues and equally important that you vote on November 3."[24] But readers are not asked to vote solely on this issue or any other. We would compare this with the facts of *Furgatch*, the erstwhile basis for Section 100.22(b). In *Furgatch*, the defendant had placed an ad criticizing President Carter's record, stating that he would continue to do the things in question if re-elected, and exhorted voters, "Don't let him do it."[25] Unlike that communication, the one at issue here includes no exhortation, but merely relates information on issues and urges voters to consider that information. Thus there is more room for "reasonable minds" to "differ." We note that the Ninth Circuit considered *Furgatch* a "very close call."[26]

Thus, while we consider the sounder analysis to be one which avoids any reliance on Section 100.22(b), due to the our belief that the section is unconstitutional, we do not agree that even under the standard of that section, this case fits the definition of express advocacy.

B. Analysis Under 11 C.F.R. 100.22(a)

Although the complaint seems to rely on Section 100.22(b), we are assured by the General Counsel that this MUR may proceed under 11 C.F.R. 100.22(a), with the communication constituting express advocacy even under that more confining definition of the phrase.[27] We disagree.

The General Counsel makes no attempt to suggest that the SOC News contains the type of explicit words that appear as examples of express advocacy in *Buckley* – words such as "vote for," "elect," etc.[28] However, the Counsel suggests to us that the SOC News is similar to the facts found in *Massachusetts Citizens for Life*, in which the Court found express advocacy

In *MCFL*, the defendant published a "special edition" of the Massachusetts Citizens for Life Newsletter in May, 1978, before the state's primary elections. The front page was headlined, "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "no pro-life candidate can win in November without your vote." "VOTE PRO-LIFE" was printed in large bold letters on the back page, with a coupon provided to be clipped and taken to the polls to remind voters of the names of "pro-life" candidates. A scorecard noted whether or not the candidates agreed with MCFL on three key issues. Additionally, certain candidates were marked with an asterisk,

[24] Response, Exhibit 1.
[25] 807 F.2d at 858.
[26] Id. at 861.
[27] First General Counsel's Report at 18.
[28] 424 U.S. 1 at 44, n.52.

those being incumbents who had made "a special contribution to the unborn in maintaining a 100% pro-life voting record...." Of over 400 candidates whose voting records were listed, 13 were identified with photos. All thirteen had perfect ratings on the scorecard.[29] The Court found this to be express advocacy because, "the publication not only urges voters to vote for 'pro-life' candidates, but also identifies and provides photographs of specific candidates fitting that description."[30]

Unlike the newsletter in *MCFL*, the SOC News never urges readers to vote in any particular manner. It is true that readers are urged to "Vote on Nov. 3." It is true that readers are told that "the new Governor, the new United States Senator, and our Congressman will be key players in the decisions as to O'Hare expansion." They are told that "your vote on November 3 for candidates for these offices will decide your future." Voters are told that SOC wants them to know "the positions of the major candidates on these issues." The newsletter describes at length the alleged problems of O'Hare and SOC's favored solution, the "Hyde-Jackson" proposal.[31] But at no point are readers urged to "vote for candidates who oppose airport expansion," or anything similar. No candidates are pictured, or specifically identified as being "pro-SOC," for example.

Ultimately, then, the General Counsel's report comes to rely on this paragraph:

> "Congressman Hyde has been a tenacious and aggressive fighter on our behalf on the issues of O'Hare expansion. He recently single-handedly defeated attempts to add more than 60 new slots at O'Hare. Congress has announced that next year will be the 'Year of Aviation' in Congress. The debate over O'Hare expansion and construction of a new regional airport will be at the center of the action. It is essential that we have a strong and knowledgeable advocate on this issue as our Congressman."[32]

The General Counsel argues that this is the equivalent of claiming, "Congressman Hyde is pro-life," as in *MCFL*.[33] However, unlike the newsletter in *MCFL*, readers are not asked to vote in any particular way. Candidates, including Mr. Hyde, are not specifically identified as "pro-SOC" and voters are not asked to vote "pro-SOC."

