Memorandum

TO: Interested Parties

FROM: The Campaign Legal Center

DATE: January 10, 2007

SUBJECT: Disclosure of Paid Astroturf Lobbying

Section 220 of the Lobbying Transparency and Accountability Act of 2007 ("Section 220") requires lobbyists to disclose their paid efforts to induce the general public to contact government officials regarding specific legislative or executive actions. S. 1, 110th Cong. § 220 (2007). A review of federal case law confirms that Section 220 is constitutional, and contrary to the unsupported claims of critics, complies with the First Amendment.

First, the Supreme Court and lower federal courts have already upheld statutes requiring lobbyists to disclose information about their compensated efforts to "artificially stimulate" the public to contact legislators in "letter campaigns." *See, e.g., U.S. v. Harriss*, 347 U.S. 612 (1954). Section 220 requires the disclosure of the same type of lobbying activity, and is thus consistent with this favorable case law. Second, cases considering disclosure statutes in the context of ballot initiative contests have approved statutes analogous to Section 220, providing further support for the constitutionality of this section.

A. Section 220 of the Lobbying Transparency and Accountability Act

Section 220 requires lobbyists to disclose information regarding their "paid efforts to stimulate grassroots lobbying," commonly known as "astroturf lobbying."[1] Five limiting features of this disclosure requirement should be noted:

- Only a narrow class of professional lobbyists must make disclosure: (1) persons or entities who already have to register as lobbyists or lobbying organizations under the Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601, *et seq*., for their direct lobbying activities; and (2) "grassroots lobbying firms," defined as persons or entities that have one or more "grassroots lobbying" clients and quarterly receipts or expenditures exceeding $25,000.
- Only paid grassroots lobbying efforts are covered. Unpaid grassroots advocacy by individuals and volunteer organizations will not be subject to disclosure.
- A *de minimus* exception for small-scale paid grassroots lobbying applies. Lobbyists must

---

[1] Section 220 defines "paid efforts to stimulate grassroots lobbying" as "any paid attempt in support of lobbying contacts on behalf of a client to influence the general public or segments thereof to contact one or more covered legislative or executive branch officials (or Congress as a whole) to urge such officials (or Congress) to take specific action with respect to a matter described [in the Lobbying Disclosure Act]…." S. 1, § 220(a).

disclose only those grassroots lobbying efforts directed at 500 or more members of the general public.

- An entity's internal communications with its members, employees, officers or shareholders are exempted from disclosure.
- In the event income or expenditures connected to a grassroots lobbying effort do not exceed $25,000 in a calendar quarter, no disclosure of the amount of income and expenditures is required.

Pursuant to Section 220 and the Lobbying Disclosure Act, a registered lobbying organization or grassroots lobbying firm must report the name of their clients, the issues upon which they conducted grassroots lobbying, and estimates of their income and expenditures relating to grassroots lobbying. *See* S. 1, § 220(c); 2 U.S.C. § 1604.

B. Federal Case Law Upholding Lobbying Disclosure Confirms the Constitutionality of Section 220.

Statutes requiring disclosure of astroturf lobbying have been upheld in both the Supreme Court and lower federal courts. The leading case on lobbyist disclosure, *U.S. v. Harriss*, 347 U.S. 612 (1954), considered the Federal Regulation of Lobbying Act, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to report information about their clients and their contributions and expenditures. *Id*. at 614-15. To avoid finding this broadly-drafted Act unconstitutionally vague, the Supreme Court narrowed its definition of lobbying. Included in the Court's narrow definition, however, were not only lobbyists' direct communications with legislators, but also their "artificially stimulated" public "letter campaign[s]" to Congress.[2] *Id.* at 620; *see also id.* at 621, n.10 (noting that the Act covered lobbyists' "initiat[ion] of propaganda from all over the country, in the form of letters and telegrams," to influence the acts of legislators). After balancing the Act's possible infringement of First Amendment rights against the government's interests, the Court found that disclosure of "lobbying," thus defined, did not violate the First Amendment. It reasoned that disclosure served the state interest of "self-protection," and enabled legislators to evaluate lobbying pressures by providing "a modicum of information from those who, for hire, attempt to influence legislation, or who collect or spend funds for that purpose." *Id*. at 625.

