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October 11, 2002

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BY HAND DELIVERY

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

Re: Comments of the Chamber of Commerce of the United States to Notice 2002-16 (Coordinated and Independent Expenditures)

Dear Mr. Vergelli:

The Chamber of Commerce of the United States ("Chamber") respectfully submits these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on September 24, 2002.[1]

Founded in 1912, the Chamber is the world's largest not-for-profit business federation representing over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and industries, 96 percent of which are small businesses with 100 or fewer employees. The Chamber furnishes a myriad of services for its members including: research, issue briefings, policy forums, small business resources, government and grass roots lobbying, litigation, and electoral activity.[2] The Chamber sponsors a political committee that is registered with the FEC as the USChamberPAC.

The Chamber is currently challenging the constitutionality of the coordination provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA")[3] in

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1 67 Fed. Reg. 60,042 (Sept. 24, 2002).

2 The Chamber's Internet site (www.uschamber.com) provides a comprehensive overview of these services as well as other relevant information.

3 Pub. L. No. 107-155, 116 Stat. 83 (2002).

federal court.[4] The Chamber asserts that the coordination provisions are facially unconstitutional. The Chamber submits these comments to assure that the Commission's proposed regulations do not further violate the constitutional rights of the Chamber or its members.

INTRODUCTION

I. The NPRM

This NPRM has been instituted to implement changes in the rules governing independent and coordinated expenditures enacted by the BCRA. The BCRA, in pertinent part, added "national, State, or local committees of a political party" to the list of participants in regulated coordinated communications.[5] In addition, Congress repealed the Commission's former definition of "coordinated general public political communications" and other regulations pertaining to coordination.[6] In the place of the repealed regulations, Congress mandated that the Commission promulgate "new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees."[7]

In mandating such new regulations, Congress declared that the "regulations shall not require agreement or formal collaboration to establish coordination."[8] In addition, the Commission is required to address the following in the new regulations:

> (1) payments for the republication of campaign materials;
> (2) payments for the use of a common vendor;

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4 *Chamber of Commerce v. FEC*, No. 02-0751 (D.D.C. filed Apr. 22, 2002) (consolidated with *McConnell v. FEC*, No. 02-0582).

5 BCRA § 214(a) (to be codified at 2 U.S.C. § 441a(a)(7)(B)).

6 *Id.* § 214(b).

7 *Id.* §§ 214(b) & (c).

8 *Id.* § 214(c).

> (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.[9]

Finally, in a separate section, the BCRA categorized as a contribution "any disbursement for any electioneering communication" that is "coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or officer of any such candidate, party, or committee."[10]

II. Current Regulations

The Commission's current definition of "coordinated general public political communications" is located at 11 C.F.R. § 100.23. It is these regulations, among others, that Congress repeals in the BCRA.

The Commission's current coordination regulations are based upon the ruling of the U.S. District Court for the District of Columbia in *Federal Election Commission v. Christian Coalition*.[11] In this opinion, Judge Joyce Hens Green for the most part disagreed with the Commission's allegation that the Christian Coalition had coordinated various expenditures with several campaigns, including President George H.W. Bush's 1992 reelection campaign.[12]

The district court found an "insider trading" or conspiracy standard to be overbroad when pursuing coordinated communications.[13] "[T]he spender

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9 *Id.*

10 BCRA § 202.

11 52 F. Supp. 2d 45 (D.D.C. 1999).

12 The opinion addressed a prosecution by the Commission under a previous version of the coordination regulations.

13 *Christian Coalition*, 52 F. Supp. 2d at 87-89.

should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate."[14] The court found coordination only where there was "substantial discussion or negotiation" so that "the candidate and spender emerge as partners or joint venturers" in the expenditure.[15]

The reasoning and opinion in *Christian Coalition* were not based upon some policy choice, but rather because "First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents, while balancing the Government's interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and association."[16] A less narrowly-tailored 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."[17]

COMMENTS

Because coordinated expenditures, under the current and proposed regulations, are considered to be both expenditures as well as contributions to the candidate, party, or committee with which they are ultimately coordinated, the Commission must tread lightly in this rulemaking. As Judge Green wrote in *Christian Coalition* after analyzing the distinction between contribution and expenditure erected by the Supreme Court in *Buckley v. Valeo*, "it must be remembered that because 'coordination' marks the constitutional dividing line between corporate contributions subject to prohibition and protected issue-oriented expenditures, that line is ultimately drawn by reference to the First Amendment, not the [Federal Election Campaign Act]."[18] Because corporations have a right to engage in legislative

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14 *Id.* at 91.

15 *Id.* at 92.

16 *Id.* at 91.

17 *Id.* at 90.

18 *Id.* at 89-90.

and educational activities and communications, any prohibition by Congress or the Commission must be in line with First Amendment principals.

