

**CONCURRENCE IN ADVISORY OPINION 2006-10 OF
COMMISSIONERS DAVID M. MASON AND HANS A. von SPAKOVSKY
AND DISSENT OF CHAIRMAN MICHAEL E. TONER**

Commissioners Mason and von Spakovsky voted for this advisory opinion with the reservations expressed below. Because of the same reservations, Chairman Toner dissented. Accordingly, this is a concurrence as to Commissioners Mason and von Spakovsky and a dissent as to Chairman Toner.

This advisory opinion concerns the coordination regulation, 11 C.F.R. § 109.21 (2006), and particular public-service announcements (PSAs) in which federal candidates make solicitations for charities. The advisory opinion correctly concludes that the PSAs are not coordinated communications. However, the advisory opinion, citing the advisory-opinion request, notes that no “campaign issues” will be topics of the PSAs and that the PSAs will not refer to any “pending official matter.” Advisory Op. 2006-10, 2006 WL 1879008, at *1 & n.1 (F.E.C. June 30, 2006), *available at* <http://ao.nictusa.com/ao/no/060010.html> (all Internet sites visited July 10, 2006). We write to explain that these facts are irrelevant and to emphasize that the use of the phrase “campaign issues” does not mean the Commission has a defined test for what constitutes a “campaign issue.”

As an initial matter, the PSAs are exempt from the coordination regulation, because they do not promote, support, attack, or oppose (“PASO”) the candidates, or opponents of the candidates, making solicitations. That is the end of the inquiry. *See* 11 C.F.R. § 109.21(g)(2). The enumeration of additional non-statutory, non-regulatory factors is inappropriate in an advisory opinion, whose purpose is to apply the statute and regulations. *See* 2 U.S.C. § 437f(a)(1) (1986).

There is no basis to conclude that the “campaign issues” and “official matters” criteria proffered in the request have any bearing on proper interpretation or application of any relevant statutory or regulatory requirements.

First, the coordination regulation includes four separate content standards. *See* 11 C.F.R. § 109.21(c)(1)-(4). The Commission could have chosen “campaign issues” and “pending official matters” as fifth and sixth content standards, but it did not. *See id.* At one time the Commission did attempt to pursue coordination claims based on a “campaign themes” theory, *see, e.g.*, Compl. at 7, *FEC v. Forbes*, No. 04-5352 (S.D.N.Y. Sept. 3, 1998), but the Commission withdrew the most recent suit filed on that basis, *see* Statement of Reasons of Vice Chairman Wold & Comm’rs Elliott, Mason & Sandstrom for Voting to Withdraw the Commission’s Complaint in *FEC v. Forbes, et al.*, (F.E.C. May 26, 1999), *available at* <http://eqs.sdrdc.com/eqsdocs/00003A06.pdf>, and later promulgated a coordination regulation without adding “campaign themes” to the regulation.

See 11 C.F.R. § 100.23 (2000), *repealed as noted in* Coordinated and Independent Expenditures, 68 FED. REG. 421, 422 (2003) (final rules) (citing P. L. 107-155, § 214(b), (c) (2002)); General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FED. REG. 76138, 76138-40, 76141-45 (2000) (final rules). This is not because the possibility did not arise. Indeed, in response to questions from Commissioner Toner at the 2002 hearing on coordinated and independent expenditures, there was substantial discussion of coordination of advertising on “campaign themes.”¹ Thus, excluding “campaign themes” was not accidental or an oversight. Moreover, the litigation spawning the most recent coordination rulemaking did include disputes over coordination of “helpful themes.” *See, e.g.*, Reply Br. for FEC at 16, *Shays v. FEC*, No. 04-5352 (D.C. Cir. March 25, 2005). However, the resulting orders and opinions did not address the issue, *see, e.g.*, *Shays v. FEC*, 337 F. Supp.2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), and the Commission did not address it in the revised regulation. *See* Coordinated Communication, 71 FED. REG. 33190 (2006) (final rules); Coordinated Communication, 70 FED. REG. 73946 (2005) (notice of proposed rulemaking).

