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October 11, 2002

Via E-Mail, Fax and Hand Delivery

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

Dear Mr. Vergelli:

American Taxpayers Alliance ("ATA") submits through counsel, the following comments on the Notice of Proposed Rulemaking, 67 Fed. Reg. 60042 (Sept. 24, 2002), to implement certain provisions of the Federal Election Campaign Act of 1971 as amended ("FECA"), as further amended by the Bipartisan Campaign Reform Act of 2002, P.L. 107-55 ("BCRA"). ATA appreciates the opportunity to comment on these proposed rules, and requests the opportunity to testify, through undersigned counsel, at the hearings to be conducted on October 23 and 24.

ATA is a non-profit organization dedicated to government reform through grassroots organization, public education and discussion of issues and is exempt from federal income tax under Internal Revenue Code section 501(c)(4). ATA regularly makes grassroots lobbying communications while at the same time engages in substantial contact with members of Congress to affect legislation and policy. ATA would like to become involved with a caucus comprised of Members of Congress who support a particular policy to help raise money and coordinate with members of this caucus regarding where educational ads would be most effective in swaying public opinion and action on the issue, as well as educating particular Members of Congress. However, the proposed regulations appear to prohibit this type of educational speech.

In submitting these comments, ATA does not concede that any of the proposed regulations addressed, or the statutory provisions underlying them, are constitutional. Indeed, ATA strongly believes that many provisions of the BCRA unconstitutionally regulate protected speech, including direct and grassroots lobbying and issue advocacy, and are not justified by any compelling governmental interest. Furthermore, ATA believes that many provisions of the BCRA will effectively dissuade individuals and non-profit organizations from participating in the political debate.

ATA strongly believes that influencing an election is not a bad or evil thing; in fact, the opportunity to do so is one of the most cherished rights Americans possess. Americans have given their lives so that fellow citizens may freely criticize our Government, and through their speech and associations, influence legislation, policy, and ultimately, elections. Americans possess the right to freely associate, to join together to affect the policies and legislation that is most important to them, to petition the Government, and to encourage other citizens to join them in this fight.

Further, ATA generally believes that broad coordination regulations will be subject to political abuse and will continue to permit intrusive and burdensome investigations of unpopular organizations. Political opponents will accuse organizations of coordination to punish them for making effective grass roots lobbying ads. Political opponents will seize upon the simple fact that a common vendor was used and force the organization to prove, through an expensive and intrusive investigation, that its effective issue ad was not coordinated. Or, an opponent could allege that a former employee of a candidate must have conveyed information with the organization because the ad was so effective and novel. The proposed tests to determine whether coordination has occurred are such that any communication between the candidate, his representative, a common vendor or former employee leaves any entity engaging in a communication of any kind open to suspicion merely by such association. Under the proposed regulations, all communications, relationships, associations and affiliations can be examined and made public. The proposed tests to determine whether coordination has occurred are so overbroad and vague that even attempting to refute them in detail will involve enormous amounts of time, effort and money. The end result will be that the political process will be stifled and only those brave individuals and organizations willing to risk politically motivated charges, and those with the funds to pay expensive lawyers to defend against these charges, will participate in our democracy.

There is a timely, real example of the type of speech that is at stake here and that will be restricted by overbroad coordination regulations. How is an individual or organization to engage in speech on the extremely important Iraq issue without also violating the proposed coordinated expenditure regulations? Legislative aspects of the Iraq issue are inextricably intertwined with the use of common vendors, former employees, and public communications on the issue. How does an organization lobby Members of Congress on the issue, consult with Members of Congress regarding the issue, while at the same time use common vendors, employ former employees, and run issue ads to lobby and educate the general public, before the election, and not run afoul of the proposed coordination regulations?

Organizations that care about this issue are in constant contact with Members of Congress and their staffs regarding the war with Iraq issue. Discussions center around what is best for our country, and how to effectively convince other Members and the general public of a certain position on the issue. Organizations are also, contemporaneously and subsequently, making public communications on the issue to influence the Members, as well as the public. These lobbying and educational efforts, some coordinated with Members of Congress and some not, will likely influence the upcoming election. *See, e.g.*, Thomas B. Edsall, *Focus on War Talk Hampers Democrats*, Washington Post, October 10, 2002, at A1 ("The prospect of war with Iraq is dealing Democratic candidates a triple blow. It's pushing their best issues, such as health care and the economy, into the background, while also damaging two crucial campaign operations – fundraising and voter turnout – among key liberal constituencies disillusioned over the party's failure to challenge President Bush more forcefully on his bellicose posture toward Baghdad.") However, consultations and discussions with Members of Congress, who are also candidates, should not turn subsequent issue ads, whether coordinated or not, on the all too important Iraq issue into prohibited coordinated expenditures, even though they may have an affect on the election. And therefore, any legislative communication which is made prior to a vote, hearing, or other legislative consideration of the issue, which also coincidentally occurs prior to an election, should be exempt from the proposed coordination regulations. To permit regulation of these types of issue communications would restrict individuals' and organizations' right to petition the Government and therefore, in ATA's view, would be unconstitutional and harmful to our democracy. If a communication dealing with a legislative issue can also be construed as political, and therefore "influences a Federal election," it must nevertheless be exempt from regulation, else important speech and association be stifled or prohibited.

