Glen Shor <gms@camlc.org> on 10/11/2002 12:18:49 PM

Please respond to gms@camlc.org

To: BCRAcoord@fec.gov
cc:

Subject: CAMLC Coordination Comments

Attached are The Campaign and Media Legal Center's comments on Notice 2002-16, the Federal Election Commission's Notice of Proposed Rulemaking relating to Coordinated and Independent Expenditures.

Comments submitted by electronic mail must include the full name, electronic mail address, and postal service address of the commenter. That information immediately follows:

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Please let me know if you have any problems opening the attached document. Thank you for your consideration of these comments.

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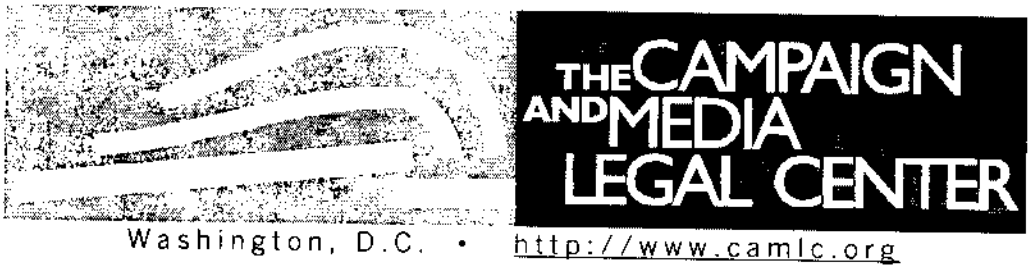

October 11, 2002

VIA E-MAIL

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

RE: Notice 2002-16

Dear Mr. Vergelli:

These comments are submitted on behalf of The Campaign and Media Legal Center, a nonpartisan organization which seeks to represent the public interest in legal and governmental proceedings involving federal campaign finance laws. They address the Federal Election Commission's Notice of Proposed Rulemaking published at 67 Fed. Reg. 60042 (September 24, 2002), containing draft regulations to implement certain sections of the Bipartisan Campaign Reform Act of 2002 (BCRA) relating to "coordinated and independent expenditures."

In addition to submitting these comments, the Legal Center respectfully requests the opportunity to testify during the Commission's hearings on coordinated and independent expenditures on October 24th.

General Comments

The Campaign and Media Legal Center appreciates the Commission's work on draft rules relating to coordinated and independent expenditures. This undertaking was necessitated in large part by BCRA's amendments to the Federal Election Campaign Act of 1971 (FECA) relating to when certain expenditures or disbursements should be considered "coordinated" with a candidate, political party, or their agents, and thus treated as in-kind contributions subject to source prohibitions, amount limitations, and reporting requirements of federal campaign finance law.

Treatment of coordinated expenditures as contributions is a legal concept that safeguards against corruption and the appearance of corruption. As the U.S. Supreme Court recognized in *Buckley v. Valeo*, where expenditures are prearranged or coordinated with a

candidate or his or her agent, there is a danger that such expenditures "will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. 1, 47 (1976). At a minimum, the prospect for a *quid pro quo* arising from coordination creates precisely the "appearance of impropriety" that the Court in *Buckley* deemed a compelling justification for limiting contributions. The Court thus treated "controlled" or "coordinated" expenditures as contributions subject to federal campaign finance law's amount limitations, source prohibitions, and reporting requirements. *Id.* In turn, FECA was amended to expressly indicate that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request of suggestion of, a candidate, his authorized political committee, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(ii).

The Supreme Court took a broad perspective on "coordination" in *Buckley*. In striking down limits on independent expenditures by non-candidate, non-party organizations, it noted that these expenditures were "made *totally independent* of the candidate and his campaign." 424 U.S. at 47 (emphasis added). However, the Commission's current coordination rules relating to general public political communications financed by non-party, non-candidate entities (*see* 11 CFR 109.1(a)(4); 11 CFR 100.23) depart from this perspective. These rules are based on a district court's understanding of coordinated conduct that is significantly narrower than the statutory standard of 2 U.S.C. 441a(a)(7)(B)(ii) and the Supreme Court's perspective on this issue in *Buckley*.

