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NAN ARON, *President*
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October 11, 2002

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

RE: Federal Election Commission Notice of Proposed Rulemaking 2002-16: Coordinated and Independent Expenditures

Dear Mr. Vergelli:

The Alliance for Justice welcomes the opportunity to submit comments in response to the Notice of Proposed Rulemaking issued on September 24, 2002.[1] We thank the Commission and its staff for their effort in creating regulations to implement the coordination provisions of the Bipartisan Campaign Reform Act of 2002,[2] particularly because that effort follows a similarly challenging rulemaking on these same issues just over two years ago. While we admit our skepticism about the decision by Congress to revisit this issue so soon, we believe that these proposed rules respond to some of our concerns that were not addressed in the previous rulemaking. Although BCRA forces the Commission to include some provisions of these regulations that still concern us, we are largely satisfied with the direction the Commission takes in these proposed rules.

The Alliance for Justice would appreciate the opportunity to expand on our views as expressed in these comments and requests the opportunity to testify in person before the Commission when it holds a hearing on these proposed regulations.[3]

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[1] Federal Election Commission Notice of Proposed Rulemaking on Coordinated and Independent Expenditures, Notice 2002-16, 67 Fed. Reg. 60042 (September 24, 2002) [hereinafter NPRM].

[2] PUB. L. 107-155, 116 Stat. 81 (March 27, 2002) [hereinafter BCRA].

[3] If the Alliance is invited to testify, John Pomeranz, Nonprofit Advocacy Director for the Alliance for Justice will present our testimony. Because he is scheduled to return to Washington from California early in the morning on October 23, Mr. Pomeranz requests that he be scheduled to testify on the second day of hearings on October 24. If this is not convenient for the Commission, Mr. Pomeranz would be able to testify on October 23.

The Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the justice system. While most of the Alliance's members are charitable organizations, a significant number also work with or are affiliated with social welfare and advocacy organizations that engage in political activity.

In these comments, we will only address the Commission's proposals specifically related to coordination. We focus on coordination because it is the portion of BCRA and these regulations that has the greatest potential to restrict or chill the constitutionally protected speech of our member organizations and their allies. In general, we believe that the Commission has proposed a set of rules that are sensitive to this vital concern. In a few cases, we fear that some of the options discussed in the regulations would unnecessarily restrict protected communications. In addition, we feel that the Commission should create additional bright line tests and safe harbors to reassure organizations that might be chilled from engaging in protected speech for fear of inadvertently violating these regulations.

I. THE COMMISSION MUST BE WARY OF RESTRICTING CONSTITUTIONALLY PROTECTED SPEECH

As in our previous BCRA rulemaking comments, our touchstone is the need to narrowly craft any restrictions to insure that essential voices in the political debate, particularly those of the nonprofit sector, are not silenced. The language of the Supreme Court in *Buckley v. Valeo* bears repeating:

> 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."[4]

We also quote again the Supreme Court in *FEC v. Massachusetts Citizens for Life* that wisely advised, "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[5] As the court in *FEC v. Christian Coalition* said more specifically about the issue at hand:

> [T]he 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.[6]

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[4] 424 U.S. 1, 14 (1976), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).
[5] 479 U.S. 238, 265 (1986).
[6] *FEC v. The Christian Coalition*, 52 F.Supp.2d 45, 88-89 (D.C. 1999).

A concern for protecting the core speech related to "discussion of public issues and debate on the qualifications of candidates" must inexorably lead to efforts to avoid regulatory overbreadth that inadvertently reaches protected speech. This concern also demands that we avoid laws that, while not banning protected speech, create a fear of regulation that chills the speaker from participating in public debate.

A fear of overbreadth is the reason that the Supreme Court applies a standard of strict scrutiny in this area, limiting restrictions to those necessary to achieve a compelling state interest. Inevitably such a standard will lead to laws that err on the side of allowing speech that, for a variety of sound reasons, we would prefer to see restricted but that, as a matter of policy, we must allow to go unregulated for fear of restricting more essential communication. To avoid overbreadth, our comments on these proposed rules seek to narrow the rules' restrictions on communications to those limits that are absolutely necessary to achieve the important goals of BCRA.

