BIPAC

ELECTING BUSINESS TO CONGRESS

October 10, 2002

Mr. John Vergelli
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments of BIPAC to Notice 2002-16
(Coordinated and Independent Expenditures)

Dear Mr. Vergelli:

The Business Industry Political Action Committee of America (BIPAC) respectfully submits these comments in response to the Federal Election Commission (FEC) Notice of Prôposed Rulemaking (NPRM) published in the Federal Register on September 24, 2002.

BIPAC is an independent, non-profit organization founded in 1963. Since its inception, BIPAC has conducted nonpartisan political research and analysis on behalf of American business and promoted the effective political participation by businessmen and women nationwide. BIPAC supporters range from a majority of the Fortune Fifty, prominent national business and trade associations, to small family-run companies and has consistently been a preeminent provider of political intelligence to American business. The BIPAC non-connected political committee, registered with the FEC, was the nation's first business PAC.

BIPAC engages in a variety of programs to increase business political activity, many of which are impacted by the regulations referenced in the NPRM. Among the nearly five hundred direct BIPAC supporters are some of the most politically active businesses and business associations in America. BIPAC is submitting these comments to: (1) protect the rights of our supporters to participate in the political process to the maximum extent allowed under the law; and, (2) ensure that regulatory implementation of the Bipartisan Campaign Reform Act (BCRA) is sufficiently clear and consistent as to encourage rather than discourage such participation.

It should be noted that BIPAC opposed the passage of BCRA and supports legal challenges to its implementation. Our comments are provided in order to assist the Commission in developing workable implementing regulations in the event those challenges are unsuccessful. Nothing said in these comments, making favorable references to the Commission's efforts to devise workable regulations, should be construed as a change in BIPAC's underlying opposition to the law.

INTRODUCTION

The NPRM

The focus of this NPRM is the definition of coordination, pursuant to the mandate of Congress contained in the Bipartisan Campaign Reform Act of 2002 (BCRA). In BCRA, Congress repealed the Commission's previous definition which emanated from the U.S. District Court for the District of Columbia's ruling in Federal Election Commission v. Christian Coalition. Although Congress didn't provide an alternative definition in BCRA, it gave the Commission guidance on several issues. The NPRM proposed definition reflects the intent of BCRA in that coordination does not require any formal agreement, collaboration, mutual understanding or meeting of the minds.

The NPRM proposed rules consider coordinated communications as "expenditures," as well as most forms of in-kind contributions to candidates or political parties, and provides a three-part test to determine the definition of "coordinated communications." All three thresholds must be met for a communication to be considered coordinated.

PROCESS FOR DEFINING "COORDINATED COMMUNICATIONS"

Given the mandate of Congress, rejecting the more definitive determinants as included in the Commission's previous definition of coordination, BIPAC appreciates the multi-criteria approach embraced by the Commission. Despite the vagueness of the Congressional mandate, it remains imperative that those desiring to exercise their Constitutional rights have some clearly quantifiable guidelines for determining permissible activity. We think the approach embraced in proposed paragraph (a) of section 109.21, providing that three general areas of (1) payment, (2) content and (3) conduct must be met before coordination occurs, could provide adequate guidance if the criteria within each remain clear, consistent and distinct.

The Commission proposes Section 109.21 (b) that provides that payment for a communication that is coordinated with a candidate or political party <u>is made for the purpose of influencing a Federal election.</u> Under proposed Section (b) (2), the commission emphasizes that a candidate or political party with whom or which a communication is coordinated DOES NOT receive an in-kind contribution from the conduct described in subsequent paragraphs (d) (4), Common Vendor, or (d) (5), Former Employee of Independent Contractor, UNLESS the candidate, party or agent engages in conduct described in paragraphs (d) (1) through (d) (3) of this section. We believe this is a critical distinction.

