American Federation of Labor and Congress of Industrial Organizations

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October 15, 2002

Mr. John Vergelli
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking, "Coordinated and Independent Expenditures," 67 Fed. Reg. 60042 (September 24, 2002)

Dear Mr. Vergelli:

Enclosed is the signed original of the comments we e-mailed to you last Friday, October 11. We have made a couple of typographical corrections (no word or other substantive changes).

Thank you for your attention to this matter.

Respectfully submitted,

Laurence E. Gold
Associate General Counsel

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Enclosure

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Mr. John Vergelli
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Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking, "Coordinated and Independent Expenditures," 67 Fed. Reg. 60042 (September 24, 2002)

Dear Mr. Vergelli:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits these comments in response to the above-referenced notice of proposed rulemaking ("NPRM"). The AFL-CIO is the national federation of 65 national and international unions representing 13 million working men and women throughout the United States in the private and public sectors and in virtually every occupation and industry; these national and international unions are in turn comprised of tens of thousands of local and intermediate affiliated labor organizations. Fifty-one state labor federations, over 500 area and central labor councils, and seven trade and industrial departments, which coordinate union activities and provide services at the state and local levels and in various economic sectors, are also affiliated with the AFL-CIO.

The AFL-CIO and its affiliates engage in substantial legislative and issue advocacy on matters of concern to working families, including Social Security, Medicare, education, labor standards, health care, pension security, workplace safety and health, trade, immigration, the right to organize, regulation of union governance, and the role of unions and corporations in electoral politics. As part of this extensive advocacy program, the AFL-CIO and its affiliates seek to educate their members concerning the importance of these issues, the performances of officeholders in addressing them, and the positions candidates for public office take on them. The AFL-CIO and its affiliates also carry out and support extensive voter registration and get-out-the-vote programs aimed at increasing their members' participation in the democratic process. The labor movement uses every means of communication, including membership

meetings, workplace leafleting, newsletters, mail, the Internet and both paid and "free" media, to articulate the issues of greatest concern to working families. We also build coalitions with allied organizations, such as civil rights groups, for advocacy on behalf of workers.

In connection with this legislative and issue advocacy work, union officers, union members and union employees regularly interact with Members of Congress and their staffs and with officials within the Executive Branch regarding both substance and strategy. Some of these contacts are intended to influence the actions and decisions of these officials, while other contacts involve joint planning in support of or opposition to particular measures; most contacts involve both purposes. In the past, the Commission's broad and ill-defined prohibition of coordinated public political communications has cast a shadow over these legitimate union activities. The AFL-CIO submits these comments in an effort to assist the Commission in developing new regulations addressing candidates' and political parties' relationships with private groups that draw clear and justifiable lines between appropriate and inappropriate conduct.[1] We well recognize that the Commission confronts a difficult task in crafting new regulations to respond to Congress's virtually unexplained dissatisfaction with those the Commission promulgated less than two years ago. The Commission must craft new regulations that, as much as possible, are consistent with the text of BCRA §§ 202 and 214 and adhere to constitutional standards. We address the latter first.

I. Any Attempt By the Commission to Regulate Coordinated Public Communications Should Be Both Very Precise and Very Narrow

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court made clear that political communications of the kind regulated in FECA, as now amended by BCRA, are entitled to the highest degree of protection afforded by the First Amendment:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

[1] Our declination to comment on some aspects of the proposed regulations should not be construed as either endorsement of or opposition to them.

424 U.S. at 14, quoting Roth v. United States, 354 U.S. 476, 484 (1957). In order to ensure that citizens would not be chilled from discussion of issues during an election campaign, and recognizing that discussion of public issues is often tied to discussion of candidates, particularly incumbents, the Court in Buckley insisted that any restriction of political expression be narrowly and clearly drawn:

> Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties is an area permeated by First Amendment interests. The test is whether the language of [FECA] affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."

424 U.S. at 41-42, quoting N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).

And, in drawing a line between express advocacy and other speech in order to define an objective, precise and justifiable distinction between pure partisan election speech and speech that could concern, in whole or in part, other matters, the Buckley Court did not naively assume that communications that do not contain express advocacy may have no impact on the outcome of elections. Rather, in adopting the express advocacy test, the Court understood that the price of protecting communications about issues is that some protected communications would also have an election-related effect -- even intentionally so. See Buckley, 424 U.S. at 45. This principle, and the concomitant danger of over-regulation, are as true for communications that might be deemed subject to regulation as coordinated expenditures as they are of independent expenditures, if not more so. Commission regulations that do not precisely and narrowly define the types of communications to which they apply "may . . . operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." Id. at 41 n. 48 (interior quotation marks omitted).

Furthermore, introduction of the element of "coordination" adds a second level of uncertainty that may not only chill the communications themselves but may also inhibit the equally important First Amendment right of citizens to meet with their elected officials. As the United States Court of Appeals for the First Circuit recognized in rejecting the Commission's overly broad regulatory definition of coordination as applied to voter guides and voting records prepared by private groups:

> We think [the FEC rule prohibiting oral contact with candidates] is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office . . . It is hard to find

> direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues... It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives.

Clifton v. F.E.C., 114 F. 3d 1309, 1314 (1st Cir. 1997), cert. denied, 522 U.S. 1108 (1998).

