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To wrtl.ads@fec.gov

cc

bcc

Subject Notice 2007-16

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"Never doubt that a small group of thoughtful citizens can change the world. Indeed, it's the only thing



that ever has." - Margaret Mead [FECCover2007-16Final.doc](#) [ACSCANResponsetoNPRM2007-16FINAL.doc](#)



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September 28, 2007

Mr. Ron B. Katwan
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Via Electronic Mail <wrtl.ads@fec.gov>

Re: Notice 2007-16

Dear Mr. Katwan:

The American Cancer Society Cancer Action Network, Inc. (ACS CAN) is dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer. ACS CAN advocates for public policies that would help to achieve its mission. Our advocacy furthers the public health: from providing smoke-free workplaces to ensuring government funding for cancer research, we know that participation in the legislative process can mean saving lives. We write on behalf of our volunteers, because our strength lies in their passion and ability to act.

The Federal Election Commission (the Commission) has requested comment on proposed new regulations regarding electioneering communications. We hope to assist the Commission in formulating standards that protect grassroots lobbying communications.

Sincerely,

F. Sheffield Hale

F. Sheffield Hale
Chief Counsel

Mary Rouvelas
Associate Corporation Counsel

**COMMENTS OF
THE AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, INC.
ON THE PROPOSED RULES REGARDING ELECTIONEERING
COMMUNICATIONS (NOTICE 2007-16)**

The American Cancer Society Cancer Action Network, Inc. (ACS CAN) submits the following comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Federal Election Commission (the Commission), Notice 2007-16. The Notice seeks comments on implementation of the US Supreme Court's decision in FEC v. Wisconsin Right to Life, Inc.,¹ which held that the prohibition on the use of corporate and labor organization funds for electioneering communications is unconstitutional as applied to certain communications.

ACS CAN's mission is to eliminate cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer. ACS CAN is a completely nonpartisan entity. We are also the sister advocacy organization of the American Cancer Society, Inc. (the Society), which is also completely nonpartisan.² ACS CAN and the Society partner on a number of initiatives, including legislative initiatives. These comments are limited to activities that could be conducted jointly.

We provide this background so that the Commission will understand that our communications do not seek to influence elections, but rather continually advocate for policies that will positively impact our mission. These comments are intended largely to request that the Commission issue clear standards with which we can comply. Resources expended on compliance are diverted from other program needs. We therefore urge that the Commission provide guidance that is understandable and practical. There are a number of important issues raised in the NPRM; these comments are limited to representing some of our own practices, with the goal of assisting the Commission with its task in writing the new standards mandated by the Supreme Court.

A. The Need to Protect Grassroots Communications

The US Supreme Court ruling made it clear that grassroots lobbying communications are constitutionally protected.³ We will not attempt to outline the regulatory framework for accomplishing this goal, but can speak to our current practices, which we feel are at the core of what the Court intended to preserve.

The legislative cycle does not stop during the election cycle, so communications geared exclusively towards impacting legislation must remain permissible at all times. Issue advocacy is not the same as campaign intervention. Because the Society is inherently limited by the tax law in its communications close to elections, the Society and ACS CAN have ongoing legal review of their communications to ensure they do not run afoul of the tax prohibitions. In the course of determining whether communications are permissible, legal counsel look to standards that have been outlined by the Internal Revenue Service (IRS) in this area. Although the

¹ 127 S. Ct. 2652 (June 25, 2007).

² As mandated by the tax law, at 26 U.S.C. § 501(c)(3) (2007).

³ See 127 S. Ct. at 2673 (holding that 2 U.S. C. § 441b(b)(2) was unconstitutional as applied to the plaintiff's grassroots lobbying advertisements because they were not the "functional equivalent of express advocacy.")

Supreme Court's ruling appears to go beyond the IRS standards, we find two IRS Revenue Rulings may contain useful standards for the Commission to consider.⁴ In sum, these rulings look at whether a communication:

- Identifies one or more candidates for office;
- Identifies the candidate solely as a government official who is in a position to act on the public policy issue;
- Expresses approval or disapproval for one or more candidates' positions or actions;
- Makes reference to voting or elections (issue advocacy would usually *not* make these references);
- Identifies the candidates solely in the list of key or principal sponsors of the legislation that is the subject of the communication;
- Includes references to non-candidate lawmakers;
- Addresses an issue that has been raised as an issue distinguishing candidates for a given office;
- Is part of an ongoing series of communications by the organization on the same issue made independent of the timing of the election; and
- Is related to a non-electoral event such as a scheduled vote on legislation.

