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CENTER *for* COMPETITIVE POLITICS
*Congress shall make no law...*

February 3, 2012

Via Electronic Filing

Robert M. Knop
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Notice 2011-18: Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations

Dear Mr. Knop:

The Center for Competitive Politics ("CCP") submits these comments in response to the Notice of Proposed Rulemaking promulgated by the Federal Election Commission ("FEC") on December 27, 2011. *See* 76 Fed. Reg. 80,803. CCP previously submitted comments on the original Petition for Rulemaking filed by the James Madison Center for Free Speech on January 26, 2010.

It has been more than two years since the Supreme Court's ruling in *Citizens United v. FEC.*[1] That decision declared certain statutes, and their accompanying regulations, unconstitutional. Yet those regulations remain on the books.

The FEC has a duty to provide clear and accurate guidance to the regulated community – a duty that is heightened where, as here, core First Amendment expression is being regulated. Ambiguous guidance chills political expression and invites "complex argument in a trial court and virtually inevitable appeal."[2] On balance, the proposed changes help the Commission meet this duty.

1. The FEC's regulations should provide clear, unambiguous guidance to the regulated community.

The laws governing campaign finance are complex and daunting. One of the greatest services the FEC can perform is to simplify those rules and eliminate guesswork or the need for

[1] 130 S.Ct. 876 (2010).
[2] *FEC v. Wisc. Right to Life,* 551 U.S. 449, 469 (2007) (cautioning against an "open-ended rough-and-tumble of factors" in the context of an as-applied challenge).

expert compliance assistance. And one of the most obvious ways to make the regulations more accessible is to simply, affirmatively tell the regulated community what it has a right to do.

Certain of these are simple. In light of *Citizens United,* corporations and labor organizations should be explicitly notified of their ability to make independent expenditures and electioneering communications. While the proposed language for Section 114.10(d) does this implicitly, an explicit regulation permitting non-coordinated expenditures would more fully inform labor organizations and corporations of their rights. Similarly, we encourage the Commission to adopt language at Section 114.10(e) affirmatively stating that corporations and labor unions may, if they choose, set up segregated accounts.

This need for clear guidance extends to the Regulations' widespread reliance on the definition of "Person." Any such approach is a mistake – as the identity of *Citizens United*'s plaintiff makes clear, not all covered organizations are large and sophisticated entities; they should not be required to hunt through multiple, interlocking provisions to understand their Constitutional rights. For instance, proposed 11 CFR 114.10(b)(2) would put corporations and labor unions on notice of their disclosure responsibilities. While, surely, an attorney would know to look up the word "Person" as used in the Regulations, the Commission should attempt to write its rules for the general public – and for that audience, clarity is an indispensable virtue.

Of course, the touchstone of clarity need not be verbosity. Long lists can themselves lead to confusion. Take 11 CFR 114.4(c)(2). There is simply no need for an exhaustive list of acceptable media. Given the pace of technological advancement, and the contrasting pace of the Commission's adaptation to those changes, such a list risks becoming outdated. And a reasonable reader could reach the unfortunate conclusion that non-enumerated technologies are forbidden.[3] Similarly, redundant provisions, such as those concerning Qualified Nonprofit Corporations – which are now subject to the same rules as other corporations – should be removed. Again, an informed reader could rationally wonder why the section exists, and if it implicitly contrasts with another section.

2. <u>The distinction between Qualified Nonprofit Corporations and other associative entities is defunct.</u>

The central rationale of *Citizens United* is that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[4] The sentence itself unambiguously eliminates the constitutional distinction between nonprofit and for-profit corporations.

As the Commission notes, certain regulations are grounded in the Supreme Court's 1986 decision in *MCFL v. FEC.*[5] But any distinction between different corporate entities based on their "potential to corrupt the electoral process" is no longer valid. The Commission is,

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[3] *Expressio unius est exclusio alterius.*
[4] 130 S.Ct. at 913.
[5] 479 U.S. 238; *see* 76 Fed. Reg. 80,812.

consequently, correct to state that "the regulatory exceptions for QNCs are now superfluous" and to "recognize explicitly the right of all corporations and labor organizations to make independent expenditures and electioneering communications."[6] That is the central duty imposed on the FEC by the Supreme Court.

But as the distinction between different corporate entities is no longer good law, so too are differing solicitation rules. Proposals to change the disclosure requirements found at 11 CFR 114.10(f) are, again, misguided. How is the public better informed by a requirement that solicitations bear a warning that funds may be used "for independent expenditures or electioneering communications, as opposed to for "'political purposes' generally?"[7] How many individuals, outside the bubble of campaign finance attorneys and compliance professionals, can accurately define technical terms such as "Independent Expenditure?" The wiser course is to use the term "political purposes," a generally-intelligible phrase.

3. The Commission should adopt Alternative A as regards voter registration and get-out-the-vote efforts by labor organizations and corporations.

The clear logic of *Citizens United* protects the political speech of corporations and unions. And it is axiomatic that protected political expression can take a variety of forms, from broadcast communications to the purely symbolic.[8] The Commission should hesitate before attempting to parse "the expressive elements of expenditures."[9]

Alternative B would prohibit "non-speech" elements of voter registration and get-out-the-vote efforts. There is statutory support for this approach. But parsing the differences between "pure speech" and "non-speech" elements of an activity is an inherently fact-specific exercise. Furthermore, there is reason to believe that compelled speech – such as requiring any voter registration to be equal-opportunity[10] – may itself be constitutionally problematic.[11]

The wiser course is to allow for wide-ranging voter registration and get-out-the-vote activities by corporations and labor organizations, while requiring full disclosure of funds used for any partisan efforts or political communications. Alternative A accomplishes this, without

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[6] 76 Fed. Reg. 80,812.
[7] 76 Fed. Reg. 80,813.
[8] *See, e.g., Texas v. Johnson,* 419 U.S. 397 (1989); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969).
[9] 76 Fed. Reg. 80,808.
[10] Of course, an activity that *was* strictly nonpartisan would not be an expenditure under Alternative A. The difference between Alternatives A and B, therefore, largely concern situations where a labor organization or corporation "takes sides" – which itself should suggest the First Amendment difficulties posed by separating the "pure speech" from the "non-speech" elements of the same activity.
[11] *See Ariz. Free Enterprise PAC's Freedom Club PAC v. Bennett,* 131 S.Ct. 2806 (2011).

creating needless Federal inquiries into "non-communicative" (but arguably still protected) First Amendment activities.[12]

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CCP appreciates the opportunity to comment on this notice of proposed rulemaking, and requests the opportunity to testify, through a representative, at the FEC's hearing on March 7, 2012.

Respectfully submitted,

Allen Dickerson
Legal Director

[12] Of course, Alternative B may also provide a disincentive for labor organizations and corporations to engage in *any* voter registration and get-out-the-vote activities.