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VIA WWW.FEC.GOV/FOSERS AND FIRST CLASS MAIL

Federal Election Commission
Attn.: Mr. Robert M. Knop
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Re: Comments on behalf of the Chamber of Commerce of the United States of America to the Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations Notice of Proposed Rulemaking (Notice 2011-18)

Dear Commissioners:

The Chamber of Commerce of the United States of America ("Chamber") submits these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Proposed Rulemaking ("NPRM") on corporate independent expenditures and electioneering communications. *See* 76 Fed. Reg. 80803 (Dec. 27, 2011). We respectfully request an opportunity, on behalf of the Chamber, to testify during the Commission's March 7, 2012, hearing on the NPRM.

The Chamber is responding to four proposals. First, the NPRM's "Proposed 114.2(b)(2)(i)—Prohibitions on Corporate and Labor Organization Expenditures." *Id.* at 80806-07. The Chamber supports the NPRM's "Alternative A—Permit Corporations and Labor Organizations To Make Expenditures Except for Coordinated Expenditures and Coordinated Communications."

Second, the Chamber is responding to "Proposed 11 CFR 114.10(c)—Solicitation; Disclosure of Use of Contributions for Political Purposes." *Id.* at 80813. The Chamber opposes this regulation's proposed extension to corporations generally. Such a revision would confound corporate efforts to distinguish between donations intended for electioneering communications and donations unrelated to electioneering communications. Further, post-*Citizens United*, the Supreme Court precedent that this regulation was designed to implement is no longer relevant.

Third, the Chamber is responding to the NPRM's "Proposed Removal of 11 CFR 114.14 and 114.15." *Id.* at 80814. The Chamber suggests that the Commission retain the provisions of § 114.15 detailing the functional-equivalent-of-express-

advocacy test because 11 C.F.R. § 109.21 relies on this test in the context of coordinated communications.

Fourth, the Chamber is responding to the NPRM's "Removal of Express Advocacy Prohibition" at 11 C.F.R. § 114.4(c)(2)-(6). *Id.* at 80810. The Chamber supports the NPRM's proposal to remove the express advocacy prohibition from the listed provisions but suggests that the regulation clarify that communications that do not contain express advocacy remain exempt from reporting obligations.

I. The Chamber

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. For a century, the Chamber has played a key role advocating on behalf of its membership and the American business community. The Chamber's efforts include large-scale public advocacy to help shape the political debate.

Accordingly, the Chamber has an acute interest in the Commission's governance of corporate political participation and in ensuring that Commission regulations are written in a manner that prevents abuse and does not otherwise infringe on the Chamber's First Amendment rights of free speech, of free association, and to petition the government for redress of grievances. The Chamber appreciates the opportunity to comment on this NPRM.

II. *Citizens United*

This NPRM was issued in response to the decision by the United States Supreme Court in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which struck down the prohibition at 2 U.S.C. § 441b on the expenditure of corporate treasury funds for express advocacy and electioneering communications, *id.* at 913. The Court concluded that the statute's ban on independent corporate expenditures could no longer be justified by government interests in preventing corporations "from obtaining 'an unfair advantage in the political marketplace' by using 'resources amassed in the economic marketplace,'" *id.* at 904 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990)); preventing corruption, *id.* at 908-11; and protecting shareholder interests, *id.* at 911. Likewise, these

government interests can no longer justify many of the regulatory restrictions identified in the NPRM.

III. The NPRM

A. Proposed 11 C.F.R. § 114.2(b)(2)(i)—Prohibitions on Corporate and Labor Organization Expenditures

11 C.F.R. § 114.2(b) implements 2 U.S.C. § 441b by banning corporations and labor organizations from "[m]aking expenditures as defined in 11 C.F.R. part 100, subpart D." "Expenditure" is defined as "a purchase, payment, distribution, loan . . . , advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.111(a). An expenditure includes an "independent expenditure," *id.* § 100.113, which is defined as an expenditure that is not coordinated with "a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents," *id.* § 100.16(a).[1] The NPRM suggests two possible alternatives to redefine the ban on corporate expenditures, post-*Citizens United.*