A majority of the Commission refused to appeal that district court decision and instead adopted coordination rules that fail to account for many real-world forms of coordination – such as the provision of material information relating to a candidate's or party's campaign needs and strategy to an entity or individual that undertakes substantial political spending benefiting the candidate or party. Senator Feingold gave voice to these concerns during Senate floor debate on BCRA, indicating on March 20, 2002 that "[T]he Federal Election Commission's current regulation defining what general public political communications funded by outside groups are considered coordinated with candidates or parties fails to account for certain types of coordination that may well occur in real-world campaigns." 148 Cong. Rec. s2145 (daily ed. March 20, 2002) (statement of Sen. Feingold). The result has been a significant, unnecessary campaign finance loophole that gives rise to precisely the dangers of actual and apparent corruption with which the *Buckley* Court was concerned.

As a result, the Bipartisan Campaign Reform Act rescinded the Commission's current coordination rule contained in 11 CFR 109.1(a)(4) and 11 CFR 100.23 and mandated that the Commission promulgate a replacement regulation which does not require the existence of "formal collaboration" or "agreement" for there to be a finding of coordination. This represents an important opportunity for the Commission to remedy deficiencies in its prior coordination rules that compromised the integrity of our political system and bring its regulations into accord with the statutory standard for coordination and the Supreme Court's understanding of the concept.

Proposed Rules

PART 100

Proposed 11 CFR 100.16: We largely support this proposed regulation. In particular, the Commission is correct to retain the term "consultation" in the list of activities that compromise the independence of expenditures. It is clear that Congress did not intend to change the statutory standard distinguishing between independence and coordination. Indeed, in BCRA, Congress added language to FECA clarifying that "expenditures . . . in cooperation, *consultation*, or concert with . . . a political party, shall be considered to be contributions made to such party committee. 2 U.S.C. 441a(a)(7)(B)(ii) (emphasis added). Senator McCain confirmed on March 20, 2002 that "The bill does not change the basic statutory standard for coordination." 148 Cong Rec. s2145 (daily ed. March 20, 2002) (statement of Sen. McCain).

The language indicating that coordinated communications under 11 CFR 109.21 or 11 CFR 109.37 are not independent expenditures is correct so far as it goes. However, we note that the cross-referenced draft regulations, in their current form, encompass "public communications" (as defined in 11 CFR 100.26) or other types of communications distributed through a particular medium. They do not appear to cover other forms of communication. As such, because coordination might exist with respect to such other forms of communication, it may be useful to clarify in proposed 11 CFR 100.16 that coordinated communications under 11 CFR 109.21 or 11 CFR 109.37 are *examples* of communications that do not constitute independent expenditures.

PART 109

Proposed 11 CFR 109.20: We support this proposed regulation, which reflects the statutory standard for coordination contained in 2 U.S.C. 441a(a)(7)(B)(i) and (ii).

Proposed 11 CFR 109.21: Our preference would be for the Commission to re-adopt its coordination regulations that applied prior to the *Christian Coalition* decision. Those regulations were well-suited towards achieving the *Buckley* Court's vision of totally independent spending on the part of non-party, non-candidate individuals or entities. We believe that the Commission erred in not appealing the portions of the *Christian Coalition* decision that narrowed the agency's previous regulations. Indeed, Congress acted to void regulations that were based on that district court opinion.

Years of advisory opinions and enforcement actions elaborated as to the scope and meaning of the Commission's original coordination regulations. They therefore could have been used as a good base for this rulemaking, perhaps with some relatively minor modifications. We urge the Commission to consider that approach at this time.

However, as the Commission has presented a different approach to defining and assessing coordination in this Notice of Proposed Rulemaking, we will provide comments on its specific proposals.