AGENT

In addition to the standards, the Commission asks for input on the definition of "agent." In specific, the Commission asks, whether an agent must be acting within the scope of his or her authority as an agent? Should the person be required to convey information that was only available to that person because of his or her role as an agent for the candidate or political committee? Should the person be considered an agent if he or she bases recommendations to a third party on information that was gained only due to that position's role as an agent for the candidate or his committee? Lastly, the Commission asks whether any person should be considered an "agent per se" due to a title or position within the campaign. Because the term agent is prominent throughout the proposed regulations, its proper definition is critical.

First, campaigns are, at best, organized confusion, with many well-meaning and aggressive individuals with various titles performing a variety of functions. To assume every worker with a title has some authority to act as an agent in all areas of a campaign simply doesn't reflect reality. Therefore, we strongly hold that the standard must require that an agent be acting within his or her expressed authority.

Similarly, the same application must be made with regard to the definition of agents of non-campaign or party-related entities. Corporate or association representatives in the Districts and States meet with Members of Congress and their staffs on a regular basis during the course of daily operations, often without the knowledge of their superiors or personnel who have actual agent authority.

The Commission's overall attempt at determining whether a communication is coordinated, based on the Payment, Content and Conduct standards should be consistently applied, to include the determination of the content of the agent's activity and their conduct. In a recent situation in the Iowa contest for the U.S. Senate, a campaign related individual engaged activity beyond his scope of authority and therefore, beyond the control of the campaign.

Similarly, to qualify as an agent, the information conveyed would need to be that information gained from the areas of the campaign within his or her scope of authority.

The concept of an "agent per se" is contrary to the standards approach offered by the Commission and should be rejected. It assumes a commonality in definitions of titles and assumes every person with a title within an organization has proprietary political knowledge and the authority to act as an agent. That is simply not the case.

In addition, Congress itself has long recognized the concept of a defined scope of activity. Congress has provided for designated political principles within the Congressional offices themselves. Those authorized to have political interaction are identified and the names are provided to the appropriate Congressional authorities. Should the Commission decide that a "per se" standard is necessary, they may wish to identify specific principles within the campaign, such as the campaign manager, to which this standard would apply.

IV CONTENT REQUIREMENT

The NPRM proposed preferred section 109.21 (c), Content Standards prescribes three standards, anyone one of which, when satisfied, would constitute coordination: (1) the communication would otherwise be considered an electioneering communication as defined by BCRA; (2) the communications disseminates, distributes or republishes, in whole or in part, campaign materials prepared by a candidate, his/her authorized committee or an agent of any of the foregoing (with provided exceptions); or, (3) the public communication expressly advocates the election of defeat of a clearly identified candidate for federal office.

The commission proposes three alternatives as an additional paragraph (4).

V ELECTIONEERING COMMUNICATION

Notwithstanding the findings of any of a number of pending legal proceedings, the definition of 109.21 (c) (1), "electioneering communications" is provided in BCRA and therefore assumed a required part of any regulation. Although it is itself confusing and still emerging, it does provide some degree of consistency.

VI REPUBLICATION/DISTRIBUTION OF CAMPAIGN MATERIAL

Paragraph (c) (2) involves the republication and dissemination of campaign material and is another Congressional mandate under BCRA. The Commission provides further explanation of this standard in 100.57 to include those uses of such information that are not coordinated. We would encourage the Commission to add to section 100 a provision corresponding to that provided in 100.57.

The Commission asks whether the dissemination, distribution or republication of campaign material should be considered a contribution by the person paying for the material absent coordination with campaign. We would respond emphatically "no." To do so would undermine the entire concept of the Commission's approach to test for coordination.

In general response to the Commission's proposed exceptions, BIPAC would encourage their enumeration under paragraph (b) as it serve to give greater clarity to what is activity is permissible. We also believe the exceptions to this standard are either incomplete or confusing.