A fear of chilling protected speech is a special concern for regulations limiting coordination. As described later in these comments, lack of care or clarity in drafting coordination regulations heightens the risk of chilling constitutionally protected speech, particularly for 501(c)(3) organizations such as the Alliance and its members. For this reason our comments on these proposed rules seek, when possible, to include clarity through the use of bright line tests and safe harbors. This clarity reassures organizations that might otherwise be fearful to share their unique and essential contributions to the public policy debate.

II. THE COMMISSION'S PROPOSED TEST IS CORRECT TO FOCUS ON A SPECIFIC TRANSACTION LEADING TO A COORDINATED COMMUNICATION

We applaud the Commission's decision in these proposed rules to focus on specific transactions leading to a coordinated communication rather than general contacts between an organization and a campaign that might somehow taint future communications. This decision, suggested by the District Court in the *Christian Coalition* case and adopted by the Commission in its prior rules on coordination, goes a long way to reduce the problem of chilling protected speech. In addition, it streamlines Commission investigations in this area, to the benefit of both the organization alleged to have coordinated its communication and the Commission itself.

A range of legitimate and important contact goes on between nonprofit organizations and candidates or campaigns, and this contact might be more limited if the Commission returned to a broader definition of coordination. For example, organizations regularly lobby elected officials on important legislation throughout the year, including the election season. Indeed as we file these comments less than a month before the elections, Congress is debating government spending for the next year, the structure of the agency that will be charged with protecting our country against terrorism, and has just voted to give the President authority to use military force in Iraq. Nonprofit organizations have a vital interest in participating in the decisionmaking on these issues. Likewise, many organizations legitimately communicate with candidates and campaigns in the course of educating the public about the choices they face in the coming election. Among other reasons, nonprofit organizations contact candidates to gather information

for voter guides and to organize candidate debates. A rule that suggested that such legitimate contacts might cause future communications by the organization to be illegally coordinated would chill these important activities.

Likewise, a transactional model of coordination limits the scope of the Commission's investigative task. An organization alleged to have engaged in coordination would only be required to produce materials related to contacts with a specific candidate or campaign and about a specific communication. Although still extensive in many circumstances, the burden of cooperating with the investigation would be substantially less for the organization and thus reduce the chance of chilling legitimate contact with candidates. As an added benefit, a more focused investigation preserves limited Commission resources that can be directed to public education or other enforcement actions.

III. THE CONTENT STANDARDS SHOULD REFLECT THE REQUIRMENT THAT ONLY COMMUNICATIONS CONTAINING EXPRESS ADVOCACY MAY BE COORDINATED COMMUNICATIONS

As stated in our the comments filed during the last coordination rulemaking, the Alliance for Justice believes that only communications that contain "express advocacy" may constitute a prohibited, coordinated communication under the FECA. This limit to the scope of coordinated communications is mandated both by Supreme Court precedent and the language of the FECA. To the degree that it is permitted to do so under BCRA, we urge the Commission to eliminate any proposed content standard that extends to communications that do not include express advocacy.

A. Support for an Express Advocacy Standard

Others have made the arguments in support of an express advocacy standard at greater length and more eloquently than we will here,[7] but we will summarize the key points.

First, Supreme Court decisions require that the Commission enforce an express advocacy standard for coordination. In *Buckley*, the Court struck down FECA's cap on expenditures for communications that did not include express advocacy and FECA's reporting obligations for expenditures in excess of $100 per year for communications that did not include express advocacy.[8] In *FEC v. Massachusetts Citizens for Life* (*MCFL*), the Court found that FECA's ban on political expenditures by corporations and labor unions was likewise limited to those expenditures containing express advocacy.[9] In short, the Court seems prepared to strike down any limits on expenditures for speech that did not include express advocacy.

The Court in *Buckley* did suggest that contributions were due less constitutional protection than expenditures, stating that contributions were only protected as symbolic speech

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[7] *See, e.g.*, Brief Amici Curiae on Behalf of the American Federation of Labor and Congress of Industrial Organizations and the American Civil Liberties Union, *FEC v. The Christian Coalition*, 52 F.Supp.2d 45 (D.C. 1999).

[8] *See*, 424 U.S. at 44 and 80.

[9] *See*, 479 U.S. 238, 249 (1986).

in favor of the candidate receiving the contribution.[10] In promoting a definition of coordination not restricted to express advocacy, the Commission has emphasized that distinction.