In developing its regulations concerning coordination and independent expenditures, it is imperative that the Commission keep two overriding principals in mind. First, there must be no presumption of coordination. Second, the rules defining what is and is not coordinated activity must be objective and narrow and contain bright-lines.

As was stated by the U.S. Supreme Court in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, the Commission cannot presume coordination.[19] "An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one."[20] In *Colorado I*, after digging into the factual details of the communication that had been aired by the Colorado Republican Party, the Court determined that the communications were, in fact, independent expenditures and not coordinated expenditures.[21] Based upon this binding precedent, the Commission must ensure that its new regulations do not presume, or have the effect of presuming, coordination on the part of corporations making public communications.

In a related manner, the Commission must also ensure that its new regulations contain bright-line rules, providing ample notice and sufficient description as to what types of activities and communications will be deemed to be coordination. The First Amendment demands that bright lines be provided when the freedoms of speech and association and the right to petition the government for redress of grievances are involved because vague rules and regulations chill the exercise of protected rights. As the Supreme Court stated in *Buckley v. Valeo*, "serious problems of vagueness [are] particularly treacherous where . . . the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights."[22] The Due Process Clause also mandates

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19 518 U.S. 604, 621-22 (1996) [hereinafter *Colorado I*].

20 *Id.*

21 *Id.* at 614-615.

22 424 U.S. 1, 76-77 (1976) (footnote omitted).

bright-line rules because those facing criminal penalties, as a corporation would if its communication is deemed to be coordinated and, hence, a contribution, must have sufficient notice to understand the parameters of possible wrongdoing. "Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'"[23]

Because the consequence of finding coordination is to limit and burden First Amendment activity, the regulations must also define coordination with narrow specificity. "Because First Amendment freedoms need breathing space to survive, government may regulate in the are only with narrow specificity."[24] Overbreadth is forbidden.

Finally, political actors cannot fairly be required to predict how their audiences will view what they say or do or how the actors' subjective intent will be perceived. Thus, the regulations involving coordinated communications must be objective. "When a definition depends on the meaning others attribute to the speech, there is no security for free discussion because the definition 'blankets with uncertainty whatever may be said,' requiring 'the speaker to hedge and trim.'"[25]

Accordingly, the Commission should make narrow tailoring, objective standards, bright-lines, and a lack of presumption the touchstones of this rulemaking.

Definition of "Coordinated Communication"

The definition of "coordinated communication" forms the core of the Commission's proposed regulations, and, accordingly, is the first topic addressed in these comments. The details of this definition and its various multi-part or multi-faceted tests determine whether actions by any person are deemed to be expenditures as well as contributions to candidates. For

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23 *Id.* at 77 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

24 *Id.* at 41 n. 42 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

25 *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) (quoting *Buckley*, 424 U.S. at 43).

corporations, this is particularly important given that the Federal Election Campaign Act ("FECA") prohibits expenditures and contributions by corporations.[26]

I. Three-Part Test

The Commission, in its proposed regulations, puts forward a three-part test for determining what is a "coordinated communication." The first prong is unproblematic, as it follows the clear statutory directive that the expenditures must be made by a person other than a candidate, his or her authorized committee, or a political party.[27] The Chamber also agrees with the Commission's proposal that the definition of coordination must contain both a content and a conduct requirement. Without a conduct requirement, the regulations would not target coordination as it is commonly understood except, perhaps, through an impermissible presumption, and the remaining restrictions would chill almost all speech by corporations in relation to issues before Congress. Without a content requirement, the new regulations would prohibit almost all interaction between a corporation and a Member of Congress or President that involved communications with the public on the part of the corporation. Only through a measured and tailored approach can the Commission hope to have its regulations upheld against constitutional challenges. The content and conduct prongs contain the beginnings of bright-line tests that should provide necessary notice to corporations and guide their actions.

Nevertheless, despite a commendable structure, there are many problems with the three-part test put forward for comment by the Commission. These problems arise from the particulars of the content and conduct standards. Even with the limitation of the other prong (*i.e.*, conduct for the content standards, content for the conduct standard), many of the proposals are too broad in their application and tread on the First Amendment rights of corporations and individuals. The difficulties the Chamber finds with these standards are discussed below.

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[26] 2 U.S.C. § 441b.

[27] *Id.* § 441a(a)(7).

II. Content Standard

The Commission is correct to include express advocacy and the republication of campaign materials in its content standards.[28] These two types of content should constitute the entirety of coordination. They prevent the circumvention of the corporate contribution prohibition while at the same time protecting other speech rights. The Commission can rightfully regulate express advocacy as defined in *Buckley*'s footnote because only such express advocacy is constitutionally and unequivocally supporting or opposing a candidate.[29] Advocacy that does not include such express terms of election or defeat are of value in regard to a legislative or lobbying proposal and may be of negative value in regard to a candidate or his or her opponent's election or defeat.

