



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 25 2007

William J. Olsen, Esq.
8180 Greensboro Drive, Suite 1070
McLean, VA 22102-3860

RE: MUR 5874
Gun Owners of America, Inc.

Dear Mr. Olsen:

On November 8, 2006, the Federal Election Commission notified your client of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On October 9, 2007, the Commission found, on the basis of the information in the complaint, and information provided by your client, that there is no reason to believe Gun Owners of America, Inc. violated 2 U.S.C. § 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information. An additional Statement of Reasons will be forthcoming.

If you have any questions, please contact Audra Wassom, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Shonkwiler".

Mark D. Shonkwiler
Assistant General Counsel

Enclosures
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENT:** Gun Owners of America, Inc. **MUR:** 5874

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8 **I. INTRODUCTION**

9 This complaint involves allegations that Gunowners of America (“GOA”) violated the
10 Federal Election Campaign Act, as amended, (“the Act”) by making “illegal in-kind
11 contributions to federal candidates by expressly advocating the election or defeat of federal
12 candidates to the general public through its web activities.” See MUR 5874 Complaint.
13 Specifically, the complainant alleged that GOA’s website (www.gunowners.org), which is
14 available to the general public and is not password protected, contained a 2006 Voter’s Guide
15 (“the voter guide”) that expressly advocated the election or defeat of federal candidates.
16 Complainant also alleged that a “corporate action alert” e-mail, distributed to GOA members and
17 “subscribers” according to the response to the complaint, referred the reader to the voter guide
18 and also contained express advocacy by using “words urging action with respect to candidates
19 associated with a particular issue.”

20 Based on the reasons outlined below, the Commission found no reason to believe that
21 Gun Owners of America, Inc. violated 2 U.S.C. § 441b in this matter.

22 **II. FACTUAL AND LEGAL ANALYSIS**

23 **A. Facts**

24 GOA is a 501(c)(4) corporation, which according to its website is a “non-profit lobbying
25 organization formed in 1975 to preserve and defend the Second Amendment rights of gun
26 owners.” See www.gunowners.org/protect.htm. GOA has a website, www.gunowners.org, that
27 is not password protected and is available to the general public.

1 In October of 2006, GOA's website included a 2006 Voter's Guide ("the voter guide").
2 *See* Attachment 1 (Selected Screen Shots of Voter Guide). The voter guide rated every Senate
3 and Congressional candidate in all 50 states based on his or her position on gun issues. Each
4 candidate was given equal space in the voter guide, and there were no marks of any kind
5 indicating a preference for any one candidate over another. Each candidate was rated on a scale
6 from "A+" to "F" with an additional rating of "NR" for candidates who refused to answer the
7 questionnaire seeking information for the ratings, or had no record on gun issues.¹ No other
8 information about the candidates or comment on their fitness for office was included in the voter
9 guide. While candidates were rated in the guide based on their position on gun issues, they were
10 not rated in such a way as to advocate the election of a specific candidate. For example, in some
11 races multiple candidates in the same race were given identical grades, including grades of "A"
12 or "F." And no one political party appears to have been favored in the grading of candidates.

13 On November 2, 2006, GOA issued an e-mail alert to "subscribers" to "help inform pro-
14 gun voters throughout the country." *See* GOA Response at 2; Attachment 2 (E-mail Alert). The
15 e-mail alert referenced and provided a link to the voter guide. The e-mail alert did include
16 phrases such as "with the election less than two weeks away," "why we need to take the

¹ The ratings are as follows:

- A+ Pro-Gun Leader: introduces pro-gun legislation.
- A & A- Pro-Gun Voter: philosophically sound.
- B & B- Pro-Gun Compromiser: generally leans our way.
- C & C- Leans Our Way: occasionally.
- D & D- Leans Anti-Gun: usually against us.
- F Anti-Gun Voter: a philosophically committed anti-gunner.
- F- Anti-Gun Leader: outspoken anti-gun advocate who carries anti-gun legislation.
- NR Not rated: refused to answer his or her questionnaire; no track record.