1. Proposed "Alternative A"

Alternative A would remove the prohibition on all corporate expenditures made without coordination with a candidate, a candidate's authorized committee, or a political party committee. 76 Fed. Reg. at 80806. As a result, Alternative A would permit corporate expenditures for express advocacy and electioneering communications. *Id.* Alternative A also would permit expenditures "that are not for communications . . . as long as these expenditures are not in-kind contributions, such as expenditures that are coordinated with candidates or political party committees." *Id.* Such permissible "non-communicative" expenditures may include "(a) [p]ayment for transportation of volunteers to campaign events, (b) payment for expenses of voter registration drives, (c) the provision of food to campaign volunteers, or (d) the provision of babysitting services to enable voters supporting a particular candidate or political party to vote." *Id.*

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[1] The term "expenditure," as used in these comments, refers only to expenditures that are not coordinated with the candidate or his authorized political committees.

2. Proposed "Alternative B"

Alternative B would amend the prohibition on corporate and labor organization expenditures "to permit independent expenditures from general treasury funds for non-coordinated communications." *Id.* at 80807. "Alternative B would distinguish expenditures for communications from other types of expenditures," however, and would prohibit "non-communicative" expenditures, even if not coordinated. *Id.* Thus, "[u]nder Alternative B, corporations and labor organizations would be permitted to make expenditures from general treasury funds solely for 'political speech presented to the electorate that is not coordinated with a candidate.'" *Id.* (quoting *Citizens United*, 130 S. Ct. at 910).

3. Comment

The Commission should adopt Alternative A, which accurately reflects the steadfast First Amendment protection that the Supreme Court has accorded expenditures for nearly forty years. Conversely, Alternative B—which labels a category of expenditures "non-communicative"—comports with neither the Supreme Court's campaign finance precedent nor fundamental First Amendment principles.

Independent spending, be it for so-called "communicative" or "non-communicative" activities, is entitled to maximum First Amendment protection. "The First Amendment protects political association as well as political expression," *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), guaranteeing "freedom to associate with others for the common advancement of political beliefs and ideas," *id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)); *see also* U.S. Const. amend. I. Courts repeatedly have accepted, generally without comment, that the NPRM's prototypical examples of "non-communicative" expenditures implicate the First Amendment no less than expenditures made for express advocacy or electioneering communications. In *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), for instance, the United States Court of Appeals for the D.C. Circuit characterized "advertisements, get-out-the-vote efforts, and voter registration drives" without distinction as "constitutionally protected" expenditures, *id.* at 11; *see also id.* at 16. Likewise, writing separately in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), Judge Henderson remarked that

> political parties that make independent expenditures—to engage in issue advocacy referring to candidates, to support ballot measures *or*

> *to fund voter registration and get-out-the-vote activities*—provide a service essential to our representative democracy by accepting donations for the sake of amplifying and channeling the political speech of other organizations and individual citizens.

Id. at 392 (Henderson, J., concurring in the judgment in part and dissenting in part) (emphasis added); *see also Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006) ("[P]articipation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment.").[2]

Furthermore, the Supreme Court's consideration of candidate expenditure limits in *Buckley v. Valeo* belies the "communicative" versus "non-communicative" distinction on which Alternative B is based. In *Buckley*, the Court struck down two limits that were grounded on a definition of "expenditure" materially identical to that in today's 11 C.F.R § 100.111. *Compare* 11 C.F.R § 100.111 *with* 18 U.S.C. § 591(f)(1) (Supp. IV 1974) (current version as amended at 2 U.S.C. § 431(9)(A)). In holding both limits facially unconstitutional, the Court did not allow for a distinction between "communicative" and "non-communicative" expenditures. *See* 424 U.S. at 52 (striking down limit on candidate expenditures from personal funds), 54-57 (striking down limit on overall candidate campaign expenditures).

Rather than create such a distinction, the Court stressed that all of the activities it was addressing, including "contribution and expenditure limitations," "operate in an area of the most fundamental First Amendment activities." *Id.* at 14. Since *Buckley*, "[t]he Court has never strayed from that cardinal tenet . . . ." *EMILY's List*, 581 F.3d at 5; *see, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 242 (2006); *McConnell v. FEC*, 540 U.S. 93, 121, 134 (2003); *FEC v. Colo. Rep. Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001); *Colo. Rep. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608, 610 (1996); *FEC v. Nat'l Conservative PAC*, 470 U.S.