For instance, the Commission provides an exception for use of "brief quotes or portions of material," it does so only for use in distribution to a "restricted class" under 11 CFR 114.39 (c) (1). Yet under its section 100.57, the Commission states that the use, reproduction, etc., of campaign material is a contribution to the candidate or party IF the dissemination, etc., satisfies any of the conduct standards set forth in 109.21 (d) (6). In that section, the Commission states that a communication that satisfies the CONTENT requirement of paragraph (c) (2) shall only be considered to satisfy one or more CONDUCT requirements IF the candidate, party or agent engages in any of the conduct described in (d) (1) through (d) (3). The resulting question is, can a person pay for the republication, dissemination or distribution of campaign material beyond the restricted class without fear of coordination if there they do not engage in conduct described under (d) (1) through (d) (3)?

We think they should be permitted to do so. There are elements within most campaign material that is explanatory of the candidate's background, qualifications and general philosophy that is suitable for inclusion in an information dialogue with voters. We would suggest that there are appropriate uses for such material in a broader, non-advocacy distribution and ask that the Commission provide for such an excepted use.

We also believe an understandable exception must be crafted allowing for the republication and distribution of original campaign information that exits in the public domain, to include public presentations made by candidates, biographies, positions on issues or voting records.

VII EXPRESS ADVOCACY AND ADDITIONAL ALTERNATIVES A-C

BIPAC acknowledges the need to satisfy the requirement for a standard that provides for communications that expressly "advocates the election or defeat of a clearly identified candidate for Federal office." This is also a pre-existing regulatory concept. BIPAC also supports the Commission's efforts to clarify and quantify this standard, and notes their attempt to do so with regards to the Commission's proposed three proposed alternatives. However, BIPAC would argue that paragraphs (c) (1) through (c) (3) are sufficient to meet the mandates of BCRA and that the addition of any of the proposed Alternatives is unnecessary.

For instance, BIPAC supports the consistent use of the term "public communications," as opposed to the introduction of other terms, and supports the application of a definitive timeframe for considering whether any "public communications" is coordinated. It is clear to BCRA that Congress intended some time constraints or it would not have incorporated them into its concept of "electioneering communications." Consistency would dictate that those timeframes (60 days before a general, special or runoff election, or within 30 days of a primary or convention) be made as standard as the law permits and argues that there is no legislative rationale for the 120 days expressly stated in Alternative (c) for paragraph (4). We would argue against any exceptions to standards that would introduce unnecessary inconsistency and expand the activities possible considered coordination.

It is consistent that communications should clearly identify a candidate for Federal office and provide express statements advocating the election or defeat, opposition, or support of said candidate.

Alternative (a) as suggested, that the communication is public as defined in 11 CFR 100.26, and refers to a clearly identified candidate for Federal office, lacks both a definitive timeframe and a content requirement. It would therefore appear inconsistent to either the Congressional intent, the Commission's approach to quantify thresholds and the needs of practitioners for measurable criteria.

Alternative (b) contains some content requirement but lacks any definitive timeframe.

Alternative (c) provides a content requirement, a timeframe and a targeted audience, the latter two of which are equally prominent in the definition of "electioneering communication." In addition, this alternative requires that all three of these criteria be met before the activity rises to coordination for purposes of the content requirement, mirroring the Commission's three-pronged approach to determining coordination. We note that paragraph (ii) is particularly important for inclusion because it addresses the focus of such activity.

Unfortunately, the (c) alternative introduces the expanded 120 day timeframe for consideration of these activities as mentioned previously and provides for an expanded set of specific contents that is to be considered. Both of these potential expansions concern BIPAC as they introduce yet additional thresholds that can only serve to depress election participation rather than encourage it under the new laws.

Indeed, the Commission asks whether (iii) under Alternative (c), concerning "express statements about the record, or positions, or views on an issue or the character of the qualifications or fitness for office, or party affiliation of a clearly identified candidate for Federal office," should be deleted. We believe that had Congress intended these enumerated activities to be specified in regulation, they would have said so.