The third prong in the content standard—the one that includes "electioneering communications"[30]—is not so narrowly tailored, and, for the reasons below, should be struck from the regulations. The Commission can strike this provision from the regulations without running afoul of the BCRA because the new law does not specifically mandate that the Commission address electioneering communications in its new coordination rules.[31]

As stated in our comments in the "electioneering communication" rulemaking, filed on August 29, 2002, the regulation of issue-oriented political speech, including that which contains a discussion of a particular candidate, is constitutionally untenable, especially when it is restricted by proximity to an election.[32] Issue advocacy mentioning the name of a clearly identified candidate is no more regulable under constitutional principals when

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28 Proposed 11 C.F.R. §§ 109.21(c)(1)-(2).

29 *Buckley*, 424 U.S. at 44 & 44 n.52.

30 Proposed 11 C.F.R. § 109.21(c)(3).

31 *See* BCRA § 214. The Chamber, however, does recognize that Congress unconstitutionally legislated in the BCRA that coordinated electioneering communications are contributions. *See id.* § 202.

32 *See, e.g., Mills v. Alabama*, 384 U.S. 214 (1966) & *Buckley* (cited in Comments of Chamber of Commerce of the United States in the electioneering communications rulemaking).

it is coordinated with a candidate, his or her authorized committee, a political party, or the agents of any of the foregoing.

In addition to rejecting the electioneering prong of the proposed content standard, the Commission should also reject the three explicitly proposed alternatives. All three severely and impermissibly restrict the speech of corporations and others without any additional benefit to what is already contained in the content standard. If Congress had wanted to cover additional and broader types of content, it would have included such content in the BCRA.

Alternatives A and B are particularly broad in regulating public communications that either (1) clearly identify a federal candidate and nothing more or (2) promote or support or attack or oppose a clearly identified candidate, respectively.[33] Obviously, such proposals are more vague and/or cover communications that are much broader than express advocacy. For the reasons stated in the constitutional cases on such advocacy, the communications covered by these proposals are off limits to regulation by the FEC.[34]

From a practical standpoint, such content requirements trample broadly on the right to petition Congress to redress grievances.[35] In short, broad standards such as these alternatives severely handicap the ability of corporations to lobby Congress by eliminating the use of certain Members' names or the use of language and rhetoric needed to build coalitions for legislation. Often, corporations and other persons join forces with Members of Congress (and even the President) in order to promote or defeat legislative measures. These

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[33] 67 Fed. Reg. 60,065.

[34] *See Buckley*, 424 U.S. at 42-44 & 44 n.52. *See also FEC v. Mass. Citizens for Life*, 479 U.S. 238, 249 (1986); *Chamber of Commerce v. Moore*, 288 F.3d 187, 195 (5th Cir. 2002); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001).

[35] U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). *See also NAACP v. Patterson*, 357 U.S. 449, 461 (1958) ("Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay the Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech.") (citing *United States v. Rumely*, 345 U.S. 41, 46 (1953) and *Harriss*, 347 U.S. at 625).

joint efforts make use of various communication methods—*e.g.*, TV, billboards, blast faxes, etc.—directed to the public or to other Members of Congress, in the hopes that the targeted Member will change or retain their position on the given topic. Members of Congress, as incumbents, are usually "candidates" under the Act during these legislative battles and lobbying campaigns.[36]

Corporations and other persons collaborating in lobbying efforts have the right to associate with Members of Congress and, together, to address Congress and the public about issues upon which votes or other action are to be taken. The Commission cannot abridge this Freedom of Association through its coordination regulations. As the *Buckley* Court recognized over 25 years ago, "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions."[37]

It would be more useful, although still constitutionally unsound, to limit communications considered to be coordinated with a candidate to those communications in which that particular candidate or his or her opponent is clearly identified in the communication or is the one promoted, supported, attacked, or opposed.[38] As Alternative A and B stand in the NPRM, if a Member of Congress from Florida was materially involved in organizing a lobbying campaign in 2004, including the creation of content in a lobbying communication, and the communication mentions a Member from Alaska who is also up for reelection, and attacked, supported, etc. that Alaska Member for his or her views on the particular piece of legislation and the lobbying effort was effectuated by a corporation, the corporation would be impermissibly making a contribution to the campaign of the Member from Florida. Broadly prohibiting communications that do not even come close to coordinating with a campaign is not only unconstitutional but beyond the pale.

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[36] *See* 11 C.F.R. § 100.8 (2002) (definition of "candidate").

[37] 424 U.S. at 42.

[38] Of course, this would still be constitutionally suspect given that a Member of Congress has the right to address the public in support of or in opposition to an issue of public concern without that communication being deemed coordinated (if the other prongs in these proposed regulations are fulfilled). A corporation also has the right to communicate on any topic and in any way except by express advocacy.