In examining this list, the Commission should understand that any one communication may not contain all of these points, but that as a whole they are useful guidance to practitioners.

There are a number of instances where we engage in this issue advocacy. For example, ACS CAN has been continuing a decades-long campaign begun by the Society to provide the Food and Drug Administration (FDA) with authority to regulate tobacco products. The most recent bill that would achieve this goal in a manner ACS CAN supports is the Family Smoking Prevention Tobacco Control Act, which would restrict tobacco advertising and promotions, especially to children; stop illegal sales of tobacco products to children; require changes in tobacco products, such as the removal of harmful ingredients or the reduction of nicotine levels; and require larger and more informative health warnings on tobacco products. These aims are critical to ACS CAN's mission, and *we need to be able to support them at all times.*

In August of this year, ACS CAN ran print advertisements urging the public to call Senators Bond and McCaskill to ask them to support the measure (see attached as Exhibit A). Although we understand that the regulations on electioneering communications do not include print advertisements, there is a strong possibility that this same messaging could have been conducted through a radio or television broadcast advertisement. (We would also like to preserve the ability to conduct these types of advertisements in the future.)

In addition to preserving the ability to run advertisements that urge the public to contact their lawmakers, ACS CAN would like to ensure the ability to make communications that thank lawmakers after a positive vote on a measure, or criticize them for a negative vote.

⁴ We refer to criteria contained in Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, and Rev. Rul. 2004-6, 2004-4 I.R.B. 328. However, we are at times highly frustrated with the vagueness of the IRS "facts and circumstances" test generally, which can be murky.

An example of these advertisements occurred during our landmark effort in 2006 to ensure that millions of people would retain their rights to cancer screenings while fighting The Health Insurance Marketplace Modernization and Affordability Act (S. 1955). S. 1955 threatened to undercut state laws that ensure coverage for mammograms and other lifesaving cancer screenings by allowing private health plans to bypass state requirements for insurance coverage. After S. 1955 was introduced, it became a major priority for ACS CAN to help defeat the legislation. The advertising campaign began with advertisements raising general awareness about the problems with the bill, and culminated in advertisements thanking named Senators who had assisted in its defeat (see attached Exhibit B). These communications are important for a number of reasons. First, after having urged the public to act on a measure, it is also important to inform the public of the outcome of its actions. The public is at the heart of any grassroots campaign, and so organizations must retain the ability to keep it informed as the legislative process unfolds. In addition, a measure such as S. 1955 may be introduced at any time, and publicly acknowledging a legislator's positive vote on a bill helps to ensure they would continue to vote the same way in the future.

We feel that these communications fall squarely within our constitutional free speech rights, and that the regulations promulgated by the Commission should be drawn to ensure their protection. If the Commission codifies specific examples or permissible advertisements in its regulations or accompanying explanation and justification, it should include these types of advertisements.

B. The Importance of Exempting Public Service Announcements

In its NPRM, the Commission specifically requested comment on whether other types of communications, such as Public Service Announcements (PSAs), warrant safe harbors.⁵ We believe that they do. The Society has commented on this issue previously in front of the Commission,⁶ but ACS CAN believes that the information certainly bears repeating again in this context.

Federal lawmakers – and their candidate opponents – may be highly respected members of their communities unrelated to their candidacy. Charities and the communities they serve can benefit from these individuals helping to disseminate mission-related information. We would like to ensure that these practices do not run afoul of any federal election laws. We would also like to ensure that charities do not bear liability for communications that they do not control (see below).

Under current Society practice, the Society creates a PSA, and sends it to media outlets. ***It does not retain control over whether and if a PSA is then used or discarded.*** The only expiration dates used in PSAs pertain to talent expirations, where the actor has agreed to allow the image to

⁵ Notice of Proposed Rulemaking on Revisions to the Rules on Electioneering Communications, 72 Fed. Reg. 50261, 50270-50271 (proposed Aug. 31, 2007) (to be codified at 11 C.F.R. pt. 100, 104, and 114).