Nevertheless, ATA is mindful of Congress' directive to the Commission to promulgate rules to implement the BCRA. However, while the court alone has the power to rule on the constitutionality of BCRA's provisions currently being challenged, the Commission must exercise its discretion, whenever possible, and promulgate only regulations within Constitutional limits.[1] As officials of the executive branch who have independently taken an oath to uphold the Constitution, the Commission must implement the BCRA in a constitutional fashion regardless of what legislation representatives of a co-equal branch of government have passed.

Although these comments generally assume, for purposes of this regulatory process only, that the applicable provisions of the BCRA will survive judicial challenge and that the Commission's regulations will govern ATA, ATA urges the Commission to implement the BCRA in a manner that is least offensive to the First Amendment and that least infringes upon the rights of non-profit organizations to engage in constitutionally protected speech.

I. The Proposed Regulations Are Inconsistent With *Buckley v. Valeo* and With Definitions in FECA, and Therefore Are Overbroad, Vague and Unconstitutional.

To develop constitutional standards for regulating coordinated expenditures, one must first start with a constitutional purpose. While the purpose of the proposed regulations – regulation of communications made "for the purpose of influencing a Federal election,"[2] – may be constitutional, the failure of the proposed regulations to incorporate a narrowing construction, adopted in *Buckley v. Valeo*, 424 U.S. 1 (1976), leads to overbroad, vague and unconstitutional regulations. Furthermore, the Commission's failure to use the terms "contribution" and "expenditure" in the coordinated expenditure context as used in the Federal Election Campaign Act ("FECA"), leads to overbroad, confusing, and chilling regulations.

The general definitions section of the FECA, which the Supreme Court held in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 245-46 (1986) is

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[1] Courts assume that Congress legislates with constitutional limitations in mind and will speak clearly when it seeks to test those limitations. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Thus, unless Congress clearly states that it intends to test the constitutional waters, courts will not presume that Congress intended to authorize an agency to do so. *See Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997); *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

[2] 67 Fed. Reg. 60047.

applicable in construing § 441b, defines "contribution" as any gift, etc. "made . . . for the purpose of influencing" a federal election. 2 U.S.C. § 431(8)(A)(i). This same phrase is used in the definition of "expenditure," § 431(9)(A)(i), and was construed by the *Buckley* Court to require a showing of express advocacy. *See* 424 U.S. at 78-80. In this portion of its opinion, the Court addressed § 434(e), which imposed independent reporting requirements on individuals and organizations who made "contributions or expenditures." In construing these terms, the Court looked to the general definition section of FECA, which defined both "contribution" and "expenditure" to include the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office. 424 U.S. at 77. The Court referred to these definitions as "parallel provisions" and gave no indication that they should be construed differently. *Id.*

The general definitions section of FECA also states that the term "contribution" does not include "any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) . . . would not constitute an expenditure by such corporation or labor organization." Since the term "expenditure" in § 441b(b) should be defined in the same manner as the Supreme Court construed it in *MCFL* with respect to § 441b(a), it follows that Congress did not intend the definition of "contribution" to include communications which do not include express advocacy.

Therefore, the definitions of "contribution" and "expenditure," as construed by the Supreme Court, should be consistently applied in the proposed regulations; the presence of "coordination" does not suggest or permit a different approach. The "fundamental constitutional difference" between contributions and independent expenditures is that "expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse." *Buckley*, 424 U.S. at 46. Thus, the difference identified in *Buckley* was the "coordination" factor, not whether the communication contained express advocacy. There is no suggestion that the *Buckley* Court's concern about vagueness and protecting issue advocacy was at all diminished as a result of the "coordination." In fact, the passage in *Buckley* that recognized that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act," *id.* at 52, came just after the Court had defined the phrase "expenditure . . . relative to a clearly identified candidate" "as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 41-43. When the Court used the term "expenditure" in the phrase "expenditures controlled by or coordinated with the candidate," which it had just defined to only include express advocacy, it is very unlikely that it meant

something more expansive. In construing the term "contribution," the Court said the term included "not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id.* at 78.

