September 13, 2010

**By Electronic Mail**

Federal Election Commission
999 E Street NW
Washington, DC 20463

**Re: Comments of Julia Queen to OpenSecrets Blog**

Dear Commissioners:

On August 20, 2010, Michael Beckel of the Center for Responsive Politics published an article on the organization's *OpenSecrets Blog* entitled "Chamber of Commerce, Other Groups Skirt Letter of Law in Reporting Political Ads."[1] The article described $250,000 in television advertisements paid for by the U.S. Chamber of Commerce, praising the conservative credentials of U.S. Senate candidate Jane Norton, which aired in the final days before Norton's primary election last month in Colorado.

The article accurately describes the FEC's two-part definition of "expressly advocating" at 11 C.F.R. § 100.22 as applicable to (a) ads "using 'magic words' such as 'vote for' or 'vote against'" and (b) ads that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" (a.k.a. "Subpart (b)").

However, the article then quotes FEC spokeswoman Julia Queen as stating: "The Chamber's Norton ad in Colorado 'wouldn't qualify as express advocacy because it doesn't actually state to vote for or vote against a candidate. It says 'help her' but it doesn't say 'vote for Jane Norton[.]'"

If Ms. Queen was accurately quoted, her statement raises serious concern. We interpret Ms. Queen's comment as suggesting that the Commission will only deem an ad to be expressly advocating a candidate's election or defeat if the ad contains the so-called magic words of 11 C.F.R. § 100.22(a). And this in turn implies that the Commission is not enforcing the "reasonable interpretation" standard of "expressly advocating" found at 11 C.F.R. § 100.22(b).

We are writing for two reasons.

First, we would appreciate clarification as to whether Ms. Queen was accurately stating the Commission's position regarding what constitutes "express advocacy" under federal law.

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[1] *Available at* http://www.opensecrets.org/news/2010/08/chamber-of-commerce-other-groups-sk.html.

Second, if Ms. Queen was accurately stating the Commission's position, we strongly disagree and request an explanation as to the legal basis for the Commission's refusal to enforce its own regulation. To be certain, the Subpart (b) standard has had a controversial past,[2] but numerous court decisions in recent years, including the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007), have made clear that the Subpart (b) standard is constitutional. *See also Real Truth About Obama v. FEC*, 2008 WL 4416282 (E.D. Va. 2008) ("Because section 100.22(b) is virtually the same test stated by Chief Justice Roberts in the majority opinion of *WRTL* . . . , the test enumerated in section 100.22(b) to determine express advocacy is constitutional.")[3] Under these circumstances, we see no basis for a decision by the Commission, *sub silentio*, to cease its enforcement of Subpart (b).

The enforcement of Subpart (b) facilitates the public's right of access to information regarding the identity of those making independent expenditures, particularly outside the 120- and 90-day electioneering communication disclosure timeframes.[4] *See* 2 U.S.C. § 434(c); *see also* 11 C.F.R. §§ 100.16 and 109.10. The Supreme Court in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), while freeing corporations to make unlimited independent expenditures from their treasuries, reaffirmed the importance of disclosure to a well-informed electorate. The Court reasoned:

> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. See *McConnell,* 540 U.S., at 128 ("[T]he public may not have been fully informed about the sponsorship of so-called issue ads"). With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

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[2] *See, e.g.*, Paul S. Ryan, *Wisconsin Right to Life and the Resurrection of Furgatch*, Stanford Law & Policy Review Vol. 19:1, 130-163 (2008).

[3] *Affirmed*, *Real Truth About Obama v. FEC*, 575 F.3d 342 (4th Cir. 2009) (The "language [of Subpart (b)] corresponds to the definition of the functional equivalent of express advocacy given in *Wisconsin Right to Life*. . . . By limiting its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*, § 100.22(b) is likely constitutional.") (vacated for consideration of mootness by 130 S.Ct. 2371 (2010)).

[4] We recognize that the Chamber of Commerce ads discussed above were subject to disclosure as electioneering communication. This fact does not, however, change our view of the importance that the Commission enforce Subpart (b) outside the electioneering communication timeframes.

*Citizens United*, 130 S. Ct. at 916 (internal citations omitted).

Enforcement of Subpart (b) is an essential element of an adequate disclosure regime, because it ensures disclosure will apply to ads that can "only be interpreted" as advocacy of a candidate's election, but that either are not broadcast ads, or are broadcast outside the electioneering communication periods. Absent enforcement of Subpart (b) such ads can avoid disclosure by the simple expediency of eschewing "magic words." This would not only be contrary to the Commission's existing regulations, but it would also undermine the Supreme Court's strong views on the merits and importance of disclosure.

Any refusal by this Commission to enforce the definitions of "independent expenditure" and "expressly advocating" in effect at the time the Court decided *Citizens United*—including Subpart (b)—flies in the face of the Court's recognition that effective disclosure "permits citizens and shareholders to react to the speech of corporate entities in a proper way." *Id.*

Sincerely,

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