While the case does bear similarities to *MCFL*, we believe that a better comparison is ultimately found in *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*CLITRIM*). In that case, the defendants distributed a "scorecard" which, after making clear "CLITRIM's stand against higher

[29] 479 U.S. at 243-44.
[30] Id. at 249.
[31] *See* First General Counsel's Report at 14-15.
[32] *See* First General Counsel's Report at 16, and Exhibit 1 to Complaint.
[33] First General Counsel's Report at 17.

taxes and 'Big Government' in favor of lower taxes and 'Less Government'," set forth the incumbent congressman's record on 24 issues, recording each vote as either "For Lower Taxes and Less Government," or for "Higher Taxes and More Government." On 21 of the 24 issues, the congressman was marked for "higher taxes and more government." The congressman's photo accompanied the ranking. As in this MUR, his opponent was not discussed, although the leaflet also made no mention of the coming election. Readers were told to "keep an eye on how your representative votes on measures which increase your total taxes," and reminded that, "You are the boss. And don't ever let your representative forget it." The scorecards were distributed shortly before the election.[34]

The primary difference we see between *MCFL* and *CLITRIM* is the exhortation to "vote pro-life," and the identification of specific candidates as being "pro-life," in *MCFL*. In MUR 4922 there is an exhortation, but it is the generic language, "vote," not the specific exhortation to vote for particular candidates or even for particular views, as in *MCFL*. As such, this case occupies something of a middle ground. The General Counsel would have this exhortation to general civic duty subject the speech involved – which is otherwise clearly issue speech – to regulation. We think that this is dangerous, however, because organizations such as the League of Women Voters and other non-partisan civic groups often publish voter guides which explicitly urge citizens to "vote" and which then include language describing the positions of candidates on important issues. The subjective effect of these responses on particular readers may be to lead readers to believe that one candidate or another is favored. But we do not believe that issue advocacy should be turned into "express advocacy" merely because, in another portion of the same flyer, readers are urged generically to do a civic duty. In short, what makes for express advocacy in *MCFL* is the exhortation to vote for specifically identified "pro-life" candidates – not to vote generally. Such is the case whenever express advocacy is found. For example, in *Furgatch* the exhortation was not to "let him do it," where "him" clearly referred to candidate Jimmy Carter, and "do it," referred to Carter's agenda: in other words, specific action relative to a specific candidate.

The potential results of the General Counsel's pro-regulatory interpretation are apparent in this MUR. Leaving aside the newsletter's description of Congressman Hyde as "a tenacious and aggressive fighter on our behalf on the issues of O'Hare expansion," the remaining text of the newsletter, in the context of discussing issues, necessarily praises Hyde because it endorses the "Hyde-Jackson" plan to solve the problem. The reader is informed that "Congressman Henry Hyde and Congressman Jesse Jackson, Jr. – a Republican and a Democrat – have offered a bipartisan "WIN/WIN" solution.... The Hyde-Jackson proposal keeps all the economic benefits associated with air traffic growth in the metropolitan Chicago region." Bold letters state, "What's the Solution – the Hyde-Jackson Partnership." This is clear issue advocacy of the purest sort, yet obviously it could certainly dispose readers to favor Representative Hyde. This potential for issue ads to influence voting was recognized by the *Buckley* Court, which noted that, "the

[34] 616 F. 2d at 51.

distinction between discussion of issues and candidates and the advocacy of election or defeat of candidates may often dissolve in practical application."[35] We do not believe that protected issue advocacy of this sort, in a publication discussing a number of candidates, becomes express advocacy for one specific candidate merely because the civic-minded reminder to "Vote on Nov. 3" is written across the bottom of the page. The purpose of the express advocacy test, we stress again, is to make it unnecessary for speakers to divine the effects of their message on voters, or for government officials to make judgment calls of this kind as to whose speech is protected.