Statements made by the *Buckley* Court would be nonsensical if "contributions" and "expenditures" could have a different meaning if coordinated. The *Buckley* Court found that the provision of the FECA defining expenditures as "the use of money or other valuable assets 'for the purpose of . . . influencing'" the nomination or election of candidates for federal office was unconstitutionally vague. *Id.* at 80. To obviate the danger that "fear of incurring [criminal] sanctions may deter those who seek to exercise protected First Amendment speech," the Court applied the express advocacy test to the phrase "for the purpose of . . . influencing."[3] *Id.* The Court noted that the phrase "for the purpose of . . . influencing" shares the same potential for encompassing both issue discussion and advocacy of a political result [as did the phrase "relative to" in § 608(e)(1)]." *Id.* at 79. The Court also characterized the express advocacy test as the "exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness. . . ." *Id.* at 45. When limiting "for the purpose of influencing," the Court was not naïve and realized that not all speech that could influence an election would be regulated, stating that § 434(e) "does not reach all partisan discussion for it only requires disclosures of those expenditures that expressly advocate a particular election result." *Id.* at 80. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45. Therefore, not all speech that promotes a candidate and his views, *i.e.*, influences an election, can be regulated. The price of protecting communications about issues is that some protected communications may also have an influence on an election. This understanding is as true of coordinated expenditures as it is of independent expenditures.

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[3] Lower courts have also limited the phrase "for the purpose of influencing" to express advocacy. *See, e.g., Virginia Society For Human Life, Inc. v. Caldwell*, 152 F.3d 268, 275 (4th Cir. 1998); *North Carolina Right to Life v. Bartlett*, 3 F. Supp.2d 675, 678-79 (E.D.N.C. 1998) ("[T]he statute at issue, which defines individuals and groups that seek to 'influence or attempt to influence the results of an election; as political committees . . . whether or not they 'expressly advocate the election or defeat of a clearly identified candidate' . . . violates the First Amendment as construed by the Supreme Court in *Buckley v. Valeo*.").

Issue advocacy encompasses a very broad category of political speech. At the most fundamental level, issue advocacy is public speech about questions that are of importance to the electorate at a given time. Issues, irrespective of candidates, therefore, have the potential to influence an election. Organizations regularly work with public officials on legislation and lobbying efforts to enact legislation. These discussions often involve coordinated grass roots lobbying efforts and public education campaigns on the issues involved in the legislation. However, since such public officials are also candidates at one time or another, advocacy groups and labor unions would be prohibited from engaging in these coordinated grassroots lobbying and public education efforts if they are deemed coordinated expenditures. A Hobson's choice awaits these groups – either refuse to discuss their public support for legislation with public officials, or discuss such legislation and be prohibited from making subsequent grassroots lobbying and educational communications. In either case, public debate is severely compromised and the rights of petition and association are restricted.

Construing the terms "contribution" and "expenditure" to require express advocacy with regard to coordinated expenditures is also supported by the Commission's prior position regarding coordinated expenditures. In *Orloski*, the FEC argued that, in order for a communication which is coordinated with a candidate to be deemed an "in-kind" contribution, it must contain express advocacy. *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). In determining whether the disbursements at issue constituted in-kind contributions under § 441b, the FEC first examined whether the event in question was a "political event." The FEC used the following test:

> An event is non-political if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event.

Id. at 160. The FEC determined that since no express advocacy occurred at the picnic, the event was "non-political," even though there was issue advocacy coordinated with a candidate. As a result, the disbursements in question did not constitute prohibited "in-kind" contributions under § 441b. The D.C. Circuit upheld the Commission's interpretation of § 441b:

> [T]he mere fact that corporate donations were made with the consent of

> the candidate does not mean that a "contribution" within the meaning of the Act has been made. Under the Act this type of "donation" is only a "contribution" if it first qualifies as an "expenditure" and, under the FEC's interpretation, such a donation is not an expenditure unless someone at the funded event *expressly advocates* the reelection of the incumbent or the defeat of an opponent or accepts money to support the incumbent's reelection.

Id. at 162-63 (emphasis added). The court also found significant that no other statutory language directly or indirectly conflicted with this objective test. *Id.* at 163.

The view underlying the Commission's interpretation in *Orloski* was that the FECA does not prohibit all corporate donations, but only prohibits corporate "contributions and expenditures." *Id.* at 160. Corporate donations made for non-political purposes were, therefore, permissible. *Id.* Thus, the Commission adopted the express advocacy requirement for coordinated expenditures because "all congressional events have some political ramifications." *Id.* (*citing United States v. Brewster*, 408 U.S. 501 (1972)). Otherwise, corporate donations for non-political purposes would be prohibited because "any corporate funding of congressional events indirectly influences the election." *Id.* at 163.