However, that distinction fails in the context of coordinated communications. With coordinated communications, the expenditures are for more than symbolic speech: They pay for speech made by the organization itself, albeit after contact with the candidate or campaign. As a result, they are more analogous to the expenditures the Court held to an express advocacy standard in *MCFL* than to the monetary contributions to candidates at issue in *Buckley*. In fact even where the Court found coordinated activities to be in-kind contributions in *Buckley*, the Court's example of such a contribution was a billboard advertisement endorsing a candidate – an express advocacy communication.[11] To protect the actual, not symbolic, speech of corporations and labor unions, these decisions suggest that the Commission must apply an express advocacy standard to its definition of coordination.

In drafting FECA, Congress said nothing to suggest otherwise. FECA defines a "contribution" as a gift made "for the purpose of influencing a federal election."[12] Congress used the same language in defining "expenditure," and the Court in Buckley held that only expenditures for express advocacy met that definition.[13] Indeed, Congress amended FECA following the decision in *Buckley* and, in the wake of the Court's ruling, used the word "expenditure" in defining coordinated expenditures as contributions.[14] Congress was well aware of *Buckley*, and the use of that term by Congress indicates an intent to apply an express advocacy standard to coordinated activity.

B. Application of an Express Advocacy Standard to the Proposed Content Test

We recognize that the proposed rule we comment on today includes content standards that would include communications that do not contain express advocacy. We urge the Commission to reconsider these proposed rules in light of an express advocacy standard.

1. Republication of Campaign Material

BCRA requires the Commission to address "republication of campaign material" as coordinated activity.[15] Much of this material, of course, will include express advocacy. In some cases, corporations or labor unions republish campaign material that does not include express advocacy not in an attempt to support the candidate's campaign, but simply to save money by not re-creating materials that cogently describe the organization's own position on an issue. Regardless of the organization's intent in republishing campaign materials, however, we urge the Commission to adopt a rule stating that republication of campaign materials will be coordination only if the materials contain express advocacy. This bright line test will provide needed clarity for nonprofit organizations and other corporations.

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[10] See, 424 U.S. at 20-21.
[11] 424 U.S. at 46, note 53 (citing an example from the Senate Report on FECA).
[12] 2 U.S.C. § 431(8)(A)(i).
[13] 2 U.S.C. § 431(9)(A)(i).
[14] 2 U.S.C. § 441a(a)(7)(B)(i).
[15] BCRA § 214(c)(1).

2. Electioneering Communications

We also note that the Commission has said that "electioneering communications" would meet the proposed content test for coordination.[16] We will not urge a change in this rule since the recently finalized rule on electioneering communications makes it impossible for 501(c)(3)s to make such a communication and prohibits other corporations and labor unions (except for qualified nonprofit corporations) from making them. As a result, few if any of the organizations with which the Alliance is concerned would ever be able to engage in coordinated communications by making electioneering communications. Nonetheless we note that should the Supreme Court ever follow the precedent described above and hold coordination to an express advocacy standard, most communications that constitute electioneering communications would fall short of that standard.

3. Additional Content Standard Alternatives

The Commission has also included several options for additional content standards. Rather than include additional content standards, the Alliance urges the Commission to include modified versions of some of these options to create safe harbors and bright line tests that will reassure organizations concerned about the threat of an investigation by the Commission.

We urge the Commission not to adopt Alternative A, which would state that a public communication that clearly identifies a federal candidate meets the content test.[17] Instead, we urge the Commission to include language in the regulations that states that unless a communication clearly identifies a federal candidate, it will *not* meet the content test.

Rather than adopt Alternative C,[18] we urge the Commission to take the election proximity test included in that proposal and turn it into a safe harbor. We urge the Commission to adopt a rule that any communication run *more* than 120 days before a federal election in which a candidate identified in the communication is running will *not* meet the content test.[19]

In addition, we urge the Commission to reject Alternative B, which proposes that communications meet the content standard if they "promote or support or attack or oppose a clearly identified candidate."[20] Because of the subjective nature of the test, it would only serve to chill legitimate communications.

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[16] NPRM at 60065 (proposed § 109.21(c)(1)).
[17] NPRM at 60065 (proposed § 109.21(c)(4)).
[18] *Id.*
[19] In our January 2000 comments we urged a similar test with an even shorter window of 30 days before an election. Alliance for Justice Comments in Response to Supplemental Notice of Proposed Rulemaking 1999-27: General Public Political Communications Coordinated with Candidates. We would still support a shorter period defining the time during which coordinated communications may be made, but any time-defined safe harbor would be useful.
[20] NPRM at 60065 (proposed § 109.21(c)(4)).

