

United States Senate

WASHINGTON, DC 20510

October 1, 2007

By Electronic Mail

Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2007-16: Electioneering Communications

Dear Mr. Katwan:

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking 2007-16, published at 72 Fed. Reg. 50261 (August 31, 2007) ("NPRM"), which proposes changes to the Commission's regulations on electioneering communications in the wake of the Supreme Court's decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"). As the principal authors of Title II of the Bipartisan Campaign Reform Act ("BCRA"), we have a particular interest in ensuring that regulations adopted by the Commission accurately construe and implement that law.¹

Commenting on how to implement Title II after *WRTL II* presents something of a dilemma for us, since we believe the Supreme Court was mistaken in its judgment that BCRA could not constitutionally be applied to the ads at issue in that case. The objective test used in Title II was designed to satisfy constitutional requirements and allow the Commission to avoid the difficult factual and legal questions raised by individual ads that it must now consider. Nonetheless, we accept the Court's decision and offer these comments to assist the Commission in fulfilling its duty to fairly interpret and implement BCRA, in light of controlling Supreme Court interpretation.

¹ The other primary sponsors of Title II, Senator Jim Jeffords and Representative Marty Meehan, are no longer in Congress.

I. Scope of Rulemaking

The Wisconsin Right to Life case concerned the application of section 203 of BCRA, which prohibits corporations and unions from spending their treasury funds on electioneering communications, to ads run by WRTL in the summer of 2004. In *WRTL II*, the Court held that the Constitution barred the enforcement of that prohibition, and that prohibition alone, against WRTL's ads. Section 201 of BCRA, which requires all persons who run ads deemed to be electioneering communications to disclose their spending on such ads if it exceeds \$10,000 in a calendar year, was not at issue in the case. As noted in the NPRM, the plaintiff in *WRTL II* explicitly did not challenge the reporting requirements in its complaint. See NPRM, 72 Fed. Reg. at 50262. The NPRM continues:

Accordingly, the Commission could construe the Supreme Court's holding that the Act's electioneering communication funding restrictions are unconstitutional as applied to certain advertisements as not extending to the reporting requirements for electioneering communications.

Id. We submit that, in fact, this is the only proper construction of the Supreme Court's opinion. The reporting requirements were not at issue in the case. The Court did not analyze their constitutionality, and if it had, an entirely different legal framework would have been implicated. The Commission should not undertake such an analysis on its own, especially since the Court in *McConnell* upheld the reporting requirement against a facial challenge. See *McConnell v. FEC*, 520 U.S. 93, 201 (2003). That remains the governing law on the question of whether the requirements can constitutionally apply to electioneering communications, including the WRTL ads and any similar ads.

One of the main purposes of Title II of BCRA was to make sure that the public was informed of the identity of persons making expenditures on electioneering communications. The legislative history of BCRA and the record in *McConnell* are replete with examples of ads run by organizations with benign sounding names and of unknown origin. The reporting requirements of Section 201 were a significant reform in and of themselves, completely independent of the prohibition contained in Section 203. Those disclosure provisions apply not only to corporations and unions but to individuals and unincorporated associations who fund electioneering communications. And the severability clause in section 401 of BCRA was meant to underscore congressional intent that even if Section 203 were declared unconstitutional, other sections of the bill, including Section 201, should survive. The Commission should not now effectively throw out Section 201 based on an as-applied challenge to Section 203 that specifically and explicitly disclaimed any challenge to Section 201.

It is important to emphasize that *WRTL II* was a decision on an *as-applied* challenge to BCRA. It is certainly appropriate for the Commission to issue regulations to implement that decision so that other groups that plan to make similar communications don't have to file their own as-applied challenges. But it would not be appropriate to make changes in the regulations that relate to sections of the law that were not challenged.

II. The WRTL Exemption

We agree that the Commission should craft an exemption based on the *WRTL II* decision. The key question is whether an ad is the “functional equivalent” of express advocacy, even though it doesn't use any of the “magic words” of express advocacy. The plurality opinion in *WRTL II* lays out a test that the Commission should use to give the regulated community guidance on what ads will not be subject to the Section 203 prohibition. The NPRM's proposed general exemption in 11 CFR § 114.15(a) appropriately tracks the language of the decision.