However, the Commission has not mandated that the terms "contribution" and "expenditure," as previously construed, mean the same thing in the case of coordinated expenditures. According to the Notice of Proposed Rulemaking ("NPRM"), a conclusion that an organization's communication is for the purpose of influencing a Federal election is justified if it satisfies all three tests set out in the proposed regulations, even though it may not contain express advocacy. 67 Fed. Reg. 60047. The Commission even recognizes that the phrase "for the purpose of influencing" an election for Federal office is also used in the definitions of both "expenditure" and "contribution." 67 Fed. Reg. 60047 (citing 2 U.S.C. 431(8)(A) and (9)(A)). Nevertheless, the NPRM states that the "Commission would make a determination that satisfying the content and conduct standards of proposed 11 CFG 109.21 would, in turn, satisfy the statutory requirements for an expenditure and a contribution." *Id.* In other words, under the proposed regulations, if a communication satisfies the proposed content and conduct standards, regardless of whether it contains express advocacy, the Commission is proposing to conclude that the communication also satisfies the statutory requirements for expenditure and contribution.

As *Buckley* and *Orloski* demonstrate, the Commission is not justified in making such a determination. The "purpose of influencing an election" test was discredited in *Buckley*, which held it to be unconstitutionally vague and saved it by limiting its "reach only [to] funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80. As the Court explained,

> [f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidate may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42. Discussion of issues and candidates do not cease to overlap simply because the speaker coordinates its message with a politician. The same intimate link between candidates and issues which necessitates a bright regulatory line also makes coordination with candidates an invaluable aid to the effective promotion of issues.

Furthermore, a communication cannot constitutionally satisfy the statutory requirements for an expenditure and a contribution unless it contains express advocacy because both statutory definitions have been construed to constitutionally require express words of advocacy. *See Buckley*, 424 U.S. at 44 (holding that the term "expenditure" in § 608(3)(1) applies "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate."); *id.* at 80 ("we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."). Section 441a(a)(7)(B)(i) as amended after *Buckley* provides that coordinated "expenditures" shall be considered to be contributions for purposes of the FECA's contribution limitations; it is unreasonable to believe that the word "expenditures" could be construed to mean anything other than expenditures for express advocacy, or that the term "contribution" would have a different meaning in § 441b than it has in § 441a.

While the Court in *Buckley* stated that expenditures by corporations and unions could be treated as contributions for reporting and other purposes under FECA if they are coordinated with candidates, the Court did not suggest that such contributions could be identified without regard to the express advocacy test. In describing when a coordinated expenditure will be treated as an in-kind

contribution, the Court cited "billboard advertisements *endorsing a candidate*." 424 U.S. at 46 n.53 (emphasis added). This is a classic example of express advocacy. Furthermore, the Court stated that the purpose of the "express advocacy" standard is to limit FECA's requirements to "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. And later, in *MCFL*, the court described the express advocacy test as applying to § 441b(a) without regard to whether the communications constituted expenditures or contributions: "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

Therefore, because the statutory definitions of expenditure and contribution have been constitutionally narrowed to require express advocacy, the Commission cannot constitutionally deem a coordinated communication satisfies the statutory requirements for expenditure and contribution unless it contains express advocacy.

II. The Commission May Require Express Advocacy and Therefore Implement Constitutional Regulations While Still Complying With its BCRA Mandate.

In enacting BCRA, Congress repealed the Commission's regulations on coordination, and instructed the Commission to promulgate new regulations on coordinated communications. While Congress mandated the Commission address four specific aspects of coordinated communications, it did not provide any further guidance or place limits on the Commission's approach. Therefore, the Commission retains, and may exercise, much discretion in promulgating new regulations.

Congress expressly provided that electioneering communications which are coordinated are to be treated like "other coordinated communications." However, not all coordinated communications are alike, just as not all coordinated expenditures are alike.[4] Just as justification exists for treating coordinated communications differently than coordinated expenditures for expenses incurred by

[4] In the *Christian Coalition* case, the court recognized an analytical difference existed between certain kinds of coordinated expenditures and found that one class of coordinated expenditures could be treated differently: "the First Amendment requires different treatment for 'expressive,' 'communicative' or 'speech-laden' coordinated expenditures, which feature the speech of the spender, from coordinated expenditures on noncommunicative materials, such as hamburgers or travel expenses for campaign staff." 52 F. Supp.2d at 85 n.45. The former is more akin to an independent expenditure, while the latter can be treated as a direct campaign contribution.

candidates (such as office rent and staff costs),[5] constitutional justification exists for treating coordinated express advocacy communications differently from coordinated issue advocacy communications.