Second, in considering 11 C.F.R. § 109.21(g), the Commission considered adopting, but chose not to adopt, a definition of PASO. *Cf.* Coordinated Communications, 70 FED. REG. at 73951 (proposing a safe harbor for communications not to be treated as coordinated); Coordinated Communications, 71 FED. REG. at 33199 & n.38 (declining to replace the time frame in the fourth content standard of the previous coordination regulation, 11 C.F.R. § 109.21(c)(4)(ii) (2003), with a PASO standard); *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (opinion of Stevens & O'Connor, JJ., joined by Souter, Ginsburg & Breyer, JJ.) (summarily holding that PASO is not unconstitutionally vague). Having just declined to adopt a regulatory definition, the Commission may not, in the advisory-opinion process, create new, generic standards altering that standard. *See* Statement of Reasons of Vice Chairman Wold & Comm'rs Elliott, Mason & Sandstrom on the Audit of Dole for President Comm., Inc., *et al.* at 4-5 (F.E.C. June 24, 1999), *available at* <http://www.fec.gov/members/mason/masonstatement5.htm>. After all, the Commission may not use “advisory opinions to establish rules of conduct.” *Id.* at 2. Instead, the Commission establishes rules of conduct by rulemaking. “Rulemaking is not simply the preferred method for filling in the FECA. It is the required method.” *Id.* at 3. Thus, we may, in an advisory opinion, conclude that particular communications PASO, but we may not, validly, declare as a generic standard, that communications mentioning “campaign issues” PASO.

Third, the Commission also considered, but did not adopt, a lobbying exception to the electioneering-communication regulation predicated in part on reference to pending official matters. *See* Coordinated and Independent Expenditures, 68 FED. REG. at 441. This occurred during the same 2002 rulemaking cycle in which the coordination rule was adopted in similar form to its current iteration. *Compare* 11 C.F.R. § 109.21 (2003) *with id.* (2006). Having considered and rejected application of the “pending official matter” standard in a closely related rulemaking,² we may not, in an advisory opinion, revive and inject that standard here.

¹ *See, e.g.*, 2 Hearing on Proposed Rulemaking on Coordinated & Independent Expenditures 21-22, 25-26 (F.E.C. Oct. 23-24, 2002); 1 *id.* 214-15, 231-32.

² Electioneering communications are a content standard in the coordination regulation, *see* 11 C.F.R. 109.21(c)(1), and the statutory limit on our electioneering-communication exemption authority is the same PASO standard used in

Given these three factors, if those who insisted on including the “no mention of campaign issues and pending official matters” factors as a condition of voting to approve this advisory opinion, *see* Open Meeting Agenda Audio File (F.E.C. June 22, 2006), *available at* <http://www.fec.gov/agenda/2006/agenda20060622.shtml>, are suggesting that these exclusions are relevant to the question of whether a communication PASOs a candidate, that suggestion is interesting. Unfortunately, the bare reiteration of these factors provides no support for that point, nor any guidance on how those factors relate to the PASO standard. In considering a “lobbying” exclusion, reference to pending official matters was proposed as a threshold factor in determining that a communication was *not* promoting or attacking a candidate. While the Commission did not adopt that proposal, *see* Coordinated and Independent Expenditures, 68 FED. REG. at 441, it ran directly counter to the suggestion that might be gleaned from reading the current opinion as it could be read, *i.e.*, that reference to pending official matters could constitute promoting or attacking a candidate. The conclusion that could be drawn from this opinion, that mentioning a pending official matter constitutes PASO, runs directly counter to the suggestion in the “lobbying” proposal, that mention of pending official matters is a threshold requirement for *avoiding* PASO. This confusion underlines the fact that the “pending official matter” category was irrelevant to a proper answer to the request.

Nevertheless, the phrase “campaign issues” does appear in a Commission regulation and in advisory opinions.