Lower courts, following *Harriss*, have also upheld state astroturf lobbying disclosure statutes. In *Minnesota State Ethical Practices Board (MSEPB) v. Nat'l Rifle Association*, 761 F.2d 509 (8th Cir. 1985), the Eighth Circuit upheld a state statute requiring disclosure of grassroots lobbying, even when the activity at issue was only correspondence from a national organization to its members. The NRA had sent three letters and one mailgram from its Washington headquarters to its members in Minnesota (approximately 54,000 persons), urging them to contact their state legislators in support of three pieces of pending legislation. *Id*. at 511. The Court found that Minnesota's interest in the disclosure of these activities "outweigh[ed] any infringement of the [NRA's] first amendment rights." *Id*. at 512. *See also Commission on*

[2] For instance, one of the lobbyist-defendants had "arranged to have members of Congress contacted" about legislation that would raise the price of agricultural commodities and commodity futures "through an artificially stimulated letter campaign." *Harriss*, 347 U.S. at 616-17.

Independent Colleges and Universities v. New York Temporary State Commission, 534 F. Supp. 489, 498 (N.D.N.Y. 1982) (finding the New York state lobby law, construed to require disclosure of efforts to "exhort the public to make such direct contact with legislators as outlined in *Harriss*," did not violate the First Amendment). *Cf. Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460-61 (11th Cir. 1996) (citing *Harriss* in upholding Florida law, which required disclosure of expenditures both for direct lobbying and for indirect lobbying activities which did not involve contact with governmental officials).

The astroturf lobbying disclosure provision at issue here is no broader than those upheld in *Harriss* and *MSEPB*. Indeed, Section 220 does not go as far as the Minnesota statute considered in *MSEPB*, which required disclosure of intra-organizational lobbying communications, a category that Section 220 expressly exempts from disclosure. Furthermore, even if a court were to distinguish the activities covered by Section 220 from the grassroots lobbying considered in the above case law, Section 220 is justified by the same governmental interest of "self protection" articulated in *Harriss*:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad [lobbying] pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal….
>
> 347 U.S. at 625.

Because Section 220 will similarly enhance legislators' "ability to properly evaluate [lobbying] pressures" and identify "the voice of special interest groups," it passes muster under the First Amendment.

C. Case Law on Disclosure in the Ballot Initiative Context Indicates that Astroturf Lobbying Disclosure is Constitutional.

Opponents of astroturf lobbying disclosure may cite case law on the constitutionality of disclosure laws in ballot initiative contests. In this area, the Supreme Court has reviewed disclosure requirements more closely, occasionally striking such laws for infringing upon First Amendment rights. Analysis of this authority, however, confirms that it does not undermine the constitutionality of Section 220. Courts are generally supportive of laws analogous to Section 220 that require disclosure of the identity and financial activity of ballot initiative advocates because such laws provide useful information to the electorate. The adverse case law on ballot initiatives, insofar as it is instructive here, considers statutes that are clearly distinguishable from Section 220.

The Supreme Court has expressed approval of state statutes requiring the disclosure of funds spent to pass or defeat ballot measures. In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court recognized the importance of disclosure in the ballot initiative context, noting that "identification of the source of [ballot initiative] advertising may be required as a means of disclosure so that the people will be able to evaluate the arguments to which they are being subjected." *Id*. at 792, n.32. The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981), where it considered a challenge to Berkeley's ordinance limiting contributions to committees formed to support or oppose ballot measures. Although the Court struck down the contribution limit, it based this holding in part on the availability of disclosure regarding the committees advocating in connection to ballot referenda. *See City of Berkley*, 454 U.S. at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting."). This judicial support for disclosure statutes in the ballot initiative context led the Ninth Circuit to hold that, "[g]iven the Supreme Court's repeated pronouncements, we think there can be no doubt that states may regulate express ballot-measure advocacy through disclosure laws." *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003).