This regulation is apparently intended to define what constitutes a "coordinated communication." However, it neither defines nor consistently uses the term "coordinated communication." This is confusing, given the references in other regulations to "coordinated communication under 11 CFR 109.21." Moreover, there are internal inconsistencies within this regulation arising from the failure to use and define the term "coordinated communication" (*e.g.*, proposed subsection (b) discusses payments for communications that are "coordinated with a candidate or political party committee" but fails to mention the prospect of coordination with an authorized committee or a candidate's or party's agents). Thus, as an initial matter, we believe that subsection (a) of this regulation should specifically define the term "coordinated communication" – and that this term should then be used consistently throughout the regulation.

Subsection (b)(2) should be clarified to indicate that a candidate or party will be deemed to have received or accepted an in-kind contribution resulting from a coordinated communication in which an *agent* of either engaged in the conduct described in paragraphs (d)(1) through (d)(3) (see previous paragraph discussing the need to define and consistently use the term "coordinated communication").

109.21(c): We support paragraphs (1), (2) and (3) of subsection (c) and believe that additional content standards are needed. With respect to paragraph (1), we note that Section 202 of BCRA (2 U.S.C. 441a(a)(7)(C)) expressly states that disbursements for "electioneering communications" that are coordinated with a candidate, his or her authorized committee, a party committee, or any agent thereof are to be treated as a contribution to the candidate supported by the electioneering or that candidate's party.

In listing the alternatives for subsection (c)(4), the Commission at least correctly recognizes that the concept of coordination under campaign finance law can and must reach beyond coordinated "express advocacy" communications. Even the district court that developed the excessively narrow conduct standard for coordination that was codified in the rescinded Commission regulations recognized the peril of restricting coordination analysis to "express advocacy," noting that "[I]mporting the 'express advocacy' standard into §441b's contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions." *FEC v. Christian Coalition*, 52 F. Supp.2d 45, 88 (D.D.C. 1999)..

In fact, the narrowing "express advocacy" construction conferred by the *Buckley* Court dealt only with *independent* expenditures. 424 U.S. at 43-47 ("The constitutional deficiencies described in Thomas v. Collins can be avoided only by reading §608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate . . . §608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign."). It is likewise clear that the Court's subsequent decision in *FEC v. Massachusetts Citizens for Life* was concerned only with *independent* spending by corporations and unions insofar as it incorporated the "express advocacy" standard to 2 U.S.C. 441b. 479 U.S. 238, 249 ("We agree with

appellee that this rationale requires a similar construction of the more intrusive provision that directly regulates *independent* spending." (emphasis added)).

In *Christian Coalition*, the district court astutely described certain of the consequences of importing an "express advocacy" requirement into coordination analysis: "expensive, gauzy candidate profiles prepared for television broadcast or use at a national political convention, which may then be broadcast, would be paid for from corporate or union treasury funds." 52 F.Supp.2d at 88. This would be tantamount to massive, undisclosed soft money contributions to candidates, flying in the face of the *Buckley* Court's concern about "the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47.

Alternative C for paragraph (c)(4) presents a framework worth pursuing, in light of the Commission's approach here to developing coordination rules. We do suggest that the Commission broaden the time frame during which this test would apply. In light of the fact that the public communication in question would be "directed to voters in the jurisdiction of the clearly identified federal candidate," that it would characterize the candidate's stance on issues or qualifications, and that there would be coordination with that candidate, his or her opponent, or a political party (or the agents of any of these individuals or entities), the prospect that the advertisement is being made for campaign purposes is high even outside the 120-day period specified in the current draft. For example, the time frame could be broadened to eighteen months before a general election involving the clearly identified candidate. We would also suggest deleting the word "express" preceding "statements" in proposed subparagraph (iii).