The regulation concerns voter guides. *See* 11 C.F.R. § 114.4(c)(5) (2003). More specifically, it concerns corporate or union spending on voter guides discussing “campaign issues.” However, the regulation does not prohibit the corporate or union spending. Rather, it permits what might otherwise be prohibited corporate or union spending provided that, *inter alia*, the spending is *not* coordinated. *See id.* § (i)-(ii)(A). Therefore, the regulation does not apply to coordinated communications. Thus, the reference in the regulation to “campaign issues” has no bearing on the coordination regulation itself, much less on communications that the coordination regulation exempts. *See, e.g.*, 11 C.F.R. § 109.21(g)(2).

Most references to “campaign issues” in advisory opinions concern voter guides. Several others address payment of legal expenses with campaign funds. Two, however, do address candidate communications in fora provided by corporations. Both conclude that the mere discussion of “campaign issues” alone is not sufficient to make payments for or incident to a candidate’s speech a contribution to, or a prohibited expenditure in connection with, the candidate’s campaign. *See* Advisory Op. 1996-11, 1996 WL 270977, at *5 (F.E.C. May 20, 1996) (“discussion of campaign issues by the candidate during a campaign necessitates further scrutiny to determine campaign-relatedness”), *available at* <http://ao.nictusa.com/ao/no/960011.html>; Advisory Op. 1992-

11 C.F.R. § 109.21(g)(2). *See* 2 U.S.C. § 434(f)(3)(B)(iv) (2004) (citing 2 U.S.C. § 431(20)(A)(iii) (2002) (referring to “a public communication that refers to a clearly identified candidate for [f]ederal office .. and that [PASOs] a candidate for that office”). “Public communication” is defined in 2 U.S.C. § 431(22) *and* 11 C.F.R. § 100.26 (2006). This definition uses the terms “mass mailing” and “telephone bank.” “Mass mailing” is defined in 2 U.S.C. § 431(23) and 11 C.F.R. § 100.27 (2002), and “telephone bank” is defined in 2 U.S.C. § 431(24) and 11 C.F.R. § 100.28 (2002).

6, 1992 WL 51226, at *3 (F.E.C. Feb. 14, 1992) (“discussion of campaign issues during an election by the candidate necessitates further scrutiny to determine campaign-relatedness”), *available at* <http://ao.nictusa.com/ao/no/920006.html>. Thus, to the extent that advisory opinions dealing with different statutory and regulatory provisions bear on the current advisory-opinion request, they suggest that mere discussion of campaign issues alone does not sweep an activity within Commission regulations.

Finally, notwithstanding the use of “campaign issues” at one place in the regulations and in several advisory opinions, if the phrase in this opinion were read as establishing a substantive standard defining the reach of the Federal Election Campaign Act (“FECA”), 2 U.S.C. § 431 *et seq.*, or of the PASO standard, we would have grave reservations about the vagueness of the phrase standing alone. *Cf., e.g., Buckley v. Valeo*, 424 U.S. 1, 40-41 & nn.47-48, 76-77 (1976) (discussing vagueness). In a permissive section of our regulations on voter guides, the vagueness is of lesser concern. Vagueness is also of lesser concern in a standard only triggering further scrutiny. *See* Advisory Op. 1996-11, *supra*; Advisory Op. 1992-6, *supra*. Unfortunately, the instant opinion could be read as excluding messages that refer to campaign issues from the exemption. Who, after all, is to say what constitutes a campaign issue? For example, is education a “campaign issue”? Is Hurricane Katrina? Yet education and disaster relief are likely subjects of PSAs at issue here.

Since the purpose of advisory opinions is to construe FECA and regulations, *see* 2 U.S.C. § 437f(a)(1), and because the “campaign issues” and “pending official matters” categories do not appear in the relevant portions of the statute and regulations, including these categories, without further definition or explanation, is neither appropriate nor helpful.

September 26, 2006

Michael E. Toner
Chairman

David M. Mason
Commissioner

Hans A. von Spakovsky
Commissioner