We have no objection to a safe harbor for grassroots lobbying ads, as long as the regulations hew closely to the analysis provided in *WRTL II*. We want to highlight two points.

First, the Court's analysis of the specific ad at issue in *WRTL II* relied both on the conclusion that its content was “consistent with that of a genuine issue ad” and the conclusion that the content of the ad “lacks indicia of express advocacy.” *See* 127 S. Ct. at 2667. Therefore, proposed § 114.15(b)(1) properly requires that all four prongs of the test be met.

Second, the plurality opinion provides an important clarification of the kinds of ads that are the functional equivalent of express advocacy when it distinguishes the WRTL ads from the “Jane Doe” ads discussed in *McConnell*:

[The Jane Doe ad] condemned Jane Doe's record on a particular issue. WRTL's ads do not do so; they instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed, one would not even know from the ads whether Senator Feingold supported or opposed filibusters.

WRTL II, 127 S. Ct. at 2667 n. 6 (internal citations omitted). Based on this analysis, we believe that the Commission should make clear that ads that condemn the record of a candidate cannot qualify for the safe harbor. The phony issue ads that led to the enactment of Title II of BCRA were mostly ads that condemned the record of a candidate. We believe that such ads “take a position on the candidate's

character, qualifications, or fitness for office” and are the “functional equivalent of express advocacy.” To allow such ads to qualify for a safe harbor would fly in the face of the Court’s decision and nullify Section 203 entirely, which the Supreme Court specifically decided not to do.

The challenge before the Commission in developing these rules will be to be faithful to the Court’s decision and set out clear guidelines that will exempt genuine issue ads from the prohibition in Section 203. At the same time, the Commission must be mindful that the plurality did not reverse the *McConnell* holding that Title II is constitutional on its face. It left Section 203 in place with respect to some subset of electioneering communications, even if those ads mention issues. If the test set out in these regulations permits or encourages a return to the pre-BCRA days of advertisers simply avoiding the “magic words,” the Commission will have gone well beyond what *WRTL II* requires.

With this balancing in mind, we provide our views on the application of the safe harbor and exemption to the example ads in the NPRM. We agree with the Commission that Examples 1 and 3 should be exempt. Example 1 is one of the WRTL ads. Example 3, the marriage amendment ad run in Maine, notes the voting record of a candidate but does not condemn that record or comment on her character or fitness for office. Examples 2 and 4, both pre-BCRA sham issue ads, should not qualify for the safe harbor or the exemption. Example 2, the infamous Bill Yellowtail ad, does not even discuss a pending legislative issue. Example 4, the Ganske environmental ad, like the Jane Doe ads discussed in *McConnell*, strongly condemns the candidate’s voting record using language that certainly constitutes a judgment on his fitness for office, if not his character. It makes no reference to a specific legislative issue or upcoming vote.

Example 5, the pension fund ad, mentions both candidates in an election, and condemns the record on the pension issue of one of the candidates. Even changing the call to action to refer to a vote on legislation should not change the analysis. An ad that compares the record of two candidates and makes clear which the organization sponsoring the ad prefers cannot reasonably be interpreted as anything other than an election ad. Put another way, it would not be reasonable to interpret an ad that contains a strong appeal to vote for or against a candidate as something else, simply because it contains a reference to an upcoming vote in Congress.

Examples 6 and 7, the two Tom Kean, Jr. ads, are attacks on the character and fitness for office of a candidate, not discussions of issues. They cannot reasonably be interpreted as anything other than an appeal to vote against the candidate. Example 7 actually mentions the election, making it even more clearly

an appeal to vote against that candidate. These ads should not qualify for the safe harbor or the exemption.

III. Conclusion

We urge the Commission to adopt Alternative I and preserve the reporting requirements of Title II for ads that qualify for the grassroots lobbying exemption outlined in *WRTL II*. In addition, the Commission should craft an exemption for genuine issue ads that does not completely swallow Title II's prohibition on electioneering by corporations and unions. We believe such a rule is not only consistent with *WRTL II*, but required by it. Thank you for your consideration of our views.

Sincerely,

Senator John McCain
Senator Russell D. Feingold
Senator Olympia Snowe
Representative Christopher Shays