Moreover, in describing a type of public communication that would mention a clearly identified candidate and meet the content standard, Alternative C does not include an advertisement that refers to a clearly identified candidate outside the 60/30 day window, does not characterize the candidate's views on issues or qualifications (or party affiliation), but does mention and strongly characterize the views of a political party. Along similar lines, the Commission did not, in the proposed content tests, address advertisements that mention and characterize political parties but make no reference to clearly identified federal candidates. However, coordinated advertisements touting or disparaging parties could properly constitute in-kind contributions. We believe that the Commission must address the issue of content concerning political parties, both in the context of advertisements mentioning federal candidates that do not constitute "electioneering communications" (the statute and rules already make clear that disbursements for coordinated "electioneering communications" are in-kind contributions) and advertisements not referring to clearly identified federal candidates.

Likewise, we are concerned that, closely proximate to federal elections, candidates and parties may endeavor to coordinate the financing of advertisements by individuals and outside groups that do not mention clearly identified candidates yet are arranged to reinforce party and candidate campaign themes. These advertisements would obviously confer significant electoral benefits on candidates and parties and, in light of their timing and targeting and the presence of coordination, be properly deemed in-kind contributions.

The Commission should account in these rules for coordinated advertisements that may not mention candidates or parties but should nonetheless be considered in-kind contributions. Along these lines, one option would be for the Commission to treat advertisements that are coordinated (under the conduct standards) with candidates up for election and directed to voters in the coordinating candidates' electoral jurisdictions, within 60 days of the general election or 30 days of the primary, as in-kind contributions (with appropriate exceptions -- *e.g.*, an exception for a true lobbying ad).

109.21(d):

"Request or suggestion": As part of this framework, we support the "request or suggestion" conduct standard included in subsection (d)(1). The inclusion of subsection (d)(1)(ii) is indeed an important means of preventing circumvention of the "request" or "suggest" standard, through actions on the part of a candidate, authorized committee, party or their agents to create an expectation that the suggestion or request should emerge from the person or entity that would ultimately finance the communication.

"Material involvement": In its commentary, the Commission specifies that a candidate or party (or presumably an agent of either) would be considered "materially involved" in the decisions enumerated in paragraph (d)(2) if "either shares material information about campaign plans, projects, activities, or needs with the person making the communication." We agree that these activities should be part of the concept of "material involvement in decisions" regarding the items specified in (d)(2). We also believe that party or candidate involvement in "discussions" of the items specified in (d)(2) (*e.g.*, the content of the communication, the means or mode of the communication, etc.) should be covered under this subparagraph (as well as "decisions" regarding those items).

"Substantial discussion": As part of this framework, we support the "substantial discussion" conduct test outlined in subsection (d)(3), in light of the regulation's guidance concerning when a discussion would be considered "substantial."

"Common vendor": Subparagraph (4) deals with the use of a "common vendor" by candidate or parties (or their agents) and the person paying for the communication. Prior to adoption of the rescinded coordination rules, the Commission's part 109 regulations indicated that coordination was *presumed* where an expenditure was "made by or through any person . . . who is, or has been, receiving any form or compensation or reimbursement from the candidate, the candidate's committee or agent." A similar presumption of coordination should be employed where the factors described in (d)(4)(i) and (d)(4)(ii) are present.

This presumption could be rebutted if the vendor demonstrated that it did not make use of or convey material information about the plans, projects, activities or needs of the candidate or party to whom the vendor had provided services, or material information used previously by the vendor in providing services to the candidate, party, or their agents.

The Commission inquired in its comments as to whether the current election cycle should be the temporal limit on the operation of the regulation. We believe that the Commission should apply a time limit of "the current election cycle, but not more than the previous two years of that election cycle" – a possibility raised in the Commission's commentary.

"Former employee"/"independent contractor": Akin to our suggestions concerning the "common vendor" conduct standard, with respect to the "former employee or independent contractor" standard," we believe: (1) there should be a presumption that the conduct standard was met when the situation described in (d)(5)(i) is present, which could be rebutted if there were no use or conveyance of material information about the candidate's or party's plans, projects, activities, or needs, and (2) the temporal limit on the operation of the regulation should be "the current election cycle, but not more than the previous two years of that election cycle." However, we do not believe that this provision should cover *every* former employee of a candidate or party. It should seek to cover only former employees that are likely to possess material information about a candidate's or party's campaign strategies, tactics, or needs.