⁶ Comments of the American Cancer Society to the FEC on Amendments to the Rules Defining Electioneering Communications (September 30, 2005) [available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/comm_9.pdf](http://www.fec.gov/pdf/nprm/electioneering_comm/comments/comm_9.pdf).

be used for a certain length of time. Currently, the Screen Actors Guild only allows one year at a time. In the case where a lawmaker or other prominent member of the community volunteers to appear in the advertisement, no time restriction is requested by the Society. In the paid actor scenario, the Society sends notices to media outlets requesting them to limit use of the advertisements and asking them to discard it, but does not ultimately decide whether an ad will receive air time and when. It is not clear to what extent broadcasters actually comply with this restriction. Indeed, the Society often does not know when a PSA has been broadcast. Although it can pay a service to track this information, it is expensive to do, and therefore not customary.

Our primary concern in the area of PSAs is that a media outlet will run a PSA in a manner not dictated by a charity, and then the charity would have unintentionally violated the law. For example, the Society worked with then-First Lady Hillary Clinton to create a PSA in 1998 urging individuals to get colorectal screenings.⁷ The PSA included an image of the First Lady, who was then the Honorary Chair of the National Colorectal Cancer Roundtable. In March of 2000, when candidate Hillary Clinton was engaged in a heated US Senate race, *The New York Post* ran the PSA without ACS or the campaign's knowledge. The Society discovered the advertisement had run in 2000 after receiving complaints from members of Congress and the public. It then sent a number of letters and other external communications to ensure that it did not appear partisan. In particular, the Society did not want to appear to violate its limitations under the tax code.

Charities should not be at risk of violating campaign finance law for PSAs that were created with no electoral purpose. Organizations would benefit from a safe harbor on PSAs. The safe harbor could include:

- Ensuring that the content does not refer to the individual's candidacy;
- That the individual is endorsing the organization or its mission practices -- in direct contrast to the organization endorsing the candidate -- with an overarching message promoting goals or practices consistent with the organization's mission. (For example, urging the public to receive cancer screening tests or to stop smoking.)

At a minimum, the Commission should craft a rule that protects charities from liability for PSAs that run within the electioneering communication time frame if the charity exercised no control over that timing. If no safe harbor exists, charities will hesitate to use lawmakers or politically oriented members of the community in PSAs at all, for fear legal communications will become illegal in time.

In addition, we agree with the Commission's observations in a previous rulemaking that PSA communications "promot[e] a wide range of worthy endeavors. Subjecting these communications to the electioneering communication regulations may discourage broadcasters from performing an important public service in providing free airtime for these ads."⁸ It is

⁷ This PSA was also a print advertisement. Although we understand that the ban on electioneering communications only applies to broadcast ads, the ad could easily have been created in broadcast form, so we believe the example is salient.