When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387-88 (2000) (citations omitted). When speech is limited, however, the regulation is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest. *Buckley*, 424 U.S. at 64-65. Similarly, restrictions on expressive association, such as those contained in the proposed regulations, are also subject to strict scrutiny by the courts. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2456-57 (2001).

The proposed regulations potentially limit, or prohibit, speech by an organization if its communications are considered coordinated expenditures. Since "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," the express advocacy test is needed to resolve the overbreadth problems. *NAACP v. Button*, 371 U.S. 415, 438 (1963). And, since "[b]road prophylactic rules . . . are suspect," *id.*, there is a serious question whether the Government's interest in preventing *quid pro quo* corruption, a prophylactic measure, is sufficient to justify a limit on one's speech. Thus, heightened scrutiny demands a narrow definition of coordinated expenditure.

Therefore, ATA urges the Commission to treat coordinated express advocacy communications differently from other coordinated communications, as well as treat coordinated electioneering communications like other coordinated issue advocacy communications and prohibit, or at a minimum, limit their regulation.

ATA urges the Commission to exercise its discretion to implement regulations that incorporate the express advocacy test so that the least amount of speech is restricted. Furthermore, such an approach is logical, reasonable, and consistent with the overall statutory framework. As currently proposed, the definition of coordinated expenditure is only a partial converse of the definition of

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[5] The express advocacy requirement should apply only to communications, not to payment for other types of expenses incurred by candidates, such as office rent and staff costs. Payment of these types of expenses incurred by candidates would constitute an in-kind contribution to the candidate.

independent expenditure because while the definition of independent expenditure incorporates the express advocacy requirement, the proposed definition of coordinated expenditure does not. Adoption of the express advocacy requirement would "only add[] to its reasonableness for it enhances the consistency and even-handedness with which the FEC ultimately administers the Act." *Orloski*, 795 F.2d at 167. If the definitions of independent expenditure and coordinated expenditure were truly converse, an organization publicly distributing a communication containing express advocacy would know that it was either independent or coordinated. However, definitions which are partially converse lead to confusion, inconsistency in application, and eventually a chill on speech. Therefore, the underlying definition of expenditure should remain the same, regardless of whether the expenditure is independent or coordinated.

In the alternative, ATA urges the Commission to create classes of coordinated expenditures which can be regulated differently. Coordinated "non-communicative" expenditures, which are most like in-kind contributions, can be treated differently than coordinated communications. Within the class of coordinated communications, ATA asserts that coordinated express advocacy communications can be regulated similarly to independent expenditures. However, coordinated non-express advocacy communications (electioneering and issue advocacy communications) should have no, or little, restriction.

III. Specific Comments on Proposed Regulations

ATA will not attempt to comment on every issue raised in the NPRM, and because the BCRA is currently being challenged in court, ATA generally will not discuss the constitutionality of the BCRA. However, no implication should be drawn from its failure to comment on particular issues raised by the Commission, or its choice not to debate the Act's constitutionality. ATA submits these comments to aid the Commission in upholding its oath to the Constitution to implement regulations that are least offensive to the First Amendment and most protective of the rights of non-profit organizations to engage in free speech and association. ATA would welcome the opportunity to comment on, or expand upon, any of these issues at the hearing later this month.

ATA is approaching its analysis of specific proposals below from the position that a constitutional coordination standard must contain two elements: what is subject to being coordinatable (content) and what is coordination (conduct). A narrow standard is constitutionally required to ensure that communications sought

to be regulated as in-kind contributions may justifiably be so treated, because coordinated expenditures also share features of independent expenditures.

Content Standards

The Commission proposes to include "content standards" in the definition of "coordinated communication" to limit the reach of 11 CFR 109.21 to "communications whose subject matter is reasonably related to an election." 67 Fed. Reg. 60048. ATA agrees that a content standard is constitutionally necessary to limit the reach of § 109.21, but of the three proposed content standards, inclusion of paragraph (c)(1) is constitutionally the most problematic. ATA notes that Congress mandated that when communications described in 11 CFR 100.29(a)(1) (electioneering communications) are coordinated, they must be treated like other coordinated communications. 2 U.S.C. § 441a(a)(7)(C). But because ATA believes that electioneering communications cannot be constitutionally regulated, ATA likewise believes that coordinated electioneering communications cannot be regulated, and incorporates its comments on the NPRM on electioneering communications herein. Therefore, to obviate this problem, ATA submits that before any coordinated electioneering communication may be treated as a coordinated communication, it must meet the definition of expenditure, *i.e.*, the express advocacy test. So that all coordinated communications are treated the same, ATA proposes that the express advocacy test be added as a content requirement for *all* communications. In other words, before a communication may be subject to being coordinated, it must first meet the definition of "expenditure." In this regard, electioneering communications would be treated like all other coordinated communications, as required by the Congressional mandate.

