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LEGAL AFFAIRS

February 16, 2004

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

RE: Draft Advisory Opinion 2003-37

Dear Mr. Norton:

This letter is submitted on behalf of the National Association of Realtors® ("NAR") and concerns the proposed draft advisory opinion ("Draft AO") in response to Advisory Opinion Request 2003-37, submitted by Americans for a Better Country ("ABC.")

NAR is an Illinois not-for-profit corporation exempt from federal income tax under Section 501(c)(6) of the Internal Revenue Code. NAR engages in a variety of federal legislative and political activities intended to advance the interests of its members by improving the legal climate in which the members conduct their businesses.[1] NAR has carefully reviewed the Draft AO, as well as the substantial volume of comments submitted in connection with it. NAR's concern, like that of many other commenters, is that the language of the Draft AO appears to reach activities of NAR and like organizations that are not political committees and that are not regulated by the Federal Election Campaign Act ("FECA"), as amended by the Bipartisan Campaign Reform Act ("BCRA.") Thus, as more specifically discussed below, NAR urges the Commission to modify the Draft AO before adoption to clarify its application to the activities of organizations like NAR.

1. We recognize that the Draft AO is to be issued in response to the request of ABC, a political committee, and therefore, strictly speaking, its analysis applies only to organizations that qualify under the FECA as political committees. Nevertheless, the Draft AO is presently drafted in a way that infers that its analysis has considerably broader significance and that it applies equally to other organizations, including incorporated membership organizations like NAR.[2] The critical importance of such a modification of the Draft AO is underscored by the substantial volume of comments already filed with the Commission by other groups that, like NAR, are not political committees but who nevertheless have concerns about its impact on their activities.

[1] NAR has established and operates the Realtors® Political Action Committee ("RPAC"), a separate segregated fund registered with and filing monthly reports to the Commission. The Draft AO does not raise concerns related to the contribution and expenditure activities of RPAC, and for that reason this letter focuses on the potential application of the Draft AO to NAR.

[2] NAR leaves it to affected political committees to address the correctness of the Draft AO as applied to such entities, and offers this letter for the more limited purpose of urging the Commission to revise the Draft AO to clarify and appropriately limit its scope only to political committees.

The Draft AO notes that "[T]he Supreme Court found that public communications that promote, support, attack, or oppose a clearly identified Federal candidate 'undoubtedly have a dramatic effect on Federal elections.' " Draft AO 2-3, citing *McConnell v. FEC*, 540 U.S. ___, 124 S.Ct. 619, 675 (2003). In fact, a careful reading of the text in which that quote appears in *McConnell* reveals that it refers to public communications by political party committees, since it appears in the discussion of the definition of "Federal election activity," 2 U.S.C. 434(20)(A)(iii), a definition that has significance *only* to party committees. *McConnell* held that this definition of communications *by party committees* is not unconstitutionally vague, *McConnell*, at 675, n.64. The Draft AO, however, ignores that context of the Court's conclusions regarding public communications by party committees, and suggests that the same standard "is equally appropriate as the benchmark for determining whether communications made by political committees must be paid for by Federal funds (because) [B]y their very nature, all political committees, not just political party committees, are focused on the influencing of Federal elections." Further, the Draft AO raises even more confusion and uncertainty regarding the scope of its conclusions and their possible application to entities other than party or other political committees by citing *McConnell's* reference to "many of the targeted tax-exempt organizations (that) engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, *including waging broadcast campaigns promoting or attacking particular candidates*...." Draft AO at 3, n.2, citing *McConnell*, at 679 n.68 (emphasis in original.) Thus, the Draft AO expressly extends statutory concepts applicable to political party committees to other political committees, and by inference suggests possible application to other tax-exempt organizations that "wage broadcast campaigns" and thereby "engag(ing) in ...activities "for the purpose of influencing federal elections." This implied relationship between the "promote, support, attack, or oppose" standard and "wag(ing) broadcast campaigns . . . . for the purpose of influencing federal elections" is quite significant, because the latter language precisely mirrors the definition of "expenditure" in 2 U.S.C. 431(9), and 2 U.S.C. 441b(a) makes it unlawful for any corporation or labor organization to make "expenditures."