In addition to having the potential to chill the exercise of free speech and free association, it is important for the Commission to recognize that the regulation of "coordinated communications" -- under which communications may be found to violate federal criminal and civil law because of the speaker's activities and relationships *external* to the communications themselves -- poses a qualitatively distinct, and in important respects greater, threat of government intrusion into protected political and legislative activities than a regulation based solely on the content of a communication. In its past investigation into alleged "coordination," the Commission has used its subpoena power to seek to identify, and inquire into, the details of virtually every contact between a corporation or union, acting through its officers, directors, members and allies, and a candidate, political party or anyone else who might be acting on the candidate's behalf. The legitimate nature of these contacts has not deterred the Commission so long as, in the Commission's parlance, the contacts provided an "opportunity for coordination," which is to say any contact has been fair game for Commission investigators. Moreover, there has been no limit to the kinds of information investigators might deem relevant to its "coordination" inquiry; they have frequently demanded access to an organization's legislative and political plans and most sensitive internal political discussions, and inquired into every relationship and affiliation, personal or otherwise. And, all or virtually all such information has concerned entirely lawful conduct.[2] See generally FEC v. Christian Coalition, Inc., 52 F. Supp. 2d 45 (D.D.C. 1999).

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[2] As Commission regulations recognize, it is permissible for corporations and unions to engage in partisan communications with their members and to coordinate these communications with candidates. See 11 C.F.R. § 114.3(a)(1). But as discussed below, the Commission has taken the position in its enforcement actions and regulations, see 11 C.F.R. § 114.2(c), that permissible coordination of these membership communications may be used as evidence that communications to *non*-members have been coordinated impermissibly. On this basis, the FEC has sought to investigate the details of corporate and union internal membership communications under the theory that coordination of such activities, although lawful in itself, may have tainted or infected other such activities.

The AFL-CIO, of course, does not view this matter abstractly or solely as an interested observer of the experiences of others. It is now publicly known that the investigation in MURs 4291 et al. of the political and legislative activities and advocacy of the AFL-CIO and some of its affiliates, during 1995 and 1996 - - an inquiry that spanned from 1996 to 2000 - - involved such extraordinary intrusions, and the federal district court in Washington recently emphasized the extremely sensitive nature of the information gathered by the Commission in that investigation when it ruled that the Commission could not implement its customary procedure of publicly disclosing almost all of it when the Commission ended its investigation into the AFL-CIO with a finding of no violation. See AFL-CIO v. FEC, 177 F. Supp. 2d 48 (D.D.C. 2001). See also In re Sealed Case, 237 F.3d 657, later opinion awarding attorney's fees, 254 F. 3d 233 (D.C. Cir. 2001); Order Denying Federal Election Commission's Motion for Entry of Protective Orders, McConnell v. FEC, Nos. 02-582 et al. (August 12, 2002).

The dangers to the First Amendment posed by such broad governmental investigations themselves were recognized in AFL-CIO v. FEC, 177 F. Supp. 2d at 63-64, as they have time and again by other federal courts. In Buckley, for example, the Supreme Court recognized that "compelled disclosure [regarding political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. Justice Felix Frankfurter made the same point earlier: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957) (Frankfurter, J., concurring). See also F.E.C. v. Machinists Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir.), cert. denied, 454 U.S. 897 (1981); F.E.C. v. Larouche Campaign, 817 F.2d 233, 234 (2d Cir. 1987). In response to these constitutional considerations, the district court in F.E.C. v. Christian Coalition, 52 F. Supp. 2d at 88-89, rightly stated that the definition of "coordination" applicable to general public communications under FECA § 441b(a) "must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions."

The AFL-CIO believes that the definition of coordinated communications proposed by the Commission in the NPRM falls short of the narrow and clear standard required by the Constitution and these authorities in a number of important respects.

II. The Proposed Definition of "Coordinated Communication" Is Unconstitutionally Overbroad and Beyond the Commission's Authority to Adopt

The NPRM defines the term "coordinated communications" to include not only

communications that expressly advocate the election or defeat of a clearly identified candidate for federal office, see proposed 11 C.F.R. § 109.21(c)(3), but also, pursuant to BCRA § 202, communications that would otherwise be considered "electioneering communications" under the Commission's regulations. See § 109.21(c)(1). The AFL-CIO believes that the prohibition in § 202 on coordinated electioneering communications is unconstitutional because it will improperly deter unions, corporations and individuals from engaging in protected issue advocacy as well as from exercising their First Amendment right to petition their elected officials. Nevertheless, we anticipate that the Commission will be unwilling to set aside the statutory direction in the absence of a final judicial decision holding it unconstitutional, so we limit our comments to the proposals in the NPRM that seek to include communications that constitute neither express advocacy nor electioneering communications. But see MUR 4358, Statement of Reasons of Chairman David M. Mason and Commissioner Bradley A. Smith (May 23, 2002); MUR 4624, Statement for the Record of Commissioner Bradley A. Smith.

In our view there is significant doubt whether the Commission has authority under the BCRA to extend the definition of "coordinated communications" to include communications other than express advocacy and electioneering communications. The question of what type of communications are subject to the rules on coordination was considered as part of the Commission's "Supplemental Rulemaking on General Public Political Communications Coordinated with Candidates," 64 Fed. Reg. 68951 (December 9, 1999), at which time the Commission determined to leave this question open. See Final Rule, Explanation and Justification, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg. 76138, 76141 (December 6, 2000) ("The Commission is not adopting any content standard as a part of these rules at this time."); *id.* ("The argument that a communication must constitute express advocacy in order to fall within the definition of 'expenditure,' . . . . in all circumstances . . . is not being addressed in this rulemaking.") See also Statement of Commissioner Bradley A. Smith on Coordinated Spending Regulations (November 16, 2000).