4. "Public Communications"

The Commission has asked whether it is appropriate to limit the scope of coordinated communications through the use of the term "public communication."[21] The Alliance believes that the Commission should do so. First, as the NPRM suggests, use of the term provides helpful consistency within the regulations. By excluding certain kinds of communications, the use of the term also offers safe harbors to reassure organizations using those forms of communication.[22]

IV. THE CONDUCT STANDARD SHOULD BE CHANGED TO A REBUTTABLE PRESUMPTION

In general, the Alliance supports the Commission's proposed conduct standards as part of its proposed three-pronged test for coordination. However we urge the Commission to allow organizations to rebut the presumption that the described conduct satisfies the test in certain circumstances.

The Commission has proposed that the conduct test would be satisfied if the organization makes a communication at the candidate's request or if the organization suggests the communication and the candidate assents.[23] In addition, the Commission has proposed that the conduct test would be satisfied if the candidate is "materially involved in decisions" about key aspects of the communication, such as content, audience, and timing.[24]

While these tests seem to be a reasonable way to test whether coordination has occurred, it is possible to imagine situations in which they would give a "false positive." For example, as part of a grassroots lobbying effort an organization committed to environmental issues has long planned a series of broadcast ads highlighting the importance of reauthorizing legislation to protect air and water quality. In the course of the organization's meetings with legislators to discuss the organization's agenda, one legislator mentions that she is facing a tough reelection battle and that she hopes to distinguish herself from her opponent by emphasizing her accomplishments on environmental legislation. She expresses her hope that the organization will publicize the air quality bill now up for reauthorization – the bill the organization had planned to feature in its ads – because she was the principal sponsor of the legislation and it bears her name. Although the organization had planned to make the expenditure prior to the request by the legislator, the request would nonetheless satisfy the conduct test under the proposed rules.[25]

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[21] NPRM at 60048.

[22] One of the excluded forms of communication is Internet communications. We have previously filed comments with the Commission urging it not to regulate Internet communications, and we reiterate that request here. Alliance for Justice Comments in Response to Notice of Inquiry on the Use of the Internet for Campaign Activity (Notice No. 1999-24).

[23] NPRM at 60065 (proposed § 109.21(d)(1)). The Alliance supports the option suggested by the Commission that such assent must be affirmative. NPRM at 60050.

[24] NPRM at 60065 (proposed § 109.21(d)(2)).

[25] We note that strict adherence to an express advocacy standard for content, as we propose, would protect the organization in this example. However, a broader content standard, including some alternatives proposed or discussed in the Notice of Proposed Rulemaking, would not. The Alliance specifically rejects the idea, raised by the Commission in the NPRM at 60050, that a request from a candidate or party committee be sufficient to establish coordination without a content standard.

To avoid results such as this, we urge the Commission to allow organizations alleged to have engaged in coordinated communications to rebut a finding that the conduct test has been satisfied by demonstrating that the organization had decided to make that communication prior to the contact with the candidate, campaign, or party.

V. THE COMMON VENDOR PROVISIONS ADEQUATELY ADDRESS BCRA'S REQUIREMENTS

The Alliance recognizes that BCRA has required the Commission to address the use of common vendors in these rules.[26] We believe that the Commission has met that obligation, although we worry that the restriction could have unintended consequences in some parts of the country.

We particularly appreciate the Commission's decision to limit the common vendor provisions to vendors that are in the business of creating, producing, or distributing communications.[27] We think this is appropriate given our position that the coordination rules should apply only to coordinated communications.

We fear, however, that there may be some areas of the country where very few companies provide these services. In these areas, there is the chance that risk of inadvertent coordination will prevent either candidates or corporations and unions from being able to purchase such services. We do not know the scope of this problem, and we do not know of any way for the Commission to address it in light of the law's instructions, but we raise it for the record.

VI. THE COMMISSION SHOULD STATE THAT NON-COMMUNICATION EXPENDITURES CANNOT BE CONSIDERED TO BE COORDINATION

The Commission has asked for comments on whether it should undertake a later rulemaking on the issue of non-communication expenditures as coordinated activity.[28] Because we believe that only express advocacy communications can constitute coordination, the Alliance not only urges the Commission not to undertake such a rulemaking, we also urge the Commission to state affirmatively in this rulemaking that non-communication expenditures will *not* be considered to be coordination.