2. Even assuming that the Draft AO is correct in concluding that communications of the type described by ABC in its request may not be made by political committees using non-Federal funds, there are numerous reasons why such communications are entirely lawful if made by corporations, labor organizations or other organizations that are not political committees under the FECA.

a. First, prior to BCRA, it was quite clear that the FECA did not to prohibit or otherwise regulate communications by corporations, labor organizations and other non-political committees that mentioned Federal candidates, where the communications did not contain express advocacy and were not coordinated in any way with the candidate:

> Since our decision in Buckley, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. . . .
>
> Section 203 of BCRA amends FECA 316(b)(2) to extend this rule, ***which previously applied only to express advocacy***, to all "electioneering communications" covered by the definition of that term in amended FECA 304(f)(3), discussed above. 2 U.S.C.A. 441b(b)(2) (Supp.2003). . . .

McConnell, 540 U.S.,____, 124 S.Ct. at 694. (emphasis added). See also *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Me. Right to Life Comm., Inc. v. FEC*, 914 F.Supp 8 (D.Me.), aff'd per curiam, 98 F.3d 1 (1st Cir. 1996).

b. Second, any doubt that the BCRA was *not* intended to amend existing law to prohibit corporations and labor organization from making non-express advocacy, non-coordinated public political

communications that mention Federal candidates *except* to define and prohibit electioneering communications[3] is eliminated by the very existence of the electioneering communications provisions themselves. As noted above, pre-BCRA law was well-understood to prohibit only express advocacy communications by such organizations using non-Federal funds. BCRA did not amend the prior law with respect to such communications in any way, but merely defined a new additional category, "electioneering communications," of prohibited communications. Most fundamentally, however, if, as the Draft AO can be understood to suggest, Congress had intended to prohibit corporations and other non-political committee organizations from using non-Federal funds to make public communications such as those described by ABC in its request, the electioneering communications provisions would be rendered wholly irrelevant, since essentially all such communications that included any mention of a federal candidate, and not simply those meeting the carefully prescribed, "bright-line" statutory definition of electioneering communications, would be proscribed.

c. Third, the Supreme Court in *McConnell* acknowledged that Congress intended to address the narrow "express advocacy only" prohibition against corporate and labor organization use of non-Federal funds for communications that mention federal candidates, but that Congress' solution was *only* to broaden that prohibition to define and regulate electioneering communications, and nothing more.

In *McConnell*, the Supreme Court considered the constitutionality of the "electioneering communication" provisions added to the FECA by the BCRA The Court noted that with respect to both the disclosure requirements of section 304 of the FECA for expenditures "for the purpose of . . . influencing" a federal election as well as the limitations on expenditures "relative to a clearly identified candidate" under 18 U.S.C. 608 (e)(1), constitutional vagueness infirmities had been avoided in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), by construing those requirements to apply only with respect to expenditures for communications "that expressly advocate the election or defeat of a clearly identified candidate." *McConnell*, at 688, citing *Buckley*, at 80. The Court noted that this express advocacy limitation "was the product of statutory interpretation rather than constitutional command," but that "advertisers (can) easily evade the line by eschewing the use of 'magic words,'" even though "the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, (but) they are no less clearly intended to influence the election." Therefore, the Court noted, "Congress enacted BCRA to correct the flaws in it found in the existing system." It did so "by coin(ing) a new term, 'electioneering communication,' to replace the narrowing construction ... adopted by this Court in *Buckley*." *Id.*

In short, the Court recognized that Congress' intent in adopting the BCRA, and in particular the electioneering communications provisions of the BCRA, was only to add those provisions to the existing prohibition on express advocacy communications by corporations or others using non-Federal funds. Thus, the inference of the Draft AO that organizations other than political committees may be subject to a considerably broader prohibition on public communications that do not contain express advocacy and do not meet the detailed definition of electioneering communications, is unsupported by and inconsistent with the BCRA and Congress' intent in enacting it, as construed by the Court.

d. Finally, in its brief to the Court in *McConnell* the FEC itself recognized that the prohibition against communications that mention federal candidates by corporations and labor organizations and other entities that are not political committees is limited to express advocacy and electioneering communications. The following series of passages from the FEC's brief to the Court in *McConnell* irrefutably makes this clear:

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[3] Corporations or other organizations using non-Federal funds are also prohibited from making coordinated political communications. 11 C.F.R. 109.20-109.23.