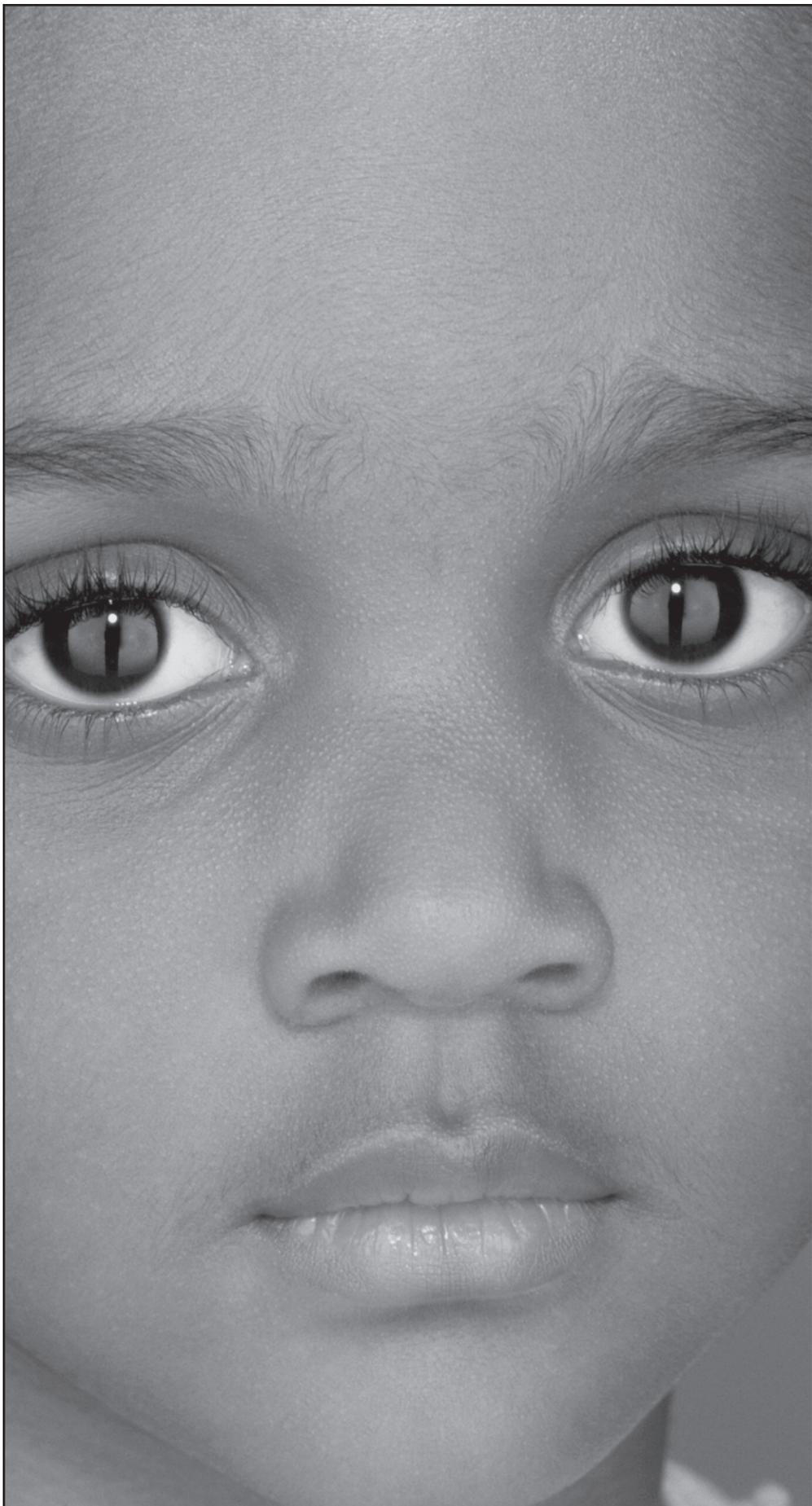
⁸ Notice of Proposed Rulemaking on Amendments to the Rule Defining Electioneering Communications, 70 Fed. Reg. 49508, 49509 (proposed Aug. 21, 2005) (to be codified at 11 C.F.R. pt. 100).

already difficult to obtain enough air time for a number of these worthy messages, and subjecting the communications to additional regulations may prevent some of them from occurring altogether.

We strongly support the Commission's previous determination in this matter, which included language indicating that, "if a section 501(c)(3) organization produces a PSA that features an individual who becomes a Federal candidate after the PSA has been provided to broadcasters, then the section 501(c)(3) organization will not be responsible for making an electioneering communication if the PSA is publicly distributed as an electioneering communication."⁹ We would urge the Commission to continue and codify this reasoning during the current rulemaking.

ACS CAN thanks the Commission for consideration of these comments.

⁹ Final Rules and Explanation and Justification for Regulations on Electioneering Communications, 70 Fed. Reg. 75713, 75715 (Dec. 21, 2005) (to be codified at 11 C.F.R. pt. 100).



WE CAN

**put her health before
tobacco company profits.**

Nine out of 10 adult smokers started smoking when they were kids. Congress must immediately grant the FDA the authority to regulate tobacco to stop marketing that targets children. With tobacco use being the number one preventable cause of cancer, ACS CAN is counting on our Congressional leaders to protect all Americans and save lives.

**Call 1-888-NOW-I-CAN
to tell Senators
Bond and McCaskill:
SUPPORT FDA
REGULATION OF
TOBACCO NOW**



acscan.org



**THANK YOU FOR
NOT LEAVING WOMEN EXPOSED.**

**MAMMOGRAMS SAVE LIVES.
YOU HELPED US SAVE MAMMOGRAMS.**

Thanks to the actions of hundreds of thousands of cancer advocates and one red bra, S. 1955 was defeated before it reached a full vote in the U.S. Senate. Together we protected insurance coverage for routine mammograms along with other life-saving cancer screenings.

Special thanks to Senators Carper and Biden for supporting coverage for mammograms and other cancer screenings.



Cancer Action NetworkSM

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