Alternatives A – C

Absent a restriction to express advocacy communications, if the regulation is to withstand constitutional challenge (which ATA believes is not possible without such an express advocacy limitation), the content standards must be narrowed as much as possible so as to exclude issue communications. Any standard adopted must be limited to candidates clearly identified as *candidates*, not merely as public officials or as individuals, include other express references to the upcoming election, as well as an expressed opinion on the candidate's positions. Without these limitations, the regulation would reach Congressional voting records, or voter guides that publish candidates' responses to questions verbatim. Furthermore, should the express advocacy test not be adopted as the sole content standard, the content standard should be limited to cover only those communications made within

30 or 60 days of a primary or general election. Although adding such a temporal requirement would not sufficiently limit the unconstitutional reach of the regulation, it would focus the prohibition on the period when coordination is most likely to "influence a Federal election" and would serve to exclude some, but not all, constitutionally protected issue communications.

The three alternatives set out in the NPRM do not sufficiently limit the scope of the content standard and would reach too much protected speech. Alternative A, the most constitutionally suspect of the three alternatives, would encompass virtually all issue advocacy and must be rejected. Alternative B also reaches too much protected speech, and is redundant if the electioneering communication prong remains part of the content standard.

Alternative C is partially redundant if the electioneering communication prong is left intact, but is worse in that it reaches speech 120 days before an election, as opposed to 30 or 60 days. Therefore, coordinated lobbying efforts would be prohibited *four* months before an election, for a total of *eight* months during each election year. The second factor of Alternative C does not help reduce the amount of issue advocacy encompassed by this alternative. Most coordinated lobbying communications are directed to the voters in the jurisdiction of the clearly identified Federal candidate because those individuals are the candidate's constituents and most likely to contact and have an affect on the candidate's vote. The third factor is also problematic. Many issue advocacy communications, including grass roots lobbying communications, refer to the candidate's position or views on an issue. Therefore, this prong would also expand the already broad reach of the content standard to encompass even more issue advocacy communications. Additionally, the factor is so vague that most citizens and organizations would likely forgo making grassroots lobbying communications and other issue speech to avoid official reprisal.

Additions to the Content Standard

As stated above, ATA believes that the express advocacy test should be added to the content standard. Furthermore, ATA urges the Commission to adopt exceptions to the content standard which would completely exempt Internet and email communications, private correspondence and internal communications between a corporation or labor union and its restricted class. Alternatively, ATA urges the Commission to adopt the term "public communication" used in Alternatives A – C, and make it a content requirement that must be met by all coordinated communications.

Conduct Standards

Regardless of whether communications which do not contain express advocacy are subject to being coordinated, there still remains the need to define coordination in a way that is consistent with the demands of the First Amendment. Congress did not limit the Commission's discretion to fashion a definition of coordination, except to bar any requirement of "agreement or formal collaboration" before coordination may be established.

In adopting a regulation, the Commission should avoid standards that unduly focus on discussions between organizations and candidates. Such an approach has great potential to restrict protected speech or at least convey the impression that such contacts between organizations and candidates are improper or bad. Rather, the correct approach is to focus on whether a *result* flows out of any communication between an organization and a candidate. "[W]e 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." *Clifton v. FEC*, 114 F.3d 1309, 1314 (1st Cir. 1997). "It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives." *Id.* In fashioning a conduct standard, the Commission should focus on the *result* of any request or discussion, rather than the *form or amount* of such speech.

An expansive definition of coordination could potentially cut off a person's freedom to engage in independent political expression or to associate actively through volunteering their services. To avoid this restriction on First Amendment rights, a permissible definition of coordination must contain several features. First, it must be established that coordination *in fact* occurred. *See Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 624 (1996). Second, it must be established that the coordination is specifically related to the disbursement alleged to be an expenditure. Allegations of a general nature that there was "involvement" between the group making the disbursement and the campaign, and that there was even knowledge of the candidate's strategy should be insufficient to transform a disbursement into a coordinated expenditure. *See, e.g., id.* at 614. Otherwise, such an approach "sweeps in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters." *Christian Coalition*, 52 F. Supp.2d at 90 (*comparing Clifton v. FEC*, 114 F.3d 1309, 1313 (1st Cir. 1997)).