The Commission should omit Alternatives A and B from its regulations for the reasons above. In addition, Alternative B is too vague. The phrase "promotes or supports or attacks or opposes" is not defined in 11 C.F.R. 100.24(b)(3) except that it does not matter whether it is express advocacy or not.[39] As the Commission alluded to in its electioneering communications explanation and justification, this term can include almost anything.[40] For the same reason, this term is also insufficiently narrowly tailored to be part of the coordinated communications regulations.

Alternative C, although more complex, suffers from the same infirmities as the above two alternatives.[41] In some ways, it is more offensive to First Amendment principals than the other two alternatives. First, Alternative C contains a provision concerning "express statements about the record or position or views on an issue, or the character, or the qualifications or fitness for office, or party affiliation" of a candidate.[42] Not only is this vague (*e.g.*, what does "character" or "issue" mean), but this phrase seems to apply in the broadest sense to almost any substantive statement about a clearly identified candidate, including an incumbent Member of Congress.

In addition, cabining the restriction to 120 days before an election and to communications directed at voters in a relevant jurisdiction does absolutely nothing to cure Alternative C's constitutional infirmities.[43] As the Chamber has discussed above, joint lobbying efforts, coordinated with Members and directed at other Members often use communications in home states and districts mentioning the Member by name in order to inspire grassroots pressure on the Member and cause the Member to support a legislative or policy proposal. Indeed, as is problematic with "electioneering

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39 *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49, 064, 49,111 (July 29, 2002).

40 *See, e.g., Final Rules and Explanation and Justification for Electioneering Communications*, Agenda Document No. 02-73 (Oct. 8, 2002) as amended Oct. 10, 2002) at 52-55. (This document has yet to be published in the Federal Register.)

41 67 Fed. Reg. 60,065.

42 *Id.*

43 The Commission appears to have arbitrarily used a 120-day delimitation. A 120-day limit only appears in the BCRA in relation to "federal election activity" by political parties. *See* BCRA § 101(b) (to be codified at 2 U.S.C. § 431(20)).

communications" as defined by Congress[44] and the Commission,[45] these legislative battles occur within 60 days of an election, much less 120 days.[46] If the Commission uses Alternative C, 240 out of 365 days in a year would possibly be covered when a primary and general election occur, not even taking into account a runoff.[47]

III. Conduct Standard

The conduct prong contained in the Commission's proposed regulations is equally as important as the content prong discussed above, else the regulations are just broad impermissible content restrictions on core political speech without any attempt to anchor the restrictions to the factor that makes their regulation possibly permissible—the coordination itself. "The absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[48] In fashioning these conduct standards, the Commission must ensure that the conduct rises to the level of actual coordination and does not produce an abundance of false positives, or implicate common informational overlaps because of shared (but not coordinated) advertising, policy, or political concerns; accidental interactions; happenstance; and normal lobbying interactions. Importantly, coordination cannot be presumed. In addition, the Commission must insist on narrowly-tailored bright-line rules that will give necessary guidance to all actors in the legislative and political arenas. Because of the fundamental rights at stake in this rulemaking, the risk of criminal penalties, and the expense of defending

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[44] BCRA § 201(a) (to be codified at 2 U.S.C. § 434(f)(3)).

[45] Proposed 11 C.F.R. § 100.29, found in *Final Rules and Explanation and Justification for Electioneering Communications* cited *supra* at note 38.

[46] *See, e.g.*, Jim VandeHei, *The Week Ahead*, Wash. Post, Sept. 23, 2002 at A17.

[47] The Commission also asks for comment on deleting the third factor of Alternative C. Such a deletion would effectively ban joint legislative and lobbying efforts by corporations and Members in an election year, which constitutes approximately half of the duration of each Congress.

[48] *Buckley*, 424 U.S. at 47 (cited in *Colorado I*, 518 U.S. at 615).

against complaints filed with the FEC, the Commission cannot leave the conduct standards vague.

A. At the Request or Suggestion Of A Covered Person

The Chamber finds the first conduct standard—where a communication is "created, produced, or distributed at the request or suggestion of a candidate" or other covered person[49] to be consistent with longstanding regulations.[50] Nevertheless, the "assent" option of this standard found in proposed 11 C.F.R. § 109.21(d)(1)(ii) is new and problematic and should be eliminated.

The "assent" option is problematic not only because it is not mentioned in the BCRA,[51] but also because the term "assent" is both vague and overinclusive, thereby giving no guidance to the regulated community and chilling protected speech and association. Assent must be defined to mean directly answering in the affirmative when directly asked.[52] In short, express assent must be required. Otherwise, a vague or implied assent standard will chill all interaction between Members or the President and corporations that engage in public lobbying because the parties would never be clear that they have not inadvertently sent or received messages or signals that could be interpreted as "assent." What if the Congressman's eyes light up at the mention of a certain communication on a certain policy issue that mentions a Member's name, but the Congressman says no? Is this assent? It is important to note that, according to at least one dictionary, even silence can imply consent and, therefore, assent.[53]

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[49] Proposed 11 C.F.R. § 109.21(d)(1)(i).