BIPAC would suggest the Commission consider adding subparagraphs (c) (4) (i) and (ii) from Alternative (c) to (c) (3), with changes made to (i) so that the timeframe reflects the consistency as stated above. The resulting new paragraph (c) (3) would provide that "The public communication expressly advocates the election or defeat, support or opposition of a clearly identified candidate for Federal office, and each of the following are true: (i) The public communication is made within sixty days of a general, special or runoff election, or thirty days of a primary, convention or caucus of a political party that has the authority to nominate candidates, and (ii) the public communications is directed at voters in the jurisdiction of the clearly identified candidate.

This altered alternative includes language consistent with statutory requirements, other regulatory definitions and the Commission process establishing understandable thresholds.

The Commission asks further, whether a "person whose interactions with a political party committee satisfies the conduct requirement, and who pays for a communication that merely says "vote Democratic" or "vote Republican" should have been deemed to have made a coordinated communications even though no specific candidate is mentioned." BIPAC would argue that this proposed standard betrays the consistency of a "clearly identified candidate for Federal office" that is prominent throughout other portions of the proposed rules or that a generic communications of this nature betrays any material information other than generic support. The fact that one paying for a communication is a Democrat or Republican and chooses to support his/her convictions is not an undesirable activity. We would encourage the Commission to avoid regulations that first conclude "coordination."

VIII CONDUCT REQUIREMENT

To meet the final test for coordination, the Commission proposes to establish a threshold based on six examples of behavior, 109.21 (d) any one of which is sufficient to meet the conduct test. BIPAC understands the Congressional mandate for determinations that lack a "meeting of the minds." However, every effort must be made to establish clear guidelines as to what is and is not permissible activity.

IX REQUEST, SUGGEST OR ASSENT

Under paragraph (d) (1), "request or suggest," the Commission has proposed two conduct standards, either one of which is sufficient to meet the "request or suggest" test for coordination.

On its face, the first example of coordinated conduct, paragraph (d) (1) (i), where a public communication is created at the request or suggestion of a candidate would seem to meet the Congressional mandate, notwithstanding our previously stated concerns about the applicable definition of "agent" used.

However, to qualify as a public communication, some actual public communication would need to <u>result</u> from this request or suggestion. The proposed regulation lacks the key cause and result linkage. Did the suggestion or request result in the activity, or was the activity planned before the suggestion? If a candidate or party suggested a communications already planned, would the entity now need to vacate those plans for fear of being "coordinated?"

This confusion could be avoided by adding "result" language to paragraph (d) (1) (i) so that the paragraph reads: "The public communication is created **<u>as a result</u>** of the request or suggestion of the candidate."

Under the second threshold of "request or suggest," paragraph (d) (1) (ii), the Commission introduces the concept of "assent." BIPAC believes there is neither a need nor a mandate for the "assent" conduct standard as provided. The proposed "assent" standard itself concludes, saying, "where an agent of any of the foregoing assents to the suggestion." If the "suggestion" assented to <u>results</u> in an actual public communications that meets the conduct standard, then the result is the same as provided under the "request or suggest" standard.

Further, the Commission asks whether "expressed assent" should be required or should the rule cover situations where assent is "implied."

Assent by itself can be nearly impossible to define and the resulting attempt to do so, difficult to enforce. Noting our objection to the entire concept of an "assent" standard, to "imply some assent" can be even more difficult. Who is in the position to determine whether an action is implying assent? If a candidate or his agent hears of a suggested activity or communication, but chooses to ignore that suggestion so as to avoid any appearance of discussing coordination, is that implied assent? Conversely, if the candidate or his agent provides any response to the suggestion, directly or indirectly, negatively or otherwise, would not that act of giving direction itself imply some coordination? To imply assent is to imply motivations to inactivity as well as activity and undermines the Commission's entire effort to provide understandable guidelines.