We are left to conclude that while this is indeed a close call, both precedent and the policy behind adoption of the express advocacy test point against a finding of express advocacy in the SOC News.

B. Exercise of Prosecutorial Discretion

Even if we believed that the SOC News contained express advocacy, we would vote to close the file in this matter, in the exercise of our prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985).

Under the Supreme Court's ruling in *MCFL*, Section 441b's prohibition on express advocacy independent expenditures from a corporation's general treasury cannot be constitutionally applied to a class of organizations that, although corporate in form, do not present the dangers that 441b is designed to prevent. To meet this exemption, corporations should have been formed for the express purpose of promoting political ideas; they should not engage in business activities; they must not have shareholders or other persons with a claim on assets and earnings; they should not have been established by a corporation or labor union; and they should have a policy of not accepting contributions from corporations or unions.[36] FEC regulations at 11 C.F.R. 114.10(c) track this criteria, adding as a final criteria that the corporations be organized under 26 U.S.C. Section 501(c)(4). Even if SOC qualified for this exemption, it could still be required to report to the FEC if its independent express advocacy expenditures exceeded $250 in the calendar year in question.

As noted in the First General Counsel's Report, a review of available documents indicates that SOC was not formed by a corporation or union, and was formed to promote "political ideas." It appears to be financed by both cash and in-kind contributions from its member municipalities.[37] The General Counsel notes that "it is not known at this time whether the SOC has accepted, directly or indirectly, funding from any corporations or labor organizations... or had a policy of not doing so."[38] But there is no evidence now on file, and no allegation in the complaint, that it does so, and we believe it would be odd if

[35] 424 U.S. at 42.
[36] 479 U.S. at 264.
[37] First General Counsel's Report at 20-21.
[38] Id. at 21.

that were the case for this type of organization. Nor is there any evidence that it engages in business activities.[39] While it is possible that the organization spent over $250 to produce and mail the SOC News, there is no evidence now on file nor any allegation in the complaint that it did so. In any case, we doubt that the amount spent was large. We note that the race for Representative Hyde's seat was not competitive – Mr. Hyde ultimately won with 67 percent of the vote, compared to 64 percent in 1996 and 73 percent in 1994.[40] It is highly doubtful that the SOC News had any serious effect on that race. Moreover, it appears to us, from the overall flyer and in particular the fact that the congressional candidates are not listed on the scorecard part of the flyer, that SOC's main concern was not with the congressional race at all. Finally, the complaint was filed nearly one year after the election in question, and there is no evidence that SOC continues to engage in such activities.

For all of these reasons, we believe the matter to be one of low significance and priority. Because of the difficult legal issues outlined in Part II-A, we believe that a prosecution in this case would involve substantial resources with at best a modest prospect of success, for a matter of relatively little importance.

Thus, following *Heckler*, we would decline to pursue this matter further even if we believed that express advocacy existed, and even if we were not under an injunction not to enforce our definition of express advocacy at 11 C.F.R. 100.22(b).

David M. Mason, Commissioner — Date: 12/7/00

Bradley A. Smith, Commissioner — Date: 12/7/00

[39] A U.S. Appellate Court has recently held that a non-profit, political corporation may qualify for the *MCFL* exemption from state law despite accepting "an insignificant amount" of corporate contributions and engaging in incidental business activities, *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999). The U.S. District Court for the Eastern District of North Carolina has more recently applied this reasoning to corporations subject to federal campaign finance law. *Beaumont v. FEC*, (2:00-CV-2-80(2), E.D.N.C., Oct. 3, 2000). This latter decision is on appeal. While these decisions are not dispositive in this case, they add to our hesitation in pursuing this matter, as it appears to us doubtful, given the lack of allegations or evidence to the contrary, that SOC engages in significant business activity or accepts substantial corporate contributions.

[40] CQ's Politics in America 2000, 438 (Philip D. Duncan & Brian Nutting, eds.)