[50] The Chamber also urges the Commission to make exceptions to this conduct standard so that coordination would not attach to public speeches by candidates or to the distribution of FEC guidelines on independent expenditures. *See* 11 C.F.R. § 109.1(b)(4)(ii) (2000).

[51] *See* BCRA § 214(c).

[52] The definition should also cover any prior agreement between the parties that a certain response be taken as an affirmative answer.

[53] *Merriam-Webster's Collegiate Dictionary* 582 (10th ed. 2000) (definition of "imply").

Related to requests or suggestions by candidates and other covered persons, the Commission also asks for comment on whether the unique nature of a request or suggestion indicates that such conduct should be handled differently than the three-prong analysis delineated in the proposed regulations.[54] For the reasons stated in the discussion of the content standard above, the Chamber answers in the negative. Even with a request or suggestion, a communication by a corporation must violate a content standard in order to be regulated. Anything less would turn the First Amendment rights of free speech, association, and redress on their heads. Under such a scenario as is begged by this part of the NPRM, a corporation would be prohibited from making a communication about a contentious legislative issue that did not even mention a candidate if a candidate suggested or requested that the corporation run such a communication. This approach would use a very broad brush to get at the small set of communications of constitutional value to a candidate's election and would not be narrowly tailored. There can be no legitimate compelling government interest in stifling speech about congressional issues.

B. **Material Involvement**

The second category proposed by the Commission for conduct that equates to coordination is where the candidate or other covered person is "materially involved in the decisions regarding" a variety of activities.[55] This standard should be eliminated by the Commission from its final rules for three reasons. First, this "material involvement" standard is not mentioned in or mandated by the BCRA.[56] Second, the phrases "materially involved" and "decisions" are vague, giving no guidance. In *Christian Coalition*, the District Court did not include such a standard, but rather it focused on coordinated communications "where the candidate or her agents can exercise control over" them.[57] Finally, any concerns about material involvement are more appropriately addressed in the "substantial discussion" category in proposed

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54 67 Fed. Reg. 60,050.

55 Proposed 11 C.F.R. § 109.21(d)(2).

56 *See* BCRA § 214.

57 52 F. Supp. 2d at 92 (emphasis added). *See also* current 11 C.F.R. § 100.23(c)(2)(ii).

section 109.21(d)(3) or the other, more explicit measures of conduct contained in the proposed regulations.

C. Substantial Discussions

In section 109.21(d)(3) of the proposed regulations, as mentioned above, the Commission addresses communications made "after one or more substantial discussions" between the candidate and person paying for the communication. As an initial matter, it is important to note that "a standard that requires 'substantial' anything leaves room for factual dispute."[58] Without the additional requirement of the District Court in *Christian Coalition* that "the candidate and spender emerge as partners or joint venturers" in the communication,[59] there is more improper leeway for the FEC, even without arbitrariness or capriciousness, to deem a corporation's pre-expenditure discussion with a candidate, Member, or other covered person to be "substantial." The Commission must limit the amount of speech and association that is chilled by these regulations by requiring the equivalent of a joint venture. While all such standards remain arguably vague, the greater the allowance for normal interaction, the lesser the risk of unconstitutional regulation and infringement of speech and association rights.

In any event, if, contrary to the Constitution, the content standard is not limited to express advocacy and republication of campaign materials, then the Commission should limit this "substantial discussion" conduct criterion to information about the specific communication and the election plans, projects, activities, or needs of the candidate or party committee. The *Christian Coalition* specific criteria should also be included so that substantial discussion about the content, timing, etc. of the communication be again part of the regulation.[60] These criteria are contained in proposed 11 C.F.R. §§ 109.21(d)(2)(i)-(v), which should be included in paragraph 109.21(d)(3). The conduct standard should also specifically exclude discussions about policy and legislation. Without such limits, the normal give and take between corporations and Members about policy concerns that are followed by

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58 *Christian Coalition*, 52 F. Supp. 2d at 92.

59 *Id.* at 92.

60 *Id. See also* current 11 C.F.R. §§ 100.23(c)(2)(ii)-(iii).

corporate communications on the same policy issues would be chilled by the vague phrasing employed by the Commission.

D. Common Vendor

The Commission's proposal about the employment of a common vendor raises many concerns—both for corporations and for the vendors themselves.[61] In the interest of space, the Chamber focuses below solely on the impact on corporations.

First, the rule proposes a presumption. To presume that the presence of an individual or a firm creates "coordination" is unconstitutional.[62] The mere fact of commonality in vendors cannot be per se coordination.