Similarly, the Commission asks whether a request or suggestion by a candidate or political party should be viewed as sufficient by itself, without reference to the "conduct standard," to establish "coordination." Given all the previous tests established by the Commission, the answer would be clearly be "no."

Candidates for Federal office and agents of the political parties regularly discuss political strategy and tactics in various public and semi-public venues where participants are, or are agents of, those that may eventually pay for election-related communications. Such is common place both in Washington and in the home districts and states. <u>To assume the mere mention of effective political tactics in these settings is sufficient for coordination is contrary to the very nature of our tradition of public discourse. It is to assume that politicians cannot talk politics with any group in which an attendee may be a political activist</u>.

Similar to our arguments regarding "agent per se", "assent" and "implied assent," to simply assume the mere suggestion of something that might be considered coordination, is in fact coordination, is likely to erroneously determine uncoordinated activities are coordinated, ensnaring the totally innocent. Certainly, that was NOT the intent of either Congress or the Commission.

X MATERIAL INVOLVEMENT

In paragraph (d) (2), "material involvement," the Commission proposes a standard that provides for meeting the conduct standard for coordination when candidates, parties or their agents are "materially involved in decisions" regarding seven specific aspects of a public communication paid for by someone other than the candidate. We question the statutory mandate for a separate "material involvement" standard and are unsure of its need given the practical application of both the proceeding and subsequent standards. For any "material involvement" to take place, resulting in a public communication, there would need to be "substantial discussions" as covered in the subsequent paragraph, making the introduction of this concept and this paragraph unnecessary. The specific activities mentioned as a part of this standard could be provided for under the following section, if needed at all.

With regard to paragraph (d) (2) (vi), or any other specific activity, BIPAC asks whether such applies to discussions a representative may have with a candidate or agent regarding the distribution of internal newsletters or trade publications in which an article about the candidate's positions on the groups issues is featured? Whether or not the mere discussion of the internal distribution numbers of in-house publication is covered under this regulation should be made clear.

To the Commission's credit, the Commission seeks input as to the scope of this rule and to the possibility of further rule-making. We strongly suggest elimination of this standard or, if it is to be proposed, that further rule-making be pursued on the issues of "material involvement" to more clearly define how the substance and materiality of these discussions can be identified and measured, and how same differs from the other standards.

XI SUBSTANTIAL DISCUSSION

In 109.21 (d) (3), the Commission provides that "the communication is created, produced or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication and the candidate who is clearly identified in the communication, or his or her opponent." The Commission comments that a discussion is "substantial" for purposes of this section, if the information about the plans, projects, activities, or needs of the candidate or political party is conveyed to a person paying for the communication, <u>AND</u> (emphasis added) that information is material to the creation, production, distribution of the communication."

In an attempt to define the parameters of the application of this regulation, the Commission emphasizes that "substantiality of the discussion would be measured by the materiality of the information conveyed."

In perspective, it is not uncommon for incumbents and candidates for Federal office to have meetings with representatives of interests in their home state, their representatives from national associations or steering committees comprised of supporters, many of whom may be employed by, or themselves, be engaged in activities regarding any of the specified activities listed under this standard. This long held practice is considered an essential part of a candidate's ability to remain in touch with both constituents at home and constituent groups in Washington. <u>Certainly, it cannot be the intent of the Commission or the very members of Congress who rely on this process, to eliminate such activity altogether. Yet, the scope and application of this standard as currently drafted may serve to do just that.</u>

As with paragraph (d) (2), BIPAC is deeply concerned that there still exits insufficient quantification as to what a "substantial" conversation is and what "material" may mean in this instance. In the broadest sense, any one who meets with a candidate to discuss an issue who works for any institution that may later communicate about that position in any one of many formats, potentially meets the coordinated threshold as that issues itself is "material" to that communication. That alone would undermine the ability of any person or group with contact to Members of Congress to engage in any communication that deals with the substance of those contacts.