See <http://gunowners.org/vgexp.txt> (no longer available on website).

1 upcoming election VERY SERIOUSLY,” “the upcoming election may well determine the fate of
2 our gun rights,” and “toward that end, Gun Owners of America has provided a valuable resource
3 to help you on Election Day” (referencing and linking to the voter guide.) But the e-mail did not
4 identify or reference any federal candidate or any political party, and there were no other words
5 of express advocacy contained in the e-mail.

6 **B. Analysis**

7 The Act prohibits any corporation from making a “contribution or expenditure in
8 connection with any election to any political office.” 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a).
9 An independent expenditure is “an expenditure by a person expressly advocating the election or
10 defeat of a clearly identified candidate” “that is not made in concert or cooperation with or at the
11 request or suggestion of such candidate, the candidate’s authorized political committee, or their
12 agents, or a political party committee or its agents.” 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.
13 The Supreme Court held in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986)
14 (“*MCFL*”) that a corporate expenditure for a general public communication, if made independent
15 of a candidate and/or his campaign committee, “must constitute ‘express advocacy’ in order to
16 be subject to the prohibition of § 441b.” The Commission’s regulations allow a corporation to
17 “prepare and distribute to the general public voter guides consisting of two or more candidates’
18 positions on campaign issues” provided that the guide complies with certain restrictions set forth
19 in the regulation, including that the guide not expressly advocate the election or defeat of a
20 clearly identified candidate. 11 C.F.R. § 114.4(c)(5).

21 Under the Commission’s regulations, a communication contains express advocacy when
22 it uses phrases such as “vote for the President,” “re-elect your Congressman, or “Smith for
23 Congress,” or uses campaign slogans or individual words, “which in context can have no other

1 reasonable meaning than to urge the election or defeat of one or more clearly identified
2 candidate(s)....” See 11 C.F.R. §100.22(a); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); see
3 also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). The second part of
4 this regulation encompasses a communication that, when taken as a whole or with limited
5 reference to external events, “could only be interpreted by a reasonable person as containing
6 advocacy of the election or defeat of one or more clearly identified candidate(s) because” it
7 contains an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one
8 meaning” and “reasonable minds could not differ as to whether it encourages actions to elect or
9 defeat one or more clearly identified candidate(s) or encourages some other kind of action.” See
10 11 C.F.R. §100.22(b). In its discussion of then-newly promulgated section 100.22, the
11 Commission stated that “communications discussing or commenting on a candidate’s character,
12 qualifications or accomplishments are considered express advocacy under new section 100.22(b)
13 if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat
14 the candidate in question.” *Express Advocacy; Independent Expenditures; Corporate and Labor*
15 *Organization Expenditures*, 60 Fed. Reg. 35292, 35295 (July 6, 1995) (“Explanation &
16 Justification”).²

17 The GOA voter guide appears to comport with the restrictions set forth in the

² In *FEC v. Wisconsin Right to Life, Inc.*, the U.S. Supreme Court held that “an ad is the functional equivalent of express advocacy,” and thus constitutionally regulable as an electioneering communication under 2 U.S.C. §441b(b)(2), if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” No. 06-969, 2007 WL 1804336, at *12 (U.S. June 25, 2007). The Court examined whether the ad had “indicia of express advocacy” such as the “mention [of] an election, candidacy, political party, or challenger” or whether it “take[s] a position on a candidate’s character, qualifications, or fitness for office.” *Id.*