When Congress enacted the BCRA last March, it arguably answered, in § 202, the question left open in the supplemental rulemaking. That section provides that communications constituting electioneering communications under the BCRA that are coordinated with a candidate or party committee constitute "expenditures" and "contributions" under FECA. Under the maxim *expressio unius est exclusio alterius,* Congress's determination expressly to include "electioneering communications" within those key statutory terms, without including other communications, strongly indicates that Congress did not intend to authorize the Commission to reach coordinated communications that do not constitute express advocacy or electioneering communications, especially in light of the Commission's prior consideration of this issue and Congress's decision, in BCRA § 214, to repeal the Commission's coordination regulation, 11 C.F.R. § 100.23.

The very sparse legislative history underlying §§ 202 and 214 reveals that the extent to which Congress should prohibit coordinated communications was a particularly contentious issue that doomed -- even before the Senate debate in 2001 began -- the complex and intrusive coordination language of S. 27, the McCain-Feingold bill, as originally introduced during this Congress, prompting negotiations that resulted, on the eve of Senate passage in April 2001, in a compromise between those who favored broader regulation and those who believed that the Commission's 2000 regulation was either satisfactory or went too far. See 147 Cong. Rec. S.3184 (remarks of Sen. McCain), S3184-85 (remarks of Sen. Feingold), S3186 (remarks of Sen. Dodd) (daily ed., March 30, 2001).

Under these circumstances, and in the absence of other legislative history suggesting that Congress intended to leave to the Commission decisions regarding the scope of content of communications as to which the regulation of coordination could extend, the Commission may not include communications that do not constitute express advocacy or electioneering communications within the definition of "coordinated communication."[3]

III. "Coordinated Communications" Should Be Limited to "Public Communications"

The Commission seeks comment on whether it is appropriate to limit the scope of coordinated communications through use of the term "public communications," as defined in 11 C.F.R. § 100.26. See 67 Fed. Reg. at 60048. The AFL-CIO agrees with this suggestion, especially insofar as it would clarify that communications between unions and their members are not within the definition of "coordinated communications" under any circumstances. See 67 Fed. Reg. at 60048. The term "public communication" should be added to the basic definition of "coordinated communication" in 11 C.F.R. § 109.21(a), rather than used only in 11 C.F.R. § 109.21(c)(4), in order to make it clear that the only communications that are included in the definition are public communications as defined elsewhere in the regulations.

IV. The Content Standards Proposed in the NPRM Will Unduly Burden Legitimate Lobbying and Public Education Activities of Unions and Advocacy Groups

Assuming *arguendo* that the Commission has authority to define the content of "coordinated communications" more broadly than express advocacy and electioneering communications, the AFL-CIO agrees with the NPRM that any such content standard should

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[3] The sponsors' own comments on the final text of § 214 did not address the communications content issue, and focused instead on matters of conduct. See 148 Cong. Rec. S2145 (remarks of Sens. Feingold and McCain) (daily ed., March 20, 2002).

"serve to limit 11 CFR 109.21 to communications whose subject matter is reasonably related to an election." 67 Fed. Reg. at 60048. The question is, where to draw that line of reason? We believe that each of the three alternative formulations proposed in the NPRM for defining the content of coordinated communications fails to meet that standard. We first address the Commission's proposed alternatives, and then suggest another version of a content standard that we believe better fits the statutory and the Commission's standard, while venturing beyond express advocacy and electioneering communications.

Alternative A. The first option in the NPRM would require merely that a communication be a "public communication"[4] and that it "refer[] to a clearly identified Federal candidate for federal office." As the NPRM acknowledges, this version of the content standard "would seem to cover the widest range of public communications of all the alternatives." See 67 Fed. Reg. at 60049. We agree that the content of a communication subject to a coordination regulation could include such a specific candidate reference, but, if so, that must be the beginning, not the end, of the content standard.

Indeed, this alternative would not limit the definition of coordinated communications to communications whose subject matter is reasonably related to federal elections because it would include innumerable kinds of communications having nothing whatsoever to do with federal elections. For example, a union that distributed flyers asking workers to oppose an upcoming vote on the "McCain-Feingold bill" would make a prohibited contribution if it coordinated the content or distribution of the flyer with a Member of Congress with whom it was working to defeat that legislation. Similarly, a union that sponsored a broadcast communication urging the public to contact a Senator and urge him to vote against a pending right-to-work bill would make a prohibited contribution if it discussed the advertisement with its allies in Congress, even though the ad ran in a non-election year when an important vote was about to take place. The only way helpfully to narrow Alternative A would be to include at least each of the exceptions to the definition of "electioneering communications" adopted by the Commission in that rulemaking, as well as others that the Commission considered but did not adopt. See 67 Fed. Reg. at 60052. But such an approach would be unnecessarily cumbersome; we suggest a simpler approach on page 11, below.

Alternative B. Under this option, a public communication would be covered if it "promotes or supports or attacks or opposes a clearly identified candidate for Federal office." The Commission already acknowledged the difficulty, if not the impossibility, of defining this phrase with any degree of precision when it refused to adopt clarifying language and merely repeated the statutory language in its definition of "Federal election activity." See 11 C.F.R. § 100.24(b)(3), 67 Fed. Reg. 49111 (July 29, 2002). Moreover, the Commission recognized the

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[4] The definition of "public communication" is discussed above.

potential breadth of this language and its adverse impact on lobbying communications when it refused to adopt any of various alternative exceptions to the definition of "electioneering communication" for lobbying and other communications because communications exempted under any of the alternatives could reasonably be understood or perceived to "promote, support, attack, or oppose a Federal candidate." Final Rule and Explanation and Justification for Electioneering Communications, Agenda Document No. 02-73 at 52, 55-56 (October 8, 2002), *approved with unrelated revisions*, October 10, 2002.