[P]rior to BCRA, federal law (2 U.S.C. 441b) prohibited corporations and unions from using their general treasury funds to pay for electioneering advertisements that contained express advocacy, but left them free to spend their treasuries on electioneering advertisements that are considered by candidates and political consultants to be if anything more effective in influencing elections because they do not contain express advocacy. As discussed above, corporations and unions not only have taken note of that loophole, but they have in each of the past few federal election cycles funneled increasing amounts of their general treasury funds into federal elections through that loophole. (p.83)

Congress responded to (the) phenomena (of corporations and unions making the above-described advertisements) by enacting Title II of BCRA. As discussed above, Title II adjusted the longstanding prohibition on the use of corporate and union general treasury funds in connection with a federal election to cover "electioneering communications," as defined in BCRA § 201, that in all likelihood, based on the presence of certain objective factors, will affect the outcome of federal elections, even if they do not contain particular words of express advocacy. (p. 84) (citations omitted).

In light of the hundreds of millions of dollars spent by corporations and unions on advertisements virtually indistinguishable from electioneering advertisements funded by candidates themselves, ... Congress clearly needed to update the limits on corporate and union expenditures to prevent the evasion of the longstanding policy embodied in Section 441b. (p.90)

In defining the "electioneering communications" subject to BCRA's (non-federal) source limitation, Congress thus established a bright-line, readily administrable test that avoids the pitfalls that this Court identified in *Buckley*. (p.91)

[A]ny entity truly not interested in airing electioneering communications may easily avoid the source limitation on such communications by simply not referring to a candidate for federal office, running the advertisement outside the 30- or 60-day window, or running the advertisement outside the candidate's district. (p. 92)

Finally, and most revealing, the FEC explicitly conceded that under BCRA it remains lawful for corporations, unions and other non-political committees to use non-Federal funds to do precisely what ABC proposes to do in its request:

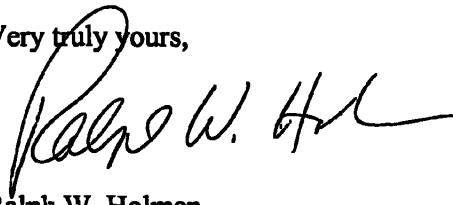
[T]he NRA (National Rifle Association, a not-for-profit, non-stock membership corporation within the meaning of 26 U.S.C. §501(c)(4)) can freely finance anywhere and anytime broadcast advertisements trumpeting the Second Amendment that do not refer to a particular candidate; it can freely complain about a particular Senator's crusade against gun rights without limitation in election cycles in which he does not stand for reelection and in 49 States even when he does run; and if it wants to complain about the Senator to his voters in the critical days before his election in a broadcast advertisement, it still may do so-it simply must act through a separate segregated fund[40].

[40]*In addition, the NRA may run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district* without even having to take the minimal step of using a separate segregated fund. (p.95)

Brief for Defendant Federal Election Commission, *McConnell v. FEC*, 124 S.Ct. 619 (2003) (emphasis added).

It is not necessary for the FEC to adopt a novel application of the FECA or the BCRA, but only to incorporate in any final version of the Draft AO it may adopt the position it has already advanced to the Supreme Court, and which the Court has itself embraced. NAR urges the FEC to address its concerns and those of hundreds of other similarly situated commenters by modifying the Draft AO before adoption to expressly confirm that corporations, labor organizations and other entities that are not political committees may engage in public communications that identify Federal candidates so long as such communications neither contain express advocacy nor qualify as "electioneering communications" under 2 U.S.C. §434(f)(3).

Very truly yours,



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