Moreover, the proposed common vendor standard applies to the vendor as a whole when "any employee of the commercial vendor" has provided certain services to the candidate or party in the past.[63] As a result, the unconstitutional presumption attached to one employee disqualifies the entire firm and all other employees. This approach is unworkable given that no part of the proposed standard incorporates an ethical screen. If law firms are able to cordon off attorneys from clients and other business so that conflicts are mitigated,[64] why does the Commission not include a provision for such ethical screens in its proposal?[65]

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61 Proposed 11 C.F.R. § 109.21(d)(4). The Commission can rest assured that the proposed regulations have fulfilled the mandate of BCRA § 214(c). Congress only stated that the Commission must "address" the use of common vendors. The Commission has gone beyond this mandate and incorporated a common vendor regulation in its proposed regulations.

62 *See Colorado I*, 578 U.S. at 621-22.

63 Proposed 11 C.F.R. § 109.21(d)(4)(ii).

64 *See, e.g.*, D.C. Rules of Professional Conduct 1.11(c) (allowing a former government attorney to be screened so as to prevent conflict imputation to the whole firm in which he or she is associated).

65 Even with ethical screens, the problem of the presumption of coordination by a former vendor or employee remains.

In addition, the definition of election cycle is extremely problematic. The Commission refers to the definition of "election cycle" contained in 11 C.F.R. § 100.3(b), which is a two-year election cycle.[66] Two years is an eternity in the lobbying and political field. A candidate in that time period could have hired and fired multiple vendors as well as created and disposed of many campaign strategies. In addition, since the election cycle under this definition begins the day after the previous general election, any vendor held over to the day after the election would be essentially off limits—with the broad conduct provisions of this section currently envisioned—to a corporation for the next two years. If this proposed "common vendor" regulation is retained, it should pertain only to vendors who were common during the election year.[67]

As alluded to above, one of the conduct prongs of the common vendor category is overly broad and vague. Proposed subparagraph 109.21(d)(4)(iii)(B) refers to "material information used previously by a common vendor in providing services to the candidate." This previously used material is not time limited and, therefore, could refer to previous elections many years ago. In addition, "material information" or important information could refer to anything. Vendors these days are highly specialized and use proprietary information about states, voting populations, policy issues, etc. for all of their clients. Such a broad conduct requirement as just described would make it extremely difficult for a corporation ever to utilize a vendor used by any Member or political party when making any type of policy communication. In effect, the Commission is again proposing a presumption of coordination. On the other hand, the Commission could more narrowly get at the activity it seeks to stamp out—the strategic use and sharing of campaign information between candidates and corporations—by limiting its conduct standards to those contained in proposed subparagraph

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[66] 67 Fed. Reg. 60,051.

[67] Specifically, the Chamber proposes that the Commission adopt a modified version of the election cycle contained in the BCRA. BCRA § 304(c) (to be codified at 2 U.S.C. § 431(25)). Under this definition, the primary election has its own election cycle, separate from the election cycle for the general election. The Chamber proposes to modify this definition for coordination regulation purposes to include in the primary election cycle only the time from the beginning of the election year up to and including the primary election day.

109.21(d)(4)(iii)(A), which concerns the "plans, projects, activities, or needs of the candidate."[68]

Finally, in proposed section 109.21(d)(4)(ii), the Commission lists the types of services the vendor must have provided to the candidate in order to be covered by the common vendor conduct standard. All of the proposed services are extremely broad and do not narrowly tailor this restriction to those persons who have and convey information about the candidate's election plans, projects, activities, or needs. The category in proposed section 109.21(d)(4)(ii)(I) is particularly overbroad in that it involves "[c]onsulting or otherwise providing political or media advice." Including this broad category in the list of activities covered by the common vendor conduct standard will severely handicap the resources available to organizations that communicate with the public about issues of legislative import, and such a regulation undeniably infringes on the rights to free speech and association by expanding an impermissible presumption of coordination. This "consulting" category, when added to the other restrictions and proposals discussed above, places off limits to corporations engaging in or contemplating public communications almost anyone retained in any way by a Member, political party, or candidate. This would be arbitrary, capricious, not required by the statute, and patently unconstitutional.

E. Former Employee/Independent Contractor

The Commission also proposes a multi-faceted analysis to determine whether the actions of a former employee or independent contractor (or employer thereof) of a candidate rises to the level of coordinated conduct.[69] This proposed section, in the view of the Chamber, contains problematic presumptions and other provisions that infringe on rights of free speech and association as well as on the employment rights of corporations.

To begin, the Commission proposes to use the "election cycle," defined in current 11 C.F.R. § 100.3, as the measure of who is a covered former

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[68] The Commission should also limit this standard to the election plans, projects, activities, or needs. *See* page 15, *supra*.

[69] Proposed 11 C.F.R. § 109.23(d)(5).

employee or independent contractor.[70] As was the case above with common vendors, the Chamber believes that such a wide two-year time frame is inappropriate and overly injurious both to corporations trying to communicate about legislative topics and to those former employees of candidates seeking employment with such corporations. As argued above, the Commission would be better served by using the modified definition of "election cycle" contained in the BCRA as discussed in the previous section.[71] Such a definition would more narrowly tailor this prohibition and increase the likelihood that the covered individuals possess the information about the campaigns to which the Commission's rules seem to be directed.