There can be little question that Alternative B would chill the exercise of protected speech, yet there is no statutory command or other reason to import this problematic phraseology from BCRA § 203 into the regulatory implementation of the BCRA coordination provisions. Alternative B should not be adopted.

Alternative C. Under this option, a public communication would satisfy the content standard if the communication is made within 120 days of a general or primary election, the communication is "directed to voters in the jurisdiction of the clearly identified candidate," and the communication "makes express statements about the record or position or views on an issue, or the character, or the qualifications or fitness for office, or party affiliation, of a clearly identified Federal candidate." Although the AFL-CIO appreciates the Commission's effort to craft a coordination content rule that, unlike the former "electioneering message" standard, does not require inquiry into the subjective effect of the communication on the reader, viewer or listener, see 67 Fed. Reg. at 60049, Alternative C demonstrates the insuperable dilemma presented by this effort if one uses a content standard that reaches broadly beyond express advocacy.

There is no empirical support for the premise of the first prong of the test that the timing of a communication during the period of 120 days before of a general or primary election marks a meaningful demarcation between election-related and other communications. Obviously, the BCRA definitions of "electioneering communication" and "federal election activity" entail similar temporal guideposts, but, their wisdom and constitutionality aside, Congress drew no such lines in § 214.

Moreover, a 120-day test could easily bar the dissemination of public communications well before an incumbent federal officeholder even qualifies as a "candidate" under FECA or qualifies to appear on a primary ballot; and, in many states, it would effectively create a black-out period for coordinated communications throughout the entire election year and even into the previous non-election year, depending upon when a primary election is scheduled.[5]

The second prong of Alternative C also poses significant interpretive problems and could unreasonably expand the reach of the prohibition on coordinated communications. Is a

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[5] In response to the Commission's inquiry at 67 Fed. Reg. 60049, if Alternative C were adopted a communication outside of the 120-day period should not be deemed to meet the content standard unless it contains express advocacy or electioneering communications.

communication in a speech "directed to voters in the jurisdiction of the clearly identified Federal candidate" if voters from that jurisdiction are in attendance at the speech, even though it is delivered in another jurisdiction? Are flyers distributed at a worksite or union hall located in State X directed to voters of State Y if a small number of employees or union members reside in State Y? Would there be a *de minimus* exception, so that a communication that accidentally reaches only a small number of residents of a jurisdiction would not be covered? Is a communication that is run in more than one jurisdiction, including jurisdictions in which the individuals named are not candidates in an up-coming election, be treated as having been "directed" to the single jurisdiction in which the individual named is a candidate? These questions point up the perhaps unintended imprecision and breadth of the "directed to voters" phrasing.

Finally, the third prong of Alternative C unreasonably prohibits communications that contain messages, such as an officeholder's prior record or position or views on an issue, that are essential if lobbying and other non-electoral messages are to be effective. Consider, for example, a broadcast advertisement urging the public to contact a Member of Congress to urge her to vote in favor of an increase in the minimum wage. Is it not highly pertinent to this message, and does it not make the message that more effective and meaningful, if the advertisement points out that the Member voted against allowing a vote on a similar measure only two months before? Isn't this information exactly what will make most clear to viewers and listeners who support a minimum wage increase (and even those who don't support it, and might wish to encourage the opposite legislative result) why it is imperative that they contact their Representative? And, since the answer to each of these questions is clearly "yes," why shouldn't the sponsor of the advertisements be allowed to coordinate them with another Member of Congress with whom it is working to enact the minimum wage legislation?

Similarly, the proposed third prong would reach congressional voting records published by numerous organizations in connection with their legislative activities even though, as the court in Clifton recognized, there is normally nothing improper about coordinating such information with Members of Congress and the Executive Branch.[6]

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[6] In this regard, the AFL-CIO supports, as far as they go, the proposed changes to the Commission's current regulation on voter guides, 11 C.F.R. § 114.4(c)(5), but only if they are expressly subject to a provision on the order of proposed § 109.21(f) as described at 67 Fed. Reg. At 60060. (As noted below, proposed § 109.21(f), which is referred to twice in the NPRM, 67 Fed. Reg. at 60060, does *not* appear in the proposed rule.)

We recommend, however, that the Commission further modify this regulation in order to conform to the *Clifton* decision as part of the current rulemaking, rather than delay this action until a subsequent rulemaking. If the changes proposed in the NPRM are adopted, there will no

AFL-CIO Proposal. Again, if the definition of coordinated communications is to withstand constitutional challenge, it should, in the Commission's own words, "serve to limit [the regulation] to communications whose subject matter is reasonably related to an election." 67 Fed. Reg. at 60048. The AFL-CIO believes that this goal is more likely to be accomplished if the content standard in the proposed regulations is framed to include only a communication that (1) expressly refers to either (a) a candidate in his capacity as a candidate or (b) the next election otherwise, and (2) is publicly disseminated in a manner that the payor of the communication knows will reach, and that actually does reach, at least 100 eligible voters in the electorate of that candidate or election.

The first requirement is not limited to express advocacy or electioneering communications but incorporates the relevant certainty that the Federal candidate is named in his candidate capacity, so the communication certainly pertains to the election; the same is true of a communication that refers to the election itself otherwise, even if it names no candidate. In either event, the communication explicitly concerns an election and, if coordinated, signifies that the coordinating candidate or party involved considers it to have electoral value. For the same reason, the communication need incorporate no temporal requirement other than that it precede the "next" election referred to.