Third, it must be established that the communication by the third party was *as a result of* the "request or suggestion" of the candidate, "material involvement in decisions," "substantial discussion," "a common vendor," or a "former employee/independent contractor." Therefore, the request or suggestion, discussion or material involvement must result in a change in the spender's activity. No coordination should be found if the spender does not do as the candidate suggests, or if the spender is already doing the specific activity requested by the candidate. This element can easily be defined as a communication that but/for the request or suggestion of the candidate would not have been made. Coordination could also be defined as details of a communication, such as timing or content, that are changed or altered as a result of the request or suggestion of a candidate, material involvement in decisions or substantial discussion by or with a candidate, a common vendor, or a former employee/independent contractor.

Request or Suggestion

Assuming a communication is actually made or tailored *as a result of* a request or suggestion, this type of coordination may constitutionally be regulated because "[t]he fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." *FEC v. Christian Coalition*, 52 F. Supp.2d 45, 92 (D.D.C. 1999). In-kind contributions, which the *Buckley* Court defined as "the expenditure of resources at the candidate's direction," 424 U.S. at 36, can implicate the same concern with *quid pro quo* corruption as do direct financial contributions. However, there can be no potential *quid pro quo* corruption unless the candidate's direction or request is actually acted upon.

Materially Involved in Decisions

This standard suffers from several of the infirmities discussed above. It is not enough that a candidate shares material information about plans, projects, activities or needs, or that the candidate conveys approval or disapproval of the other person's plans. The person must either make, or decide not to make, the communication, or change the content, timing, intended audience, means or mode, or media outlet used for the communication *as a result of* the shared material information or the conveyance of approval or disapproval. Otherwise, a communication is deemed coordinated if an organization tells a candidate that it is distributing "x" number of voter guides and the candidate states, "great." Such a

reply by the candidate would be the conveyance of approval. Thus, the reason for requiring an organization to change its position and do something it was not otherwise going to do, or tailor its activity to the needs or suggestion of a candidate, becomes readily apparent.

Substantial Discussion

This element is redundant if "request or suggestion" is a standard because it does not add any further narrowing that "request or suggestion" does not already provide. Furthermore, the focus of this element is wrong because "substantial discussion," or how many meetings are had, is not relevant to a determination of coordination. What is relevant is the *result* that flows from the discussion, whether the discussion is substantial or insubstantial. This element is overbroad because it focuses on the discussion itself, rather than the result flowing from the discussion. Requiring that the discussion involve material information does not remove the overbreadth. "Substantial discussion," therefore, should not relate to the amount of the discussion, or the materiality of the discussion, but whether "the candidate and spender emerge as partners or joint venturers in the expressive expenditure" *as a result* of their discussion(s). *Christian Coalition*, 52 F. Supp.2d at 90. Coordination does not occur unless a communication is actually coordinated with the candidate, as opposed to simply occurring after contact or substantial discussion with the candidate.

Employment of Common Vendor

The Commission has previously advanced a common vendor theory of coordination in connection with independent expenditures which was derived from the use of the term "agent." *See* 11 CFR § 109.1(a)(4); *see also* FEC Advisory Opinion 1979-80. While the third condition in paragraph (d)(4)(iii) is a vast improvement over the Commission's past attempts, the standard should be revised so that the mere conveyance of material information by the common vendor, without more, does not result in prohibited coordination. As discussed above, the mere conveyance of information, even non-public information, should not be enough to transform a communication into a coordinated expenditure. As long the communication is not materially modified as a result of the conveyance of the information, the receipt of such information should be irrelevant.

ATA is concerned with the practical implementation of this standard. How is the Commission to determine whether a common vendor uses or conveys

information? Without a narrow content standard (limited to express advocacy), *all* types of communications are subject to investigation. How is a common vendor to disprove that it did not use information from a candidate in drafting a letter for an organization? What if the information allegedly used or conveyed is in the public domain? What if a common vendor uses the same type of procedure, no matter who the client? For instance, what if the common vendor believes that a certain method of writing ads is the best method, or that ads are most effective if run on particular stations at certain times, and attempts to write and run all its clients ads in this manner? How will the organization and candidate disprove allegations of coordination in such a case? What is a common vendor to do if it buys time for a candidate's ads and then later an organization directs the common vendor to buy time for its ads that just happen to coincide with or complement the time periods for ads placed for the candidate? Is the common vendor "using information" if it buys time from a station for ads for an organization based upon knowledge of which time slots it has already bought on a station for another client that happens to be a candidate?

This conduct standard has a grave potential for abuse and misuse. Furthermore, it will lead the chilling of speech as common vendors, and their clients who rely upon them for professional services, will steer clear of any similarities in their communications and instead craft them so that they are dissimilar in order to avoid any allegations of coordination. Or, out of fear of "coincidences" or afraid that a common vendor's style of doing business will be confused with the use or conveyance of information, organizations and candidates will refrain from speaking or take their business elsewhere.