109.21(e): We support this proposed regulation, which reflects BCRA's mandate that these newly promulgated coordination rules not require "agreement" or "formal collaboration" for there to be a finding of coordination.

Proposed 11 CFR 109.31: We support this proposed regulation, which among other things indicates that a "party coordinated communication" is an example (though not the only example) of a coordinated party expenditure.

Proposed 11 CFR 109.32: We support this proposed regulation, which is consistent with current law. However, as we will discuss subsequently in these comments, we oppose the Commission's draft regulations permitting national parties to make independent expenditures in connection with the general election campaigns of presidential candidates (see comments on proposed 11 CFR 109.36).

Proposed 11 CFR 109.33: We largely support this proposed regulation, which continues the current practice permitting assignment of coordinated party expenditure authority between party committees. However, it should be made completely clear that nothing in this regulation supersedes the prohibition of proposed 11 CFR 109.35 on national and state parties' (properly treated as "one unit" in this instance) making both coordinated expenditures and independent expenditures with respect to a candidate post-nomination (*see* comments on proposed 11 CFR 109.35).

Proposed 11 CFR 109.35: We oppose the Commission's proposed approach of splitting the political parties into two groups (a national party group and a separate state party group) for purposes of implementing Section 213 of BCRA (2 U.S.C. 441a(d)(4)). This approach contradicts the language of and legislative intent relating to this provision.

2 U.S.C. 441a(d)(4)(B) states that, for purposes of 2 U.S.C. 441a(d)(4), "all political committees established and maintained by a national political party . . . and all political

committees established and maintained by a State political party (including any subordinate committee of a State committee). . . shall be considered to be *a single political committee.*" (emphasis added). The language of the preceding subparagraph (2 U.S.C. 441a(d)(4)(A)) indicates that "no committee of a political party" may, after a candidate's nomination, make coordinated expenditures with respect to the candidate after "it" makes any independent expenditure with respect to the candidate (and vice-versa). Thus, this provision clearly calls for treatment of all committees of a political party – including national, state and subordinate party committees – as one group (one "political committee") for purposes of this provision.

In fact, this section of BCRA was widely understood in Congress as treating all committees of a political party – including national, state and subordinate committees – as one group for its purposes. We note the following comments from the legislative history:

- March 5, 2002 (material inserted in the Congressional Record by Senator McConnell, concerning a proposed "technical corrections" legislative package): "4. Permit Party Coordinated And Independent Expenditures. *Shays-Meehan treats all party committees (from national to local parties) as a single committee.* Prohibits all committees from doing both coordinated expenditures and independent expenditures after nomination by party (contrary to S. Ct. ruling in Colorado I). Solution: Do not treat all party committees as a single committee and do not prohibit them from doing both independent and coordinated party expenditures." 148 Cong. Rec. s1529 (emphasis added).

- March 5, 2002 (material inserted in the Congressional Record by Senator McCain, responding to proposed "technical corrections" legislative package): "3. Hard Dollar Candidate Support by Parties-- This is a proposed substantive change to the pending CFR legislation. The proposal would allow parties to make both independent and coordinated expenditures in individual races. The requirement that the parties choose between these expenditures was contained in both the Senate and House-passed bills and is not inconsistent with the Colorado I decision. *For purposes of this provision only, national and state party committees are treated as a single entity.*" 148 Cong. Rec. s1530 (emphasis added).

- March 18, 2002 (section-by-section analysis included by Senator Feingold in the Congressional Record): "*For purposes of this section, all national and state party committees are considered to be one entity* so a national party cannot make an independent expenditure if a state party has made a coordinated expenditure with respect to a particular candidate." 148 Cong. Rec. s1993 (emphasis added).