The second requirement incorporates both knowledge and actuality that the communication is disseminated to at least 250 eligible voters in the relevant electorate of the named candidate or election. This requirement avoids capturing both inadvertence by the payor and a "no harm" situation where the audience in fact falls under the requisite number. A numerical audience figure (100) appears in current § 100.23(e)(1) and in the regulation governing disclaimers for mailed independent expenditures, § 110.11(a)(3); we suggest 250 as a more reasonable cut-off for enforcement of a coordination standard.

V. The "Request or Suggestion" Element of the Proposed Conduct Standard Is Unsatisfactory in Several Respects

Whereas the content standard proposed at 11 C.F.R. § 109.21(c) makes clear that a communication will be a coordinated communication only if it clearly identifies a federal

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longer be any reason to distinguish between voter guides covered by 11 C.F.R. § 114.4(c)(5)(i) and those covered by 11 C.F.R. § 114.4(c)(5)(ii), especially insofar as the latter provision continues to rely on the discredited "electioneering message" test. See 11 C.F.R. § 114.4(c)(5)(ii)(D)-(E). Five years is long enough for the Commission to retain a patently unconstitutional provision in its regulations. We refer the Commission to the AFL-CIO's comment submitted in response to its Notice of Availability, 64 Fed. Reg. 46319 (August 25, 1999), for a fuller explanation of our views on this subject.

candidate, the "request or suggestion" element of the conduct standard set forth at 11 C.F.R. § 109.21(d)(1) does *not* require that the defined activity take place between the person paying for the communication and the candidate who is identified in the communication or with an opposing candidate (or a political party allied with either). Accordingly, conduct would be proscribed even where a union or corporation makes a public communication at the request or suggestion of a candidate in another state or congressional district who is not acting as an "agent"[7] for the candidate named in the public communication or his opponent. As a result, a union or corporation could be penalized for coordinating with respect to an issue communication with any Member of Congress who is running for re-election in another jurisdiction. Such a broad prohibition is inconsistent with the mandate in Christian Coalition and common sense, and is nowhere required by the BCRA.

The AFL-CIO also has significant concerns about the second prong of the "request or suggestion" element, under which the conduct standard would be satisfied if the person paying for the communication suggests the creation, production, or distribution of a communication to the candidate, authorized committee, political party committee, or agent of any of the foregoing, and the candidate or political party committee "assents to the suggestion." The district court in Christian Coalition made clear that "coordination" does not exist where a union or corporation merely informs a candidate about its own political plans. Adding a requirement of "assent" by the candidate, particularly if it might be implied from the candidate's silence, simply adds to the complexity of the inquiry and will allow even greater intrusion into protected political discussions. There is no evidence that the kind of circumvention at which this element is aimed, see 67 Fed. Reg. at 60050, is a real, rather than a theoretical, problem; and, the costs of including this element override any gain that may be achieved in this regard.

The AFL-CIO also disagrees with the suggestion, 67 Fed. Reg. at 60050, that a request or suggestion for a communication by a candidate or political party should be viewed as a coordinated communication without reference to any content standard. As we have discussed earlier, there are numerous communications that may be made at the request or suggestion of a candidate that have no relationship to any election; they should not be included in the definition of coordinated communications.

Finally, the NPRM explains that "general appeals for support" would not be encompassed. See 67 Fed. Reg. at 60050. We agree with that sound view, and suggest that the text of the regulation itself expressly so state in order to enhance the guidance that the regulations will provide to the public.

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[7] With respect to the definition of "agent", see pages 20-21, below.

VI. The "Materially Involved" Element of the Conduct Standard Should Not Be Construed As Suggested in the NPRM

The AFL-CIO does not take issue with the proposed language of the "materially involved" element of the conduct standard as it appears in 11 C.F.R. § 109.21(d)(2). We specifically endorse the Commission's explanation that material involvement covers both the nature of the contact and the information or other content conveyed, and the regulation itself should so state.

However, we have significant problems with the manner in which the NPRM states that this element will be construed. Specifically, we do not agree that providing information about a campaign's plans, projects, activities, or needs, 67 Fed. Reg. at 60050, or conveying approval or disapproval of the other person's plans, *id.*, should be sufficient standing alone to meet the conduct standard. Specifically, "material involvement" should exist only where the candidate or political party has had significant control or influence over decisions regarding the communication.

The AFL-CIO also believes that the "materially involved" element of the conduct standard should require that the "material involvement" be by or on behalf of the candidate identified in the communication or his or her opponent, or an allied political party, not any candidate as is presently the case. And, the regulation should provide, as the NPRM explains, that "general appeals for support" are not included.

VII. The Proposed Conduct Standard Should Not Preclude "Substantial Discussion" With a Candidate or Political Party

For the reasons set forth earlier, the AFL-CIO disagrees with the Commission's position that it must include in the "coordinated communication" regulation each of the items set forth in BCRA § 214(c)(1)-(4), including "payments for communications made by a person after substantial discussion about the communication with a candidate or a political party." And, because the "substantial discussion" prong of the content standard appears to overlap entirely with the "materially involved in decisions" prong, adding a separate provision can only produce confusion and uncertainty. These two prongs should be combined into one.

VIII. The Final Regulation Should Include Exceptions to Make Clear That Any Communication With a Candidate or Party Regarding Their Legislative or Policy Positions Does Not Alone Make a Communication Coordinated in Order to Avoid Unduly Intrusive Enforcement Actions

The NPRM also seeks comment on whether exceptions to the proposed content or

conduct standards should be included in the final rule. 67 Fed. Reg. at 60052. The AFL-CIO believes that certain exceptions should be included, as follows.