Further and again similar to the proposed common vendor regulations discussed above, the Commission misses the mark in its second prong describing the material information of which the former employee or independent contractor makes use. In proposed 11 C.F.R. § 109.21(d)(5)(ii)(B), the Commission in effect criminalizes the conduct of the former employee or independent contractor when he or she makes use of or conveys to the person paying for the communication the following:

> Material information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent, or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing.

This section is problematic because its wording is vague and because it follows a more focused conduct standard in proposed 11 C.F.R. § 109.21(d)(5)(ii)(A), which targets the more specific "[m]aterial information about the plans, projects, activities, or needs of the candidate" or other covered person. Proposed Subparagraph 109.21(d)(5)(ii)(B), therefore, begs the question as to what "material information used . . . in providing services to the candidate" refers. Is it information that was used in providing services

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70 Proposed 11 C.F.R. § 109.23(d)(5)(i).

71 *See* page 17 and note 67, *supra*.

to the candidate and is material to the communication? Or is it information that was material to the former employee providing services to the candidate and now is involved in the communication, material or not? In either case, what would prevent this provision from encompassing the following scenario: a staffer to a candidate learns that farmers in Missouri are upset about the low price of corn and uses this information to provide services to her boss, the candidate. She then leaves the employ of the candidate and uses this information in a communication about a pending agriculture appropriations bill for her new employer, a corporation? Either way, if information important to the performance of the staffer's job for the candidate or information important to the corporation's communication are criminalized, then the provision is overly broad. The end result is that coordination is presumed by this provision; therefore, the Commission must remove it.

As is recognized by the Commission in proposed subparagraph 109.21(d)(5)(ii)(A) and in its narrative, the material information on which this conduct standard should be focused is the strategy of the candidate's campaign, including his or her "plans, projects, activities, or needs."[72] If not so limited, the term "material information," or important information, is so broad as to freeze the employees into their campaign jobs and put them off limits to corporations who may be contemplating making communications about legislative issues that include the former employer/candidate's identity. In addition, if the term "material information" is not limited to campaign strategy and tactics and, instead, encompasses policy views, then the provision will chill associational and speech rights—especially when incumbent Members of Congress are involved.[73]

In a subsequent section of its NPRM, the FEC asks for comment on whether a requirement of continuing direction or control by the former employer/candidate should be added to this former employee conduct

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[72] Proposed 11 C.F.R. § 109.23(d)(5)(ii)(A); 67 Fed. Reg. 60,051 ("The Commission interprets the Congressional intent behind section 214(c)(3) of BCRA to encompass situations in which former employees, who by virtue of their former employment have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee, may subsequently use that information or convey it to a person paying for the communication.").

[73] *See* page 15 and note 68, *supra*.

standard.[74] Indeed, such a control requirement is necessary. Without such a control requirement, how would the former employer/candidate know that the former employee is divulging material campaign strategy (or a broader set of information if the proposed regulations remain unchanged) to his or her new employer?[75] Without such a control requirement, how can the new employer be found guilty of coordinating its communication with the candidate if the former employee is no longer employed by the candidate and does not otherwise fall under any other conduct standards? The answer is: only by presumption. If the Commission wishes to target agreements between employing candidates and corporations about having key employees strategically join the communicating corporation's payroll in order to facilitate the making of corporate communications, the Commission should draft regulations that narrowly pinpoint such concerns. It should not criminalize the mere information "windfall" that the corporation receives by hiring experienced political and legislative staff members.[76] The Commission should not eliminate the employment market and suppress core First Amendment rights in the legislative/political arena by instituting this proposed conduct standard as written.[77]

The Commission further requests comment as to whether this former employee conduct standard should be extended to volunteers, such as "fundraising partners," who, by virtue of their relationship with the candidate may have acquired material information about the plans, projects, activities, or needs of the candidate or party committee.[78] The Chamber's position is

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[74] 67 Fed. Reg. 60,052.

[75] This situation is already taken into account by the Commission's proposed regulations, *see* 67 Fed. Reg. 60,048, and the Commission should similarly discount any coordination on the part of the corporation in a scenario described in the following sentence by eliminating this presumption.

[76] The Commission characterizes this information as a "windfall" in one of the scenarios in the narrative of its NPRM. *See* 67 Fed. Reg. 60,052.

[77] The Commission, in its NPRM, assumes that "former employee" must be different from "agent" as used in the BCRA and that if a former employee is under the control of the candidate after leaving his or her employment, then the former employee is the candidate's present agent. 67 Fed. Reg. 60,052. The Chamber does not believe that the Commission is correct in this assumption. Congress did not define "former employee," but only mandated that former employees be addressed in the regulations. BCRA § 214.

