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Mai T. Dinh
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments to Notice of Proposed Rulemaking on the Definition of "Electioneering Communications"

Dear Ms. Dinh:

These comments address some aspects of the Commission's proposed rules to meet the requirements of *Shays v. FEC*. Please consider this also as a request to testify at the Commission hearing scheduled for October 19-20, 2005.

The Commission should, first of all, consider whether this rulemaking should be kept open to allow for the incorporation of whatever may emerge from the Supreme Court's consideration of *Wisconsin Right to Life v. FEC*. *WRTL* is an as applied challenge, of course, which presents that specific question, but WRTL also seeks a ruling on the merits. Should the Commission reach the merits—on the question of whether the provision prohibits the airing of certain grassroots lobbying communications—the Court's analysis would likely affect the legal analysis that the Commission would bring to bear in this rulemaking. The Court ruling will come well before the general election, and before many primary elections: and few of the issues in this rulemaking, such as the appearance of candidates in public service announcements, are likely to arise in large number in many primary elections or to much affect them.

On the merits, the Commission is asking for comment generally on whether the exemptions invalidated or questioned by the Court of Appeals may be rescued by conditioning them on the absence of PASO (language that seems to promote, attack, support or oppose a federal candidate). The extension of PASO, even to uphold sensible exemptions for PSA and 501(c)(3) activity, is a troublesome step, since the statute as enacted provided for it in limited circumstances and expanded use of the notion is generally unwarranted and better avoided. 501(c)(3) organizations could,

for example, could be spared the application of PASO, if the FEC incorporated the IRS standards for permissible lobbying activity.

If, however, the Commission proceeds through the use of PASO, it should emphasize that its use here is solely to remedy the defects identified by the *Shays* Court, allowing for useful exemptions to be preserved rather than completely discarded. Those exemptions are useful and should be retained, even if PASO is the price paid.

Even more important, the Commission should make an effort to define PASO. Examples are helpful but more of an effort is needed to bring the term to life, enabling practitioners to more effectively counsel their clients. The *McConnell* Court suggested that the absence of a definition was not fatal, but there is no barrier to the adoption of some practical definition, and every advantage to offering one. Particularly as the use of PASO expands, as it has already, beyond the original design of BCRA, it makes little sense for the agency to stand fast against offering additional guidance. If the *McConnell* Court is correct that people of "ordinary" intelligence would figure out PASO with little difficulty, *McConnell*, 124 S. Ct. at 675, n.64, the expert agency—experienced and trained in the law and its administration—should be able to construct a workable definition. The Commission should, of course, propose a definition with adequate notice and opportunity for comment.

There is no point, however, in forcing PASO on the exemption for the advertising of movies, books and plays. The proposed Commission rule would already require that any advertising be in the "ordinary course" of the advertiser's business, providing adequate protection against the use of the exemption to turnout issue advertising in the guise of art. Proposed 11 C.F.R. § 100.29(b)(7). The addition of a PASO restriction is at odds with the purpose of the proposal, which is to protect artistic expression and its promotion. Such productions may well, subtly or even very openly and provocatively, express an opinion about the virtues or vices of officeholders who are candidates, or of just candidates, and the rules should clear and preserve the space for them to do so.

Very truly yours,

Robert F. Bauer