Only when a disclosure law fails to serve an important state purpose, such as providing the electorate with useful information, will it run afoul of the First Amendment. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court invalidated provisions of a Colorado statute which required (1) sponsors of ballot initiatives to disclose the names and addresses of the paid circulators of ballot petitions, and (2) paid circulators to wear name tags when collecting petition signatures. This holding was based in part on the Court's conclusion that these provisions did not serve the state's informational interest: the "benefit of revealing the names of paid circulators … is hardly apparent and has not been demonstrated." *Id*. at 203. At the same time, the Court noted approvingly the provision of the Colorado statute which was more analogous to Section 220 and which required "sponsors of ballot initiatives to disclose who pays petition circulators, and how much." *Id*. at 205. This requirement informed voters about "the source and amount of money spent by proponents to get a measure on the ballot." *Id*. In *McIntyre v. Ohio Elections Comm'n*., 514 U.S. 334 (1995), the Court declared unconstitutional an Ohio statute that required ballot initiative literature to identify the source of the literature, even in the case of a private citizen. The Court was skeptical of the government's alleged informational interest in this disclosure, finding that "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything to the reader's ability to evaluate the document's message." *Id*. at 348-49. Given the personal nature of the political handbill at issue, the Court also noted that compelled disclosure was "particularly intrusive," and "reveals unmistakably the content of the [author's] thoughts on a controversial issue." *Id*. at 355.

The statutes invalidated in *Buckley* and *McIntyre* are distinguishable from Section 220 in three principle respects. First, this ballot initiative case law is of limited relevance to an analysis of lobbying disclosure. The regulation of lobbying activities serves different state interests than does the regulation of the ballot initiative process. Requiring disclosure of lobbying serves to prevent the real or apparent corruption of government officials, as well as important "informational" interests. In the ballot initiative context, however, money is being spent to influence ballot measures, not government officials, so the potential for corruption is materially different. The Supreme Court has explicitly recognized this difference, stating that the anti-corruption interest that helped justify the disclosure of lobbying activities in *Harriss* was not relevant to the disclosure statute considered in *McIntyre*. *McIntyre*, 514 U.S. at 356, n.20.[3] Second, in contrast to the statutes considered in *Buckley* and *McIntyre*, Section 220 is justified by a stronger state "informational" interest. Whereas the laws invalidated in *Buckley* and *McIntyre* provided information of little use to the public, Section 220 would provide to government officials valuable disclosure about "those who for hire, attempt to influence legislation," aiding these officials in their evaluation of the "myriad pressures to which they are regularly subjected." *Harriss*, 347 U.S. at 625. Section 220 is thus more analogous to the provisions cited approvingly in *City of Berkley* and *Buckley*, which required disclosure of the "the source and amount of money spent by proponents" of ballot initiatives, enabling voters to evaluate the arguments for and against the initiatives. *Buckley*, 525 U.S. at 205. Finally, Section 220 applies only to paid lobbyists who conduct large-scale, astroturf lobbying campaigns for clients. The regulated class is simply not comparable to the private citizen distributing a "personally crafted statement of a political viewpoint" in *McIntyre*. 514 U.S. at 355.[4] This point is underscored by the fact that Section 220 applies only to a lobbyist's professional activities; a lobbyist is still free to engage privately in uncompensated *McIntyre*-style grassroots advocacy without any obligation to make disclosure.

D. Conclusion

Federal case law confirms that Section 220 passes constitutional muster. The Supreme Court and lower federal courts have upheld comparable statutes requiring disclosure of astroturf lobbying, and found them justified by important state informational interests. Furthermore, the case law on ballot initiatives in no way undermines the constitutionality of Section 220, and instead has expressed approval for analogous statutes requiring the disclosure of the source and amount of funds spent to pass or defeat ballot measures.

---

[3] The Supreme Court explained that:

> The [anti-corruption] interest also serves to distinguish *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), in which we upheld limited disclosure requirements for lobbyists. The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.
>
> *McIntyre*, 514 U.S. at 356, n.20.

[4] In the context of campaign finance regulation, the Supreme Court has upheld statutes requiring disclosure of contributions from <u>private</u> citizens to political parties, committees and candidates. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).