[78] 67 Fed. Reg. 60,052.

that this conduct standard should not be so extended. Not only does the BCRA not refer to volunteers,[79] but such an extension would chill the political participation of many employees of corporations that make public communications on issues of legislative importance. The American political system is based upon massive volunteer efforts. Without volunteers, the width and breadth of this nation could not be adequately covered by candidates and their ideas and the vigorous two-party system would not be maintained. Stigmatizing volunteers with such a material information imputation as is contained in this former employee conduct standard would act as a deterrent for anyone employed by a corporation (or labor union for that matter) from volunteering for a campaign. Such an extension would add to the volunteer's cost of participating in campaigns and, given the increased cost, reduce the supply of volunteers.

F. Exceptions to the Content and Conduct Standards

The Chamber argues above that the content standard should be limited to express advocacy and the republication of campaign materials. Because such a standard would already be narrowly tailored, there would be no need for exceptions to the content standard.

To the extent that the Commission inappropriately includes electioneering communications in its content standard, the Chamber believes, for the reasons contained in its comments in the electioneering communications rulemaking, that the plain language of the BCRA provides the Commission with little to no room to craft exceptions.[80]

As for the conduct standards, the focus of these regulations, as stated above, should be on the candidate's campaign strategies and tactics. As a result, there should be an exception to the conduct standards for a candidate's response to an inquiry about his or her position on legislative or policy issues.

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79 BCRA § 214(c)(3); *see also* 67 Fed. Reg. 60,051.

80 *Final Rules and Explanation and Justification for Electioneering Communications* 40, cited *supra* at note 38, ("[T]he Commission acknowledges that the statue limits its exemption authority by providing that the Commission may not exempt communications that promote, support, attack or oppose a candidate. The Commission's exemption authority is also limited by BCRA's use of 'bright-line' distinctions between electioneering communications and other communications.").

Such an "exception" appears to be constitutionally required.[81] This exception should not be limited to some sort of formal written inquiry or public comments, but rather should except all discussions of legislative issues—formal and informal—and include public speeches. Individuals have a right to know where their elected officials and candidates for elective office stand on policy matters, and the individual's status as an employee of a corporation does not vitiate this right to information. The employee acting to ascertain the candidate's position on policy questions should not be held against them or their corporate employer if the corporate employer subsequently makes communications on those issues.

Definition of Agency

The definition of "agent" is extremely important in the Commission's proposed regulations because certain interaction by a corporation with an agent of a candidate, committee, or political party can cause a corporation's communications to be deemed to be coordinated. As a result, the Commission addresses this definition below.

First, there can be no per se definition of agent, as is contemplated by the Commission in the narrative of the NPRM with respect to persons authorized to receive funds for a campaign and holding a title in the campaign.[82] With such a per se definition, the campaign and corporation would incur liability based on the conduct of an individual not authorized by the candidate or party to engage in such activity.[83] In addition, this per se definition would essentially create apparent authority, which the Commission is trying to avoid.[84] The agency would attach from the title and fundraising authorization, but the penalty would arise from the conduct relating to communications.

In a related manner, the candidate and corporation cannot be held liable for the actions of renegade employees of the campaign or party. "A master is

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81 *See Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997).

82 67 Fed. Reg. 60,043.

83 A principal can only be held liable for the actions of his agent when the agent acts within his or her authority. *Restatement (Second) of Agency* §§ 144, 186, 219(1) (1957).

84 *See* 67 Fed. Reg. 49,082.

subject to liability for the torts of his servants committed while acting in the scope of their employment."[85] The Commission should prescribe that a person can only be an agent if he or she is "acting within the scope of his or her authority as an agent."[86]

For the reasons specified by the Commission in its soft money Explanation and Justifications (and comments cited therein), the Chamber urges the Commission to retain the requirement that the agent's actions must be undertaken "on behalf of the principal"[87] in order for liability to attach to the principal.[88]

Finally, the agent must be required to have conveyed information that was only available to that person because of his or her role as an agent for the candidate or party. Without such a limitation, the proposed regulations would criminalize general conversations with campaign staffers about public information. No coordination can be imputed by such discussions except by presumption, which, as the Chamber has already discussed, is inappropriate.

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85 *Restatement (Second) of Agency* § 219(1).

86 *See* 67 Fed. Reg. 60,043. For an example of the common law approach, see *Tenn. Farmers Mut. Ins. Co. v. Amer. Mut. Liab. Ins. Co.*, 840 S.W.2d 933 (Tenn. App. 1992).

87 Proposed 11 C.F.R. § 109.3.

88 *See* 67 Fed. Reg. 49,081-49,083.

CONCLUSION

In its regulations on coordinated and independent expenditures, the Commission should focus on ensuring that there is no presumption of coordination and on providing objective, narrowly-tailored, bright-line rules to the regulated community. Incorporating the above suggestions will improve the regulations in this regard, although it will not cure all the constitutional infirmities contained in the proposed regulations.

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