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[2] Indeed, the Supreme Court has "long recognized that [the First Amendment's] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding flag burning to be protected activity); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (noting that nude dancing can be "expressive conduct" protected by the First Amendment); *Schacht v. United States*, 398 U.S. 58, 63 (1970) (holding wearing of military uniforms in dramatic presentation to be protected activity); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding wearing of black armbands to be protected activity); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (suggesting that burning of draft card implicates the First Amendment); *Brown v. Louisiana*, 383 U.S. 131, 146 (1966) (holding sit-in to be protected activity).

480, 491, 498 (1985); *cf.* Richard Briffault, *The 527 Problem . . . and the* Buckley *Problem*, 73 Geo. Wash. L. Rev. 949, 982 (Aug. 2005) (under *Buckley*, an individual's "independent expenditures—that is, expenditures for campaign activities aimed at the voters that are not coordinated with any candidate—may not be limited because they present no danger of corruption"). Hence, the notion that certain categories of independent political expenditures are afforded varying degrees of First Amendment protection runs counter to the Court's long-standing precedent.

In addition, a distinction between "communicative" political activity and "non-communicative" political activity would be unworkable and would unavoidably "dissolve in practical application." *Buckley*, 424 U.S. at 42. As a result, such a distinction would invite discriminatory enforcement and risk chilling political participation. *See generally Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The NPRM's examples of "non-communicative" expenditures underscore the fatal vagueness of such a category. Voter registration drives necessarily involve communicating with potential voters and, in many instances, persuading them to participate in the democratic process. *Cf. Meyer v. Grant*, 486 U.S. 414, 421 (1988) (remarking that a "petition circulator . . . will at least have to persuade [potential signatories] that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate"). And increasing voter turnout by offering child-care would help citizens communicate their political views at the ballot box. *See, e.g.*, *Citizens United*, 130 S. Ct. at 948 n.52 (Stevens, J., concurring in part and dissenting in part) ("Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless communicative acts aimed at influencing electoral outcomes.").

Accordingly, the NPRM focuses on the wrong distinction. Whether an expenditure is "communicative" or "non-communicative" carries no weight. The question is whether spending is independent of or coordinated with a candidate. The Court in *Buckley* specifically addressed expenditures "for media advertisements *or for other portions of the candidate's campaign activities*" when striking down the statutory limit on independent expenditures by individuals. 424 U.S. at 46 (emphasis added).[3] The Court made clear that all such activities may be limited only if they

[3] This is not the only place where *Buckley* describes expenditures—in the parlance of the NPRM—for both "communicative" and "non-communicative" activities. In prefacing its holding striking down the statutory limit on independent expenditures by individuals, the Court explained that "*a primary effect* of these expenditure limitations is to restrict the quantity of campaign speech."

are "coordinated" with a candidate and are, therefore, "treated as contributions rather than expenditures" because "they might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse" as "disguised contributions." *Id* at 46-47; *see* 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . shall be considered to be a contribution to such candidate.").

Thus, the Supreme Court upheld some limitations on campaign contributions based on the permissible government interest in preventing quid pro quo corruption. *Buckley*, 424 U.S. at 26-29. Because candidates often "must depend on financial contributions from others," the Court in *Buckley* concluded that "the integrity of our system of representative democracy is undermined" by the threat of quid pro quo corruption induced by contributions as well as by the appearance of such corruption. *Id.* at 26-27. By contrast, expenditures made independently of a candidate consistently have been held to eliminate the risk and appearance of quid pro quo corruption. *Id.* at 46-47; *Citizens United*, 130 S. Ct. at 908. *Citizens United* did not disturb the line between independent and coordinated expenditures, but reinforced it. The Court maintained that "[t]he absence of prearrangement and coordination" of an independent expenditure "alleviates the danger that [the] expenditure will be given as a *quid pro quo* for improper commitments from the candidate." 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47); *see also id.* ("In *Buckley*, the Court found this interest [in preventing corruption] 'sufficiently important' to allow limits on contributions but did not extend that reasoning to expenditure limits.").

The Commission should adopt Alternative A which tracks the distinction between independent and coordinated expenditures that has been consistently recognized by the Supreme Court. Alternative B would result in the creation of categories of expenditures receiving differing First Amendment protection anathema to campaign finance and other First Amendment jurisprudence.[4]

(Continued . . .)
Buckley v. Valeo, 424 U.S. 1, 39 (1976) (emphasis added). Of course, a secondary effect is to restrict independent expenditures for other campaign-related activities.

