



Credit Union National Association

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April 17, 2006

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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COMMISSION
OFFICE OF GENERAL
COUNSEL
2006 APR 17 P 4:45

Re: Grassroots Lobbying Exception

Dear Mr. Deutsch:

Through these comments, the Credit Union National Association ("CUNA") urges the Federal Election Commission ("FEC" or "Commission") to adopt a grassroots lobbying exception to its electioneering communication regulations.¹ In short, the FEC should exercise the power granted to it by Congress and provide such an exception because, without it, incorporated nonprofits like CUNA are needlessly limited in representing their members and in opposing detrimental legislation during the corporate electioneering communication blackout periods – periods when Congress is often in session and acting on legislation.

Background on CUNA

CUNA is a trade association incorporated in the state of Wisconsin as a non-stock, non-profit corporation with members. It maintains offices in Washington, D.C. and Madison, Wisconsin. It is recognized as an organization exempt from federal income tax under 26 U.S.C. § 501(c)(6). CUNA represents 90% of the nation's 8,800 state and federal credit unions. CUNA was organized to, among other things, promote and improve business conditions relating to the operation of its members. CUNA's members consist of state- and federally-chartered credit unions as well as credit union leagues representing the 50 states and the District of Columbia. Through several Advisory Opinions, the Commission has recognized CUNA to be a federation of trade associations. See FEC Advisory Opinions 2000-15 & 1998-19.

¹ See FEC, *Rulemaking Petition: Exception for Certain 'Grassroots Lobbying' Communications from the Definition of 'Electioneering Communication,'* Rulemaking Petition: Notice of Availability, 71 Fed. Reg. 13,557 (Mar. 16, 2006) [hereinafter "Notice of Availability"].



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Mr. Brad C. Deutsch
April 17, 2006
Page Two

Legal Background

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress granted the Commission power to exempt certain communications from the application of the labor union and corporate prohibition on electioneering communications. Pursuant to this power, the Commission may exempt "any other communication" that is consistent with the statutory exceptions and does not "promote[] or support[] a candidate for [federal] office, or attack[] or oppose[]" such a federal candidate as per 2 U.S.C. § 431(20)(A)(iii). 2 U.S.C. § 434(f)(3)(B)(iv). The electioneering communication structure to which such an exemption would apply prohibits labor union- and corporate-funded television and radio ads within 30 days of a primary or 60 days of a general election if such ads (1) mention or feature a federal candidate; and (2) can be received by 50,000 or more persons within the candidate's state or Congressional District. *Id.* §§ 441b(a)(2) & 434(f)(3).

The Commission has not exercised its regulatory exemption power with respect to electioneering communications except for one exception related to state and local candidates, 11 C.F.R. § 100.29(c)(5), and one for certain charities, the latter of which has been rescinded, see FEC, *Electioneering Communications*, Final Rules, 70 Fed. Reg. 75,713 (Dec. 21, 2005). In fact, the Supreme Court noted the Commission's inactivity related to grassroots lobbying communications that are the subject of this pending Notice of Availability. "Although the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here." *Wis. Right to Life, Inc. v. FEC*, 126 S.Ct. 1016, 1017 (2006) (per curiam). Lacking a regulatory exemption upon which to make a ruling, the Court remanded the suit to the District Court to consider the merits of the entity's as-applied challenge. *Id.* at 1018.

Discussion

Because CUNA represents its state leagues and member credit unions, which have millions of individual credit union members across the country, it is imperative that CUNA keep constant vigilance over federal legislation that may negatively affect the interests of these individual members. Correspondingly, when faced with detrimental legislation, it is imperative that CUNA be able to utilize its right under the Constitution to petition Congress and to try to stop such legislation. In order to use this Constitutional right effectively, CUNA must have at its disposal every avenue of grassroots communication and advocacy, including targeted, legitimate issue advertisements on radio and television. (Radio and television ads not only reach CUNA's diverse

Mr. Brad C. Deutsch
April 17, 2006
Page Two

membership, but they also reach the local decision-makers and influential persons who can bring additional legislative pressure to bear on Members of Congress.) Although FEC rules on electioneering communications may provide for corporate pre-election blackout periods, the need for timely and effective advocacy never takes a vacation.

Nothing prohibits Congress from holding session during the corporate electioneering communication blackout periods. Indeed, Congress is often in session within 60 days of general elections, passing bills and sending legislation up to the President for his signature. Congress always is in session for at least some portion of all of the 30-day pre-primary corporate blackout periods that occur during election years. As a result, the risk of legislation detrimental to the interests of our millions of members is always at hand—as is the need for strong and effective advocacy. Indeed, the pre-election risk may actually be higher today in certain legislation areas because lawmakers know that, under the current regime and unless and until the courts or the FEC take action, corporations will be unable to respond with their most effective tool—grassroots ads on radio and television. Without an exception, lawmakers are insulated from their constituents. (Vital legislation, of course, also can be favorable to our members' interests—indeed the need for strong and effective advocacy works both ways.)

Moreover, Congress never intended to prohibit grassroots advertising, even during election years. Instead, Congress recognized the Constitutional necessity and public policy importance of legitimate issue ads. For example, according to Senator Jeffords, the electioneering communication provisions of his Snowe-Jeffords Amendment

do not stop the ability of any organization to urge their members and the public through grassroots communications to contact their lawmakers on upcoming issues or votes. That is one of the biggest distortions of the [electioneering communication] provisions. Any organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers. Under the [electioneering communication] provisions any organization still can undertake this most important task.

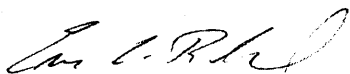
147 Cong. Rec. S2813 (daily ed. Mar. 23, 2001) (statement of Sen. Jeffords). Senator Snowe expressed the same concerns: "We are not talking about ads that are purely designed to convey an issue." 147 Cong. Rec. S2458 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe). Referring to the Wellstone Amendment, which eliminated the exception in the electioneering communication prohibition for incorporated 501(c)(4)s and 527s, Sen. Wellstone stated "I am not talking about ads . . . that are legitimately trying to influence policy debates—rather, this amendment only targets

those ads that we all know are trying to skew elections but until now have been able to skirt the law. I am not talking about legitimate policy ads. I am not talking about ads that run on any issue." 147 Cong. Rec. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone).

For these reasons, CUNA supports the petition for rulemaking that is the subject of this *Notice of Availability*. The proposal's diverse backing and common-sense approach show that the proposed regulation changes would help clarify the reach of the campaign finance laws and help CUNA protect the legislative interests of its members. With such changes, legitimate issue ads would not be forced off the air when a pre-election electioneering communication period overlaps with a heated legislative session and the need for legislative action. Through the proposed changes, CUNA's grassroots efforts would be free to air television and radio calls to action for real, pressing legislative matters.

Through BCRA, Congress gave the Commission the authority to craft tailored exceptions to the electioneering communication prohibition, and the Supreme Court recently referred to this authority, noting the Commission's lack of action with respect to grassroots activity. The subject proposal of this *Notice of Availability* is just such a tailored exception, ensuring that the legitimate issue advocacy being excepted does not "promote, support, attack, or oppose" a federal candidate. Without such an exception, effective advocacy is gagged, exposing CUNA's members and others to a risk that Congress will take adverse action when they cannot protect themselves. CUNA urges the Commission to adopt before this year's general election blackout period a grassroots advertising exception to the electioneering communication prohibition.

Sincerely,



Eric L. Richard
Executive Vice President & General Counsel