While the NPRM states that the proposed rules on coordinated communications "would allow a person, such as a corporation or a labor union, to contact a candidate to inquire about the candidate's positions on the issues without a subsequent communication paid for by that person being deemed coordinated with the candidate," 67 Fed. Reg. at 60060, the section cited, 109.21(f), does not appear in the proposed regulation. See 67 Fed. Reg. at 60066. This is evidently a typographical oversight, but hopefully one that reflects a decision to include such a provision. Such an exception should be included in the final regulation, and it should expressly exempt contacts with a candidate concerning legislative and other policy matters or the candidate's positions on public issues, regardless of whether the group utilizes the contacts for lobbying, preparation of voting records or voter guides, or other uses, so long as there are no dealings with the candidate described in an appropriate conduct standard concerning the groups' potential public communications.

The regulation should also be revised to make clear that a candidate's or political party's response to any communication with a candidate or party regarding their position on legislative or policy matters does not alone make the communication coordinated no matter how that communication is brought about. In a crucial portion of its opinion, the Christian Coalition court made clear that a corporation's or union's mere knowledge of a candidate's or party's plans and strategies does not amount to coordination even where this information is available only to insiders: "the First Amendment does not allow coordination to be inferred merely from a corporation's possession of insider knowledge from a federal candidate's campaign." 52 F. Supp. 2d at 95. Addition of express language incorporating these qualifications to the regulation would give notice that the regulation is not intended to deter certain legitimate activities that they might otherwise avoid out of an abundance of caution. In addition, setting out the qualifications in the regulation would make clear that particular evidence, standing alone, is not sufficient to open a far-ranging investigation into a respondent's activities. Proposed language is set out in a footnote.[8]

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[8] *Communications With A Candidate or Party Not Constituting Coordination.* The following communications shall not standing alone constitute evidence of the existence of coordination with a candidate or political party:

> (1) A communication with a candidate or political party regarding the candidate's or party's position on legislative or public policy issues, no matter how such communication is initiated;
>
> (2) A communication concerning a candidate's or party's plans and

IX. The Proposed Conduct Standard Should Not Prohibit the Use of Common Vendors or Former Employees of Candidates and Parties

Contrary to the position taken in the NPRM, see 67 Fed. Reg. at 60047, 60051, BCRA § 214(c) does *not* mandate that the regulations on coordinated communications exclude communications made with the assistance of a so-called "common vendor" or by a former employee of a candidate or political party. Section 214(c) calls upon the Commission only to "address" these matters. In introducing the Section 214 compromise language that survived almost verbatim through enactment, Senator Feingold emphasized:

> There is one thing I want to make very clear and reiterate: While this amendment instructs the FEC to consider certain issues in the new rulemaking, it doesn't require the FEC to come out any certain way or come to any definite conclusion one way or another.

147 Cong. Rec. S3185 (daily ed., March 30, 2001). And, on the eve of final enactment of the BCRA one year later, Senator Feingold repeated:

> Section 214 directs the FEC to promulgate new regulations on coordinated communications and lists four specific subjects that the FEC must address in those new regulations. It does not dictate how the Commission is to resolve those four subjects.

148 Cong. Rec. S2145 (daily ed., March 20, 2002).

If Congress had intended to prohibit these activities, it could have done so explicitly. The compromise left it to the Commission to decide, not only how to regulate the four enumerated types of activity (common vendors, prior employees, republication of campaign materials and communications following "substantial discussion"), but *whether* they should be regulated at all. The Commission apparently has failed to consider the option of not doing so.

> strategies, even where such information is only available to persons associated with the candidate's campaign or the party; or
>
> (3) A communication to a candidate or party providing information about an individual or entity's plans and strategies, even where such information is not available to the public.

This point is especially important with respect to the Commission's proposals regarding former/common[9] vendors and former employees. While in theory common vendors and former employees may serve as conduits for information from candidates and political parties, the question left to the Commission to decide is whether this possibility has manifested itself to an extent that would justify the substantial intrusion into protected campaign activity entailed by both of the proposed regulations. Thus, while the issue of common vendors has arisen in enforcement actions occasionally over the years, see, e.g., Democratic Senatorial Campaign Committee v. FEC, 745 F. Supp. 742 (D.D.C. 1990); Branstool v. FEC, No. 92-0284 (April 4, 1995), the facts of these and other coordination cases suggest that the presence of a common vendor is usually the result of oversight or inadvertence, rather than a deliberate effort to evade the prohibition on coordinated communications. In the Commission's investigation in MURs 4291 et al., for example, the evidence demonstrated that the AFL-CIO was not even aware that some of its vendors were also working for a small number of candidates. See General Counsel's Report at 42-43 (June 9, 2000).

Nor has Congress identified a pervasive practice of using common vendors or former employees to evade FECA's requirements. On the other hand, the Commission's experience in attempting to enforce its prior rules regarding common vendors makes clear the extent to which such efforts necessarily intrude into the day-to-day conduct of political affairs in a manner and to an extent that will necessarily chill the exercise of political rights. Legitimate concerns about reaching indirect avenues of actual coordination are addressed by the regulation's reach to "agents" of candidates, political parties and other entities.

In sum, the historical record before the Commission simply does not support the kinds of broad prohibitions on the use of common vendors and former employees proposed in the NPRM; the Commission should drop these provisions and revisit these questions when, and if, evidence emerges to support regulation.