[4] The NPRM's expenditure scenarios described in connection with Alternative A should be permissible provided they are not coordinated with, or otherwise result in contributions to, a candidate or campaign. For example, one of the scenarios contemplates "the provision of food to campaign volunteers." If the volunteers are working independently of the campaign, then

B. Proposed 11 C.F.R. § 114.10(c)—Solicitation; Disclosure of Use of Contributions for Political Purposes

1. Proposed Regulation

11 C.F.R. § 114.10(f) currently requires that solicitations by qualified nonprofit corporations (also known as "MCFL corporations") "inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates." The NPRM proposes to redesignate this provision as 11 C.F.R. § 114.10(c) and to extend its application to all corporate solicitations for donations that "may be used for political purposes." 76 Fed. Reg. at 80813.

2. Comment

The Commission should not revise current 11 C.F.R. § 114.10(f) to apply to all corporations because expanding the regulation would invite confusion, especially when viewed alongside existing Commission regulations. In addition, the Supreme Court precedent that § 114.10(f) was designed to implement did not compel the regulation and, in any event, is no longer relevant.

First, the proposed extension of § 114.10(f) would yield a puzzling regulatory scheme. In particular, 11 C.F.R. § 104.20(c)(9) requires corporations engaged in electioneering communications to disclose the identity of each person who makes a donation "for the purpose of furthering electioneering communication."[5] As a result, potential donors who either do not wish to support an organization's electioneering communications or value their anonymity more than they value financially aiding such communications can safeguard their privacy by donating money for purposes other than electioneering communications. An organization

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(Continued . . .)
expenditures for them should not be limited. But if the volunteers are working at campaign headquarters or otherwise at the direction of the campaign, expenditures for them might be deemed to be constructively accepted by the campaign and, therefore, contributions to the campaign. Ultimately, the answer will depend on the specific facts. Those facts should be applied to existing coordination and contribution concepts, and not to new regulatory categories that have no basis in law or precedent.

[5] Similarly, 11 C.F.R. § 109.10(e)(1)(vi) requires disclosure of the identity of each person who makes a donation "for the purpose of furthering [an] independent expenditure."

can likewise facilitate such a donor's willingness to provide aid by making a clear statement that the organization is not soliciting contributions earmarked for electioneering communications. This distinction would be muddied by a requirement that corporations expressly *not* seeking funds in furtherance of electioneering communications nonetheless must inform potential donors that their donations "may be used for political purposes, such as supporting or opposing candidates."

Second, the requirements of § 114.10(f) were neither based on a statutory directive nor compelled by the Supreme Court. Furthermore, the rationale for them has been repudiated by *Citizens United*. 11 C.F.R. § 114.10(f) was promulgated solely to implement the Supreme Court's distinction between qualified nonprofit corporations and "traditional" business corporations in *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*). 479 U.S. 238 (1986). The Court in *MCFL* considered an as-applied challenge to the federal ban on corporate independent expenditures brought by Massachusetts Citizens for Life, Inc. ("MCFL"), a non-profit corporation that did not accept contributions from business entities and was "formed for the express purpose of promoting political ideas." *Id.* at 264.

The Court held that even though the law at the time banned all corporations from making independent expenditures, the government's justification for the ban did not apply to certain nonprofit ideological corporations. In particular, the government interests in "eliminat[ing] the effect of aggregated wealth on federal elections" and protecting dissenting shareholders did not apply to "MCFL corporations." *Id.* at 257, 260. In the Court's view, because the funds spent by such entities almost certainly derive from like-minded supporters (in contrast to business corporations), these expenditures would accurately reflect the organization's "popularity in the political marketplace." *Id.* at 260. The Court noted that any concern that donors may not know their funds might be used for independent expenditures "can be met" by "simply requiring that contributors be informed that their money may be used for such a purpose." *Id.* at 261. The Court did not compel this result. Moreover, publicly available reports of independent expenditures would inform any donor that the MCFL corporation was spending money for that purpose.

The Court's recent reassessment of the government interests that can justify campaign finance restrictions, however, has eliminated any interest served by the § 114.10(f) disclosure. In *Citizens United*, the Court rejected the government interests both in diluting the effect of "money amassed from the economic

marketplace" and in protecting dissenting shareholders. 130 S. Ct. at 905, 911. "The First Amendment protects the resulting speech," the Court maintained, "even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." *Id.* at 905. Accordingly, an interest in protecting donors from funding speech with which they disagree is no longer a valid basis for regulation. Therefore, the Commission should not require the § 114.10(f) disclosures by organizations that might engage in such speech.