However, if it is the intent of the Commission that, to establish coordination, such discussions must be SPECIFIC to a subsequent and intended communication, **that specific language needs to be added.** We would suggest that "substantial discussion" join "material involvement" as subjects for future rule-making consideration.

XII COMMON VENDOR

In this section, the Commission seeks input regarding the time parameters of this provision. It is clear that BCRA, and these rules, are meant to apply only to activity whose purpose is to impact the outcome of Federal elections. Not all activity regarding public communications is purposefully focused on election outcomes. Indeed, much of it is geared toward legislative outcomes. Therefore, BIPAC suggests a consistently applied timeframe of "during a calendar year in which the candidate's name is on the ballot for election to Federal office." That same comment is relevant to issues of timeframe raised in the following section.

XIII FORMER STAFF AND INDEPENDENT CONTRACTORS

In section 109.21 (d) (5), the Commission is presented with a dilemma of defining the limits of activities of former staff and independent contractors of candidates that would qualify as coordinated. In this section, the Commission asks a series of questions.

First, with regard to a specific timeframe for determining whether a conduct is coordinated, we strongly believe that a specific, logical and limited timeframe is essential. We again suggest the language stated above. A great many of those involved in political endeavors with corporations, associations and vendors, have served on a Congressional staff or within a political party committee at one point or the other. Without a suitable timeframe, application of this rule becomes too broad.

Second, asking whether a requirement that the former employer have some kind of direction or control over the former employee, should be added to the standard, we would suggest "yes." Some relevant relationship between the former employer and the former employee seems essential. The fact that someone previously worked for a member of Congress, now being supported by his/her current employer doesn't, and shouldn't, by itself rise to the level of a "coordinated conduct." However, coordinated conduct may be established if there exists some direction or relevant relationship between the candidate who is the former employer and the former employee.

Third, the establishment of such a standard would give guidance to the Commission's question whether coordination exists when a former employee work's on behalf of his former employer's current opposition. The fact that some control, direction or relevant relationship must exist would exclude "coordination" between the former employer and the former employee in these cases.

Fourth, these standards should NOT be extended to volunteers. For the most part, the relationship of volunteers to the candidate and the campaign are very different than the relationship of staff. Volunteers historically participated in more than one campaign at a time. As a matter of practice, campaigns attempt to make volunteers feel more involved in the campaign by the intentional communication of "insider" information, which may or may not be in fact proprietary and, therefore, volunteers cannot be held to the same standard as paid staff with regard to coordination.

XIV OTHER EXEMPTIONS

BIPAC believes the Commission is wise to allow for additional exemptions to conduct considered "coordinated" and would support those mentioned.

For instance, it could hardly be considered "coordinated conduct" to refer to a candidate's name when such is commonly used as part of the formal or informal description of legislation or law.

BIPAC would strongly support a more explicit exemption for communications based on a candidate's written OR verbal responses to a specific inquiry about his positions on issues or legislative policy. It is a long-held and common practice that associations, businesses, labor groups and others with interest in legislation, send representatives, generally from their Congressional District or state, to meet with their Members of Congress to ascertain their positions on specific issues critical to the group. These meetings commonly result in verbal statements regarding issues or policy. To assume that these representatives cannot now communicate these responses to the broader association membership or interest, without becoming a "coordinated conduct," undermines the purpose of our representative system.

XV CONCLUSION

As stated previously, BIPAC opposed BCRA. We still believe it prescribes unconstitutional restrictions on the first amendment rights of all Americans. Whether they intended to or not, in its attempt to cure some vague "perception of corruption," Congress has created a framework where legitimate political activity is discouraged. BIPAC believes the Commission has a responsibility to not only devise regulations consistent with the law, but also consistent with the American tradition where one is presumed innocent until proven otherwise. Americans have a right to participate in the political process and the government has the obligation to provide clear and usable guidelines as to permissible activity.

BIPAC is prepared to participate in whatever public testimony the Commission may request.

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