X. The Proposed Rules Regulating the Use of Common Vendors and Former Employees of Candidates and Political Parties Are Overly Broad

If the Commission nevertheless decides to prohibit the use of former/common vendors and former employees of candidates and political parties, then the proposed regulations set forth

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[9] We use the term "former/common vendor" rather than "common vendor" because under the proposed rule a commercial vendor who no longer works for a candidate or political party committee may still be prohibited from working for a third party during the election cycle. The proposed rule is *not* limited to vendors who are working simultaneously for a candidate or a political party committee and a third party, as the term "common vendor" would suggest.

at 11 C.F.R. §§ 109.21(d)(4) and (d)(5) should be narrowed in three important respects.

First, the period during which the use of common vendors[10] and former employees[11] is prohibited under each provision should not extend to the entire "election cycle," which in the case of a U.S. Senator could last as long as six years, or even a fixed period of two years, which could extend beyond the date of an election. Given the extremely short half-life of political strategies and political information, which is frequently outdated within days, if not hours (the Commission's regulation concerning the valuation of opinion poll data incorporates a depreciation formula as a function of time, see § 106.4(g)), there is no justification for limiting for such long periods the ability of unions and other organizations to employ vendors and employees with the background and experience necessary to undertake effective political campaign activities. The non-use period in the regulation should extend for no more than 30 days after a vendor or employee has ceased to work for the candidate or political party, and the non-use should be limited to work that relates to that candidate or party, not employment itself; otherwise, individuals could be unfairly suspended from working at all in their chosen profession for a period of time.[12]

Second, both rules should be amended to delete the language that prohibits a vendor or former employee from "making use" of information about the plans, etc. of the former client or employer, without actually transferring that information to the sponsor of the communication.

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[10] In response to the Commission's question, 67 Fed. Reg. at 60051, we do not believe that media buyers should be included in the scope of "commercial vendor," since such firms normally do not exercise significant discretion with respect to the placement of public communications.

[11] While the AFL-CIO agrees with the qualification in the proposed rule that former employees of a candidate or political party should be covered only if they have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee. 67 Fed. Reg. at 60051, we believe that the rule should automatically exclude certain categories of former employees from the prohibition, including, for example, persons who worked only for an officeholder's legislative or executive office and not his or her campaign, and administrative and support employees. It is unlikely that employees fitting these descriptions would have access to material information, as required in the definition, and a safe harbor would give some measure of certainty to candidates, unions and corporations seeking to comply with the rule and would avoid unnecessary investigations in many cases.

[12] If the Commission were to reduce the period during which a vendor or former employee could not work for a third party to 30 days, as we suggest, some of the problems raised in the NPRM could disappear.

See 67 Fed. Reg. at 60051. Such a *per se* rule would mean that virtually every complaint filed with the Commission alleging unlawful coordination through common vendors would have to prompt a full-fledged investigation. That is because the complainant in coordination cases rarely will have information sufficient to establish the existence of coordination using this standard, and the party against whom the charge is made will usually not have access to the kind of information that could rebut the inference of coordination arising from the use of common vendors. The Commission has struggled in the past to define how much evidence is required before an intrusive investigation into alleged coordination may be opened, see, e.g., MUR 2766, Supporting Memorandum of Commissioner Thomas J. Josefiak for The Statement of Reasons of Chairman Lee Ann Elliott and Commissioners Joan D. Aikens and Thomas J. Josefiak at 1-3 (1990),[13] and this vexing problem would only be exacerbated by the "make use of" standard proposed in the NPRM.

Moreover, an investigation into whether a vendor or former employee "ma[d]e use of" information obtained from a former client or employer would frequently require a massive and intrusive investigation into what the vendor or former employee thought and how the respondent otherwise made decisions about its political activities, in addition to the role of the vendor or employee in those decisions. The district court in the Christian Coalition case aptly warned that "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." 52 F. Supp. 2d at 88-89.

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[13] As Commissioner Josefiak explained:

> Contrary to popular belief, the job of the Commission is not to "ferret out" violations wherever we remotely suspect they might lurk, or to act as investigative reporters following a hunch. The Commission is not intended to be a roving "watchdog"-- nor should anyone want it to be . . . it is clear that the Commission is not entitled to view the Constitutional constraints upon prohibiting or limiting genuinely independent expenditures as some "loophole" in the regulation of campaign finance activity or as a threat to proper enforcement of the Federal Election Campaign Act. The First Amendment's permitting of unlimited independent expenditures is not a dangerous result for which the Commission must compensate. The Commission should be vigilant and thorough in scrutinizing evidence presented in complaints concerning this activity, but we should not make it impossible for those engaging in independent expenditures to avoid an 'RTB' finding and a lengthy and full-blown inquiry.

Id.

There is no such possibility of *quid quo pro* corruption where a vendor or former employee relies on information gathered from a client or former employer without transferring that information to the sponsor of a communication.[14]

Third, the Commission should not embrace either "independent contractors," as it proposes, or "volunteers," as it asks, within the "former employee" rubric. Federal labor and employment, tax, and many other fields of law regulate matters concerning "employees," and that term is legally distinct from "independent contractor." Congress plainly had the experience and wherewithal to direct the Commission to address the latter, but did not. On the merits, we also suggest that the Commission would invite complaints about situations that are too far afield from the concerns that may animate regulation of employees. For similar reasons, volunteers, even fundraisers, include ordinary citizens who give their time without compensation to political campaigns; they should not be subject to this regulation due to that status alone.