Former Employee/Independent Contractor

For the same reason stated above under Employment of Common Vendor, the standard should be revised so that the mere conveyance of material information by the former employee/independent contractor, without more, does not result in prohibited coordination. Either an expenditure must be made but/for the conveyance of material information, or some material aspect of an expenditure must be changed as a result of the conveyance of material information.

ATA also has the same concern as that expressed under the common vendor standard. How is an employee to prove that it did not use or convey information when faced with a coordination accusation filed by a political opponent? What if an organization decides it wants to run ads on certain stations in the state of the employee's former employer, and the employee knows (but takes no part in the

decision and does not convey any information) that the former employer is going to run ads on all the other stations? How will the organization and the former employee prove that it did not use or convey information? The end result is that all effective communications and "coincidences" will be presumed to be the result of coordination.

No Requirement of Agreement or Formal Collaboration

As discussed above, while no "formal" agreement or collaboration is required for coordination, there necessarily must be some sort of agreement or meeting of the minds. Otherwise, coordination could be found merely because of the existence of a discussion, even though it had no impact on the communication. Individuals and organizations frequently inform candidates in some detail about their proposed communications without seeking the agreement of the candidates, or, if assent or disapproval is given, without relying upon it in any way. For example, an organization could tell a candidate that it planned to run ads which criticize his opponent, to which the candidate states, "I pledged to the voters not to run negative ads and I don't want you to run the ad either, okay?" If the organization airs the ad anyway, then no coordination should be deemed to have occurred. However, if instead, the organization honors the candidate's request and for this reason does not air the ad, coordination has occurred, whether or not there was agreement or formal collaboration.

As another example, an organization could tell a candidate that it was going to run radio ads in her district which praise her position on a piece of legislation coming up for a vote. If the candidate replies, "great," there is agreement. However, if the organization was not seeking the candidate's agreement and would have run the ad anyway, it should not matter whether the candidate agrees or not.

As previously explained, the focus needs to be on the result, rather than on the speech. However, the NPRM states that even a minimal amount of agreement is not necessary, and that, in fact, agreement is not required at all. 67 Fed. Reg. 60052. However, a mere request, an expression of approval or disapproval, or a simple conveyance of information, without more, is not enough. The request, agreement or collaboration must lead the organization to change some aspect of the communication, whether it be a decision not to make the communication, or the communication's timing, content or mode.

Corporate and Labor Activity

The retention of § 114.4, in light of the proposed regulations, is confusing. Are voter guides and scorecards analyzed under both § 114.4 and § 109.2? While the NPRM states that the deletion of certain sections of § 114.4, found to be unconstitutional by the courts, will permit organizations to informally contact a candidate to inquire about the candidate's positions on the issues without a subsequent communication paid for by that organization being deemed coordinated, it is unclear how this is permitted without an express exception, given the proposed all-encompassing Alternatives in §109.2.

Unless a voter guide or scorecard contains express advocacy, corporations and labor unions should be permitted to act in cooperation, consultation, or concert with or at the request or suggestion of a candidate regarding the preparation, contents and distribution of the voter guide. If the Commission adopts any of the proposed Alternatives and retains the electioneering prong of the content standard, ATA urges the Commission to create an exemption to the content standard for voter guides and Congressional voting records.

ATA is particularly concerned that this section could be used to prohibit or limit its non-express advocacy activities. Specifically, the American Defense Council, a project of ATA, produces a vote scorecard, which does not contain express advocacy. These vote scorecards are produced soon after important votes in Congress. For example, a vote scorecard is currently being produced to include the vote on the Iraq resolution. By the time the vote scorecard is printed, there will be less than two weeks before the election.

What if ATA wants to hold a press conference announcing the vote scorecard and invite Members of Congress who received high scores on the scorecard to present them with awards? If ATA coordinates with the candidate to schedule an appearance, can the press conference be construed as a coordinated expenditure? To prevent this type of protected speech from being prohibited, the final regulations must require that the coordination relate to a specific communication. Thus, ATA should be permitted to coordinate a candidate appearance at its press conference announcing the vote scorecards, without causing the vote scorecard or the press conference to be deemed a coordinated expenditure.

Assuming the Commission retains this section, the problems discussed above with deeming a communication coordinated upon a mere request or suggestion, without more, are applicable here.

IV. Conclusion

Although the Commission is constrained to implement the BCRA, there exist opportunities for the Commission to exercise its discretion and remove some of the constitutional deficiencies of the Act. While portions of the BCRA will chill free speech and association, the Act should be implemented in a way that is least offensive to the First Amendment rights of corporations, and in particular, non-profit organizations.

Respectfully submitted,

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