C. Proposed Removal of 11 C.F.R. §§ 114.14 and 114.15

1. Proposed Regulation

11 C.F.R. § 114.14 prohibits corporations from providing general treasury funds to others to make certain electioneering communications. This regulation implemented the Supreme Court's holding in *FEC v. Wisconsin Right to Life, Inc.* (*WRTL II*), 551 U.S. 449 (2007), that only electioneering communications that are functionally equivalent to express advocacy could be banned. 11 C.F.R. § 114.15 echoes the Court's definition of proscribable electioneering communications as those "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate." The regulation also contains a detailed test, derived from *WRTL II*, to identify such electioneering communications.

The NPRM proposes to remove 11 C.F.R. §§ 114.14 and 114.15 in light of *Citizens United*'s holding that corporations cannot be prohibited from making expenditures for electioneering communications, whether functionally equivalent to express advocacy or not. 76 Fed. Reg. at 80814. The Commission seeks comment on, among other issues, the effect that this change will have on remaining, valid regulations.

2. Comment

The Commission should not remove entirely § 114.15. This provision defines proscribable electioneering communications—that is, communications functionally equivalent to express advocacy—as those "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate." The regulation also details a multi-factor test derived from *WRTL II* to help potential speakers determine reliably whether their speech is functionally equivalent to express advocacy.

Even though *Citizens United* eliminated the distinction between "issue advocacy" and "express advocacy" for purposes of banning corporate speech, the distinction remains alive in the Commission's still-valid regulation of "coordinated communications." Under 11 C.F.R. § 109.21, certain communications may be deemed "coordinated"—and thus an in-kind contribution—if they are "the functional equivalent of express advocacy." Section 109.21 remains valid post-*Citizens United*, and, like § 114.15, it treats a communication as being functionally equivalent to express advocacy "if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."

Although the standard promulgated in § 109.21 is based on the *WRTL II* test developed in § 114.15, *see* 75 Fed. Reg. 55947-01, 55952-54 & n.13 (Sept. 15, 2010), § 109.21 itself does not contain the test. Thus, if the Commission were to remove § 114.15 without retaining the *WRTL II* test, the clarity provided by the test would be lost for purposes of determining whether certain communications are coordinated. For this reason, the Commission should retain the regulation's definition of the functional equivalent of express advocacy.

D. Proposed 11 C.F.R. § 114.4(c)(2) through (6)—Removal of Express Advocacy Prohibition

1. Proposed Regulation

Current FEC regulations include a number of exceptions to the general ban on corporate expenditures, including those for voter registration and get-out-the-vote communications, voting records, and voting guides. 11 C.F.R. § 114.4(c)(2)-(6). These exceptions currently prohibit such communications from containing express advocacy. *Id.* In light of *Citizens United*, the NPRM proposes to eliminate this prohibition. 76 Fed. Reg. at 80810.

2. Comment

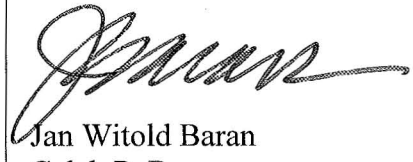
The Chamber supports removal of the express advocacy prohibition as mandated by *Citizens United*. Although it is plain that any communication that includes express advocacy could be subject to the reporting requirements that apply to independent expenditures, *see id.* at 80812-13, the NPRM does not clearly state that communications that do not contain express advocacy would continue to be exempt from independent expenditure reporting. To avoid confusion, the Commission

should clarify that communications of the types listed at § 114.4(c)(2)-(6) are not subject to reporting absent express advocacy.

IV. Conclusion

For the foregoing reasons, the Chamber respectfully requests that the Commission (1) adopt Alternative A in revising 11 C.F.R. § 114.2(b)(2)(i); (2) decline to extend § 114.10(f) to corporations generally; (3) ensure that the functional-equivalent-of-express-advocacy test is not stricken from § 114.15 for purposes of the Commission's coordination regulations; and (4) clarify that corporate communications that do not contain express advocacy are not subject to reporting obligations.

Sincerely,



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