VII. THESE LIMITS ON THE SCOPE OF COORDINATION ARE NECESSARY TO PROTECT NONPROFITS, PARTICULARLY 501(C)(3)S

Unless the Commission adopts the regulations as we have discussed above, nonprofit organizations will face the threat of burdensome investigations that could chill legitimate speech. In particular, 501(c)(3) organizations would refrain from engaging in legitimate communications with candidates and campaigns for fear of inadvertently violating the rules with the resulting loss of their tax-exempt status.

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[26] BCRA § 214(c)(2).
[27] NPRM at 60066 (proposed § 109.21(d)(4)(i)).
[28] NPRM at 60047.

Even for organizations that are eventually vindicated, a Commission investigation of possible coordination can itself be a penalty on the organization if the scope of what constitutes coordinated activity is not restricted. The target of any coordination investigation would be required to document the circumstances and content of every contact between the organization and a campaign that might have tainted the communication in question. If those contacts are extensive, even an investigation that clears the organization could consume hundreds of hours of staff time and thousands of dollars in legal fees. The risk of a penalty for violating section 441b could pale in comparison to the threat of a Commission investigation. If coordination regulations are not clear, the mere threat of investigation will force many organizations out of policy debates.

The possibility of chilling speech is even greater for organizations operating under section 501(c)(3) of the Internal Revenue Code (IRC). As we discussed in our comments on the Commission's rulemaking on BCRA's electioneering communications provisions, section 501(c)(3) forbids charities from intervening in political campaigns. Indeed, as the Commission accepted in crafting an exception for 501(c)(3)s in its recent rule on electioneering communications, this provision in the IRC is far more restrictive than the limits imposed on organizations by FECA.[29] The penalty for violating the IRC provision is loss of the organization's tax-exempt status, a penalty that the Internal Revenue Service (IRS) has been known to enforce.[30] The loss of 501(c)(3) status frequently forces an organization to severely cut back its operations or even dissolve because donors lose the incentive of tax-deductible contributions, and foundations are generally unwilling to undertake the additional legal steps required to fund a non-501(c)(3) organization.

This strict sanction makes 501(c)(3)s exceptionally wary of appearing to violate the coordination rules. It seems likely that the IRS would find that a ruling that a 501(c)(3) has made a "contribution" to a political campaign would demonstrate that the 501(c)(3) had violated the IRC's campaign intervention prohibition. Thus, if the Commission was to find that coordination between a 501(c)(3) and a campaign had turned a public communication into a prohibited contribution under section 441b, the IRS could act to revoke the organization's tax-exempt status.

These very real impacts on nonprofits support the basic principal that we stated at the beginning of these comments and the specific recommendations that we have made. It is the vital importance of public speech on public policy that requires the Commission to avoid overbroad rules by carefully defining coordination only to cover communications that the Commission may constitutionally regulate. It is the chilling impact that the threat of Commission investigation or loss of tax-exempt status that argues for clear, bright line rules and safe harbors for protected speech.

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[29] *See* Memorandum to the Federal Election Commission for the Meeting of October 10, 2002, "Final Rules and Explanation and Justification for Electioneering Communications" (Agenda Document No. 02-73) at 46-47.

[30] *See, e.g., Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (upholding IRS revocation of 501(c)(3) status from church that ran newspaper advertisements critical of a presidential candidate).

VIII. CONCLUSION

Coordination poses the greatest threat to nonprofit organizations of all of the provisions of BCRA because of its potential to reach all organizations and all types of communication. Furthermore, the regulations could easily be misinterpreted to reach constitutionally protected speech or drafted in such general terms as to chill organizations that might otherwise feel free to engage in the debate on public policy.

Although we believe that the rules proposed by the Commission avoid many of the possible pitfalls that we feared, we urge the Commission to improve these rules further by adopting a strict express advocacy content standard and by adopting our other suggestions for bright line tests, safe harbors, and other clarifications.

Thank you for the opportunity to comment on these proposed regulations. We would be happy to provide whatever additional information or thoughts the Commission would find helpful in its consideration of this rule. We look forward to testifying at the upcoming hearing expanding on our views expressed here.

Sincerely,

Nan Aron,
President
Alliance for Justice