LAW OFFICES
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY
1250 EYE STREET, N.W., SUITE 1000
WASHINGTON, DC 20005
(202) 682-0240
FACSIMILE (202) 682-0249

MARVIN J. SONOSKY (1909-1997)
HARRY R. SACHSE
REID PEYTON CHAMBERS
WILLIAM R. PERRY
LLOYD BENTON MILLER (AK)
DOUGLAS B.L. ENDRESON
DONALD J. SIMON
MYRA M. MUNSON (AK)*
ANNE D. NOTO
KAY E. MAASSEN GOUWENS (AK)*
MARY J. PAVEL
DAVID C. MIELKE
JAMES E. GLAZE
GARY F. BROWNELL (NM)*
COLIN C. HAMPSON

NACOLE D. HESLEP (AK)*
JAMES T. MEGGESTO
HILARY C. TOMPKINS (NM)*
ANGELINA OKUDA-JACOBS
MARISSA K. FLANNERY (AK)*
MELANIE B. OSBORNE (AK)*
MICHALYN STEELE

OF COUNSEL
ARTHUR LAZARUS, JR., P.C.
ROGER W. DUBROCK (AK)*
MATTHEW S. JAFFE
JOHN P. LOWNDES (AK)

*NOT ADMITTED IN D.C.

October 11, 2002

By Electronic Mail

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

Re: Comments on Notice 2002-16: Coordinated and Independent Expenditures

Dear Mr. Vergelli:

I am writing on behalf of Common Cause and Democracy 21 to provide comments in response to the Commission's Notice of Proposed Rulemaking, published at 67 Fed. Reg. 60042 (September 24, 2002), to implement the provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), relating to coordinated and independent expenditures, Sections 213 and 214.

Both Common Cause and Democracy 21 supported the enactment of the BCRA. We appreciate the opportunity to comment on these proposed regulations. I request the opportunity to testify at the Commission's hearing on these regulations. For scheduling reasons, I would appreciate my testimony be set for October 24, 2002.

Background

The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), distinguished between limitations on "contributions" to a candidate's campaign, which are generally constitutional, and limitations on "expenditures" by a campaign, which generally are not. *Buckley* also recognized that, to be effective, any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47.

Buckley emphasized the difference between expenditures "made *totally independently* of the candidate and his campaign," *id.* at 47 (emphasis added), and "coordinated expenditures," construing the FECA contribution limits to include not only contributions made directly to a candidate, political party, or campaign committee, but also "all expenditures placed *in cooperation with or with the consent of* a candidate, his agents or an authorized committee of the candidate ...." *Id.* at 46-47 n. 53 (emphasis added); *see also id.* at 78.

This distinction was drawn because it goes to the heart of the Court's corruption rationale that supports the constitutionality of contribution limits. In the Court's view, "The absence of prearrangement and coordination of an expenditure with the candidate or his agent 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." *Id.* It is only the "absence of prearrangement" or the fact that expenditures are made "totally independently" of a candidate that diminishes the potential for corruption and takes such expenditures outside the ambit of permissible limitation.

The 1976 amendments to the FECA codified *Buckley*'s treatment of coordinated expenditures. Under 2 U.S.C. § 441a(a)(7)(B)(i), an expenditure made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." Conversely, the FECA defined an "independent expenditure" as

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation* with any candidate, or any authorized committee or agent of such candidate, *and which is not made in concert with, or at the request or suggestion of*, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17) (emphasis added).[1]

Under the interpretive rules promulgated by the FEC in 1980, an expenditure was not considered "independent" if made pursuant to

> ...any arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication. An expenditure will be presumed to be so made when it is –

[1] The FECA definition of "independent expenditure" is limited to expenditures for "express advocacy," although at least several courts have held that this limitation is not required by *Buckley*. *See, e.g., FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 87 n. 50 (D.D.C. 1999).

> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or
>
> (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agents.
>
> 11 C.F.R. 109.1(b) (1980).

Subsequent to *Buckley,* the "coordination" standard used by the Commission developed through litigation on two separate tracks: one related to "expressive" communications, and the other related to party communications. The BCRA addresses both developments.

A. "Expressive" expenditures. In *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), the FEC took the position that "any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election 'coordinated,' i.e., contributions." *Id.* at 89. The district court found the FEC's treatment of such expenditures to be constitutionally overbroad because "the spender 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." *Id.* at 91.

Instead, the district court formulated its own, "narrowly tailored" definition of coordination, providing that coordination could be found where 1) an expenditure was "requested or suggested" by a candidate, or 2) where there had been "substantial discussion or negotiation between the campaign and the spender over" a communication's contents, timing, audience or the like, "such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure..." *Id.* at 92.

The court's analysis in the *Christian Coalition* case – the decision of a single federal judge – has serious flaws. The court formulated such a narrow definition of coordination that it failed to encompass even the extensive discussions about strategic matters between campaign officials and Coalition leaders that took place in that case. Further, the court's standard would allow virtually unfettered communications between candidates and outside groups, so long as one side simply provides information to the other without eliciting a response. Yet that information could plainly be sufficient for an outside spender to craft an ad that would be of great value to the candidate.

Aware that its decision would be controversial, the court invited the FEC to appeal, *id.* at 98 (finding that there are questions of law "as to which there is substantial ground for difference

of opinion and...an immediate appeal...may materially advance the ultimate termination of the litigation"), and the Commission's counsel recommended it do so. Yet a majority of the Commission refused to appeal, leaving in place the district court decision. As Commissioners Thomas and McDonald pointed out in dissenting from this decision, "Not only is the district court's narrow and restriction standard of coordination found nowhere in the [FECA] and Commission's regulations, but also it runs directly contrary to *Buckley* where the Supreme Court considered independent expenditures as those made 'totally independent of the candidate and