WASHINGTON
LEGISLATIVE OFFICE

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By Fax to 202/219-3923 and U.S. Mail

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Re: Notice of Availability, Rulemaking Petition : Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication", 71 Fed. Reg. 13557 (March 16, 2006)

Dear Mr. Deutsch:

The American Civil Liberties Union ("ACLU") strongly urges the Federal Election Commission to initiate a formal rulemaking proceeding in response to the Petition for Rulemaking submitted on behalf of the AFL-CIO, Alliance for Justice, U.S. Chamber of Commerce, National Education Association and OMB Watch ("Petition"). The Petition seeks a regulatory exemption for certain grassroots lobbying communications from the definition of electioneering communications set forth at 11 C.F.R. § 100.29 (2005).

The ACLU is a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nation-wide devoted to protecting the principles of freedom and equality set forth in the U.S. Constitution and civil rights laws. In the 85 years since it was established, the ACLU has never endorsed or opposed a candidate for federal, state or local office. As the organization has grown in size and budget, however, broadcast ads have become an increasingly important part of its advocacy strategy, particularly concerning legislative proposals involving the USA Patriot Act, and other issues. These radio and television ads seek to alert the public to important civil liberties issues and to persuade the public to contact their elected representatives and urge them to take a position supportive of civil liberties.

The timing of the ACLU's lobbying ads is never determined by the electoral calendar. But the electoral calendar often determines when issues are brought up for a vote on the floor of Congress. For obvious reasons, elected officials like to build a record of accomplishment just prior to elections. Also, politicians often perceive a political advantage in forcing their opponents to cast a controversial vote just before elections are held. As a result of these factors, beyond the control of the ACLU, the organization's issue ads run in support of its legislative agenda often need to be run within the 60/30 day windows used to define BCRA's prohibition on corporate expenditures for electioneering communications. *See* 2 U.S.C. §434(f)(3)(i)(II). In October 2004, for example, the ACLU sponsored radio ads opposing several anti-immigrant provisions of a bill being considered by Congress to implement the recommendations of the 9/11 Commission. The timing of these ads resulted entirely from Congress' legislative schedule.

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Because of the ACLU's need to be heard on legislative issues when they arise, we were one of the plaintiffs who facially challenged BCRA's ban on electioneering communications on First Amendment grounds in *McConnell v. FEC*, 540 U.S. 93 (2003), and we filed a Brief *Amicus Curiae* in *Wisconsin Right To Life, Inc. v. FEC*, 546 U.S. ___ (2006)(*per curiam*) supporting the right of lobbying organizations and others to challenge the electioneering communications prohibition as applied to particular advertisements. Although the Supreme Court upheld the right of the ACLU and other groups to bring as-applied constitutional challenges to protect their First Amendment right to participate in the legislative process, the Court also noted that Congress specifically granted to the Commission authority to issue regulations exempting certain classes of communications "to ensure the appropriate implementation" of the statute. 2 U.S.C. §434(f)(3)(B). The regulatory approach authorized by Congress and urged in the Petition has a number of advantages for both the regulated community and the Commission itself, including the avoidance of costly and time-consuming litigation, frequently under the pressures created by the Congressional calendar, and the ability to develop guidance beyond the limited facts of a particular case.

Not only should the Commission immediately commence a formal rule-making proceeding in response to the Petition, but it should expedite that proceeding in order to permit the final rule to take effect before September 8, 2006, when the 60-day window begins for the up-coming federal general election. While it is, of course, difficult to predict what bills will be considered by Congress during the 60 days preceding the November 2006 federal election, there are a number of legislative proposals of great interest to the ACLU which could be considered by Congress during that period, including reauthorization of the Voting Rights Act, a proposed constitutional amendment to ban flag desecration, a constitutional amendment to ban same-sex marriage, and bills to restrict federal court jurisdiction. While the ACLU could file one or more as-applied challenges to protect its right to run

broadcast ads in connection with these legislative proposals, it would be far better if the Commission would adopt a regulation that would obviate the need for such litigation.

Finally, the Notice of Proposed Rulemaking issued in response to the Petition should seek comment not only on the specific proposal advanced by the petitioners but on related issues. The advantage of this approach is that it would allow the Commission to consider suitable safeguards for other genuine issue ads that might not be covered by the proposed exemption for grassroots lobbying communications.

Respectfully submitted,

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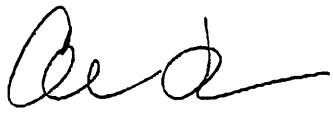

Caroline Fredrickson
Director