1 Commission's regulations at 11 C.F.R. § 114.4(c)(5)(i).³ The voter guide does not expressly
2 advocate the election or defeat of a clearly identified candidate. The voter guide does not
3 contain words or "in effect" explicit directives that urge the election or defeat of any of the
4 identified candidates. *See* 11 C.F.R. § 100.22(a). In addition, the voter guide contains no
5 extraneous commentary about voting or about the candidates. There is no marking of preference
6 for any particular candidate in any particular race. There is no language to encourage voting at
7 all, much less voting for an identified candidate. Thus, reasonable minds could differ as to
8 whether the voter guide expressly advocates for any specific candidate under 11 C.F.R.
9 § 100.22(b).⁴ Further, no information has been presented suggesting that GOA acted "in
10 cooperation, consultation, or concert with or at the request or suggestion of [a] candidate, [a]
11 candidate's committee, or agents regarding the preparation, contents and distribution of the voter
12 guide." 11 C.F.R. § 114.4(c)(5)(i).⁵

13 Similarly, the e-mail alert that GOA sent to its subscribers on October 26, 2006, which
14 contained a link to the voter guide, referenced the upcoming election but did not contain any

³ The Commission's regulations at 11 C.F.R. § 114.4(c)(5) contain two parts with which a voter guide may comply and be deemed permissible under the Act. Since the voter guide in question here complies with 11 C.F.R. § 114.4(c)(5)(i), it is unnecessary to analyze whether the guide would be permissible under 11 C.F.R. § 114.4(c)(5)(ii).

⁴ *Cf.* MUR 5634 (Sierra Club) (in which the Commission concluded that the "Conscience" pamphlet, which included phrases such as "Let Your Conscience Be Your Guide" and "Let Your Vote Be Your Voice" and checkmarks beside preferred candidates, constituted express advocacy).

⁵ Before BCRA, 11 C.F.R. § 114.4(c)(5)(i) provided that a corporation or labor organization must not, among other things, contact a candidate in the preparation of the voter guide, and 11 C.F.R. § 114.4(c)(5)(ii) provided that contact with a candidate must only be in writing. In 2003, the Commission revised its regulations to create a safe harbor in the coordination rules at 11 C.F.R. § 109.21(f) to allow a person, including a labor union or corporation, "to contact a candidate to inquire about the candidate's positions on legislative or policy issues" without a subsequent communication paid for by that person being deemed coordinated with the candidate, and also amended 11 C.F.R. § 114.4(c)(5)(i) to delete the prohibition against any "contact" with the candidate and 11 C.F.R. § 114.4(c)(5)(ii) to delete the requirement that contact with a candidate be in writing. *See* Explanation & Justification for 11 C.F.R. § 114.4 ("E&J"), 68 Fed. Reg. 450 (Jan. 3, 2003). Nevertheless, no other actions resulting in coordination are permitted under 11 C.F.R. § 114.4(c)(5)(i).

1 words of express advocacy under 11 C.F.R. §§ 100.22(a) or (b). *See* Attachment 2 (E-mail
2 Alert). The alert included the words “Election Day” and “voter” but did not include a reference
3 to any political party or candidate. And although it linked to the voter guide, the e-mail alert did
4 not in any way instruct viewers on how to use the voter guide (for example, by stating that voters
5 should only vote for candidates with a grade of “A” on the voter guide, etc.).⁶ Therefore, the e-
6 mail alert appears to be a permissible corporate communication in itself and does not alter the
7 analysis of the voter guide complying with 11 C.F.R. § 114.4(c)(5).

8 For all of the above reasons, the Commission found no reason to believe that Gun
9 Owners of America, Inc. violated 2 U.S.C. § 441b in this matter.

⁶ *C.f.*, *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (concluding that cover letter accompanying “Scorecard” stating that the recipient need not bring the Scorecard to the voting booth for the congressional primary election “because only one incumbent is being challenged, Newt Gingrich, and he is a ‘100 percenter’ was express advocacy, because “[w]hile marginally less direct than saying ‘Vote for Newt Gingrich,’ the letter in effect is explicit that the reader should take with him to the voting booth the knowledge that Speaker Gingrich was a ‘Christian Coalition 100 percenter’ and therefore the reader should vote for him.”).