- March 20, 2002 (statement of Senator McCain, in response to request by Senator Thompson for an explanation of Section 213 of BCRA): "*Section 213 provides, for this purpose only, that all the political committees of a party at both the state and national levels are considered to be one committee for the purpose of making this choice.*" 148 Cong. Rec. s2144 (emphasis added).

- March 20, 2002 (statement by Senator McConnell): "Under this bill, parties are prohibited from engaging in both independent and coordinated party expenditures after a candidate has been nominated. *The bill treats all party committees, from State and local to the national party, as a single committee.*" 148 Cong. Rec. s2121-22 (emphasis added).

In light of the statutory language, the weight of the legislative history on this issue, and the fact that the "one group" interpretation is not contradicted by the anti-transfer provision of 2 U.S.C. 441a(d)(4)(C), the Commission should treat national, state, and subordinate party committees as a single group for purposes of the prohibition on making both independent and coordinated expenditures with respect to a candidate in the post-nomination period. If the Commission feels compelled to assign separate and distinct meaning to 2 U.S.C. 441a(d)(4)(C), we note that it could be read to prohibit a national party from, *pre-nomination*, using up its coordinated expenditure authority on behalf of a candidate and then transferring funds to a state party for it to try to make supposedly independent expenditures with respect to that candidate.

Proposed 11 CFR 109.36: We believe that this proposed regulation is based on a misinterpretation of BCRA. Previously, 11 CFR 110.7(a)(5) indicated that "[t]he national committee of a political party may not make independent expenditures (see part 109) in connection with the general election campaign of a candidate for President of the United States." This proposed regulation – which would replace 11 CFR 110.7(a)(5) – prohibits national parties from making independent expenditures in connection with the general election campaign of a presidential candidate *only* when the national party is designed as the authorized committee of the its presidential candidate. The Commission cites Section 213 of BCRA – prohibiting party committees from making both post-nomination independent expenditures and post-nomination coordinated expenditures with respect to a candidate – as support for making this change.

However, Section 213 of BCRA in no way visited the issue of whether national parties may make independent expenditures with respect to presidential campaigns. Rather, the provision is appropriately understood as a response to the Supreme Court's *Colorado I*'s holding that party committees may make independent expenditures with respect to *congressional* races. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 611-12 (1996) ("Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns."). Under *Colorado I*, parties may engage in unlimited independent spending (*if truly independent*) with respect to congressional candidates, and

indeed, parties have since that decision claimed to engage in independent expenditures in such races. Section 213 of BCRA was a response to that phenomenon – not precluding parties from making such independent expenditures, but prohibiting them from making both independent and coordinated expenditures in the post-nomination period with respect to a congressional race. It should not be read as affirmatively authorizing party committees to engage in any particular activity. Indeed, given the importance of this issue, we believe Congress would have addressed it expressly and squarely if it had desired a change in the current regulation. Accordingly, we believe that proposed 11 CFR 109.36 should be modified to incorporate the language of prior 11 CFR 110.7(a)(5) – completely precluding independent expenditures by a national party in connection with the general election campaign of a presidential candidate.

Proposed 11 CFR 100.37: As we suggested with respect to "coordinated communications" under proposed 11 CFR 109.37, we believe that this regulation should specifically define the term "party coordinated communication" and use it consistently throughout the regulation to avoid confusion.

The relationship between candidates and parties is of a different nature than that between candidate or parties and outside groups. Namely, as has been observed by BCRA friend and foe alike, the two are significantly and naturally intertwined, sharing campaign strategies and consultants and engaging in fundraising for one another. In light of the consistently extensive interactions between candidates and parties, it would be appropriate for the Commission to establish a presumption of coordination with respect to party expenditures on behalf of their candidates. This presumption could be rebutted by a showing of truly independent action by a party.

Thank you for your consideration of these comments. We look forward to working with the Commission during the course of this rulemaking.

Sincerely,

/s/

Trevor Potter
General Counsel

/s/

Glen Shor
Associate Legal Counsel