XI. The Final Regulation Should Amend 11 C.F.R. § 114.2(c) To Eliminate the Tainting Theory of Coordination

The Commission's current regulation at 11 C.F.R. § 114.2(c) contains language regarding the effect of permissible coordination on subsequent communications that is at variance both with the decision in the Christian Coalition case and with the proposed regulation on coordinated communications, and it should be deleted as part of the final regulation. This provision states, correctly, that disbursements by corporations and labor organizations for the election-related activities described in §§ 114.3 and 114.4 of the regulations will not constitute contributions or expenditures even when coordinated with a candidate, candidate's agent, candidate's authorized committee or party committee. The regulation then states that while coordination "beyond that" described in the cited provisions shall not cause subsequent activities directed at the restricted class to be considered contributions or expenditures, such coordination "may be considered evidence that could negate the independence of subsequent communications to those outside the restricted class by the corporation, labor organization or its separate segregated fund." While the meaning of this provision has always been extremely unclear, it appears to be based on a tainting theory of coordination that wanders far away from even the conduct standards in the proposed regulations. Furthermore, the tainting theory greatly expands the scope of coordination

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[14] If the final rule continues to include the "make use of" element, then the Commission should, as suggested in the NPRM, see 67 Fed. Reg. at 60052, exclude situations in which a former employee makes use of information in a manner that is adverse to the candidate or political party committee, without coordinating in any manner with the candidate or political party committee that benefits from the communications. In this situation there is no possibility that the former employee has been sent by the candidate or party for whom he previously worked as a "secret agent" or otherwise.

investigations by allowing investigators to probe not only into the communications alleged to have been coordinated, but into other lawful communications by the respondent that were permissibly coordinated, and that the courts have long recognized enjoy constitutional protection. See, e.g., Pipefitters Local 502 v. U.S., 407 U.S. 385 (1972); U.S. v. CIO, 335 U.S. 106, 121 (1948). This regulation should be revoked in this rulemaking.

XII. The Proposed Definition of "Agent" Should Exclude Legislative or Other Non-Campaign Staff of an Officeholder

The Commission seeks comments on a proposed definition of "agent" that would be limited to 11 C.F.R. part 109. See 67 Fed. Reg. at 60043-44. The proposed definition focuses on whether a purported agent has "actual authority, either express or implied," to engage in one or more specific activities on behalf of specified principals. While the AFL-CIO is in general agreement with the Commission's approach, we suggest that the proposed definition in 11 C.F.R. § 109.21(a) be amended in order to make it easier for unions and other organizations to work with federal officeholders without risking a subsequent determination that they have engaged in prohibited coordination. It will not always be obvious whether an employee or volunteer has "actual authority, either express or implied" to act on behalf of a candidate. This problem can be remedied in part, however, if all persons in the legislative offices of federal officeholders would automatically be deemed not to be "agents" as defined in the regulation, unless the person dealing with them knows that they are acting on behalf of the officeholder in her capacity as a candidate. This will create a safe harbor for groups to work with congressional and other offices on legislative matters without having to fear that they will later be found to have engaged in prohibited coordination with a candidate.

With respect to the specific questions asked by the Commission, the AFL-CIO believes that the definition of "agent" should state that a person must be "acting within the scope of his or her authority as an agent," in order to avoid any uncertainty on this point. The AFL-CIO also agrees that a person should be required to convey information that was only available to that person because of his or her role as an agent, and that a person should not be considered an agent merely because he bases his recommendations to a third party on information that was gained only due to that person's role as an agent. In clarifying the definition of "agent" in these respects, however, the Commission should be careful not to undercut the "conduct" standard set forth at 11 C.F.R. § 109.21(d), under which conveying information alone does not satisfy the content requirement.

Finally, we do not believe that a person who is authorized by a candidate or political committee to solicit or receive contributions or other transfers of funds, and who holds a formal or honorary position or title with the candidate's campaign or a political party committee, should be considered *per se* to be an agent of that candidate or political party committee. Many individuals who fit this description will not have "actual authority, express or implied" to engage

in the specific activities relating to public communications, and, more importantly, many outsiders who communicate with such individuals may be unaware of their status within a campaign or committee.

XIII. The Commission Correctly Proposed to Predicate the Requirement to File 24- and 48-Hour Reports of Independent Expenditures on the Occurrence of Actual Public Distribution of a Communication

For the reasons set forth in the AFL-CIO's comments in response to the Commission's "electioneering communications" rulemaking, we support the Commission's proposed interpretation of the BCRA's "makes or contracts to make" language and the triggering mechanism for 24-hour and 48-hour reports of independent expenditures, namely, the actual public distribution of a communication. See 67 Fed. Reg. at 60045-46. The Commission's NPRM in that rulemaking well stated why requiring advance disclosure of a possible future communication is both practically and constitutionally problematic. See Notice of Proposed Rulemaking, "Electioneering Communications," 67 Fed. Reg. 51131, 51141 (August 7, 2002).

We do suggest that the text of proposed §§ 104.4(b)(2) and (c) and 104.5(g)(1) and (2) be clarified to specify that the filing of reports of subsequent aggregations of $10,000 or $1,000 in independent expenditures, as the case may be, are subject to the same trigger of actual distribution of the communication; alternatively, the Commission's explanation and justification should explicitly so explain.

We withhold comment on other reporting issues until the Commission's separate, consolidated rulemaking on reporting obligations under the BCRA.

Conclusion

The AFL-CIO appreciates the opportunity to comment on these proposed regulations. The AFL-CIO tentatively requests the opportunity to testify at the Commission's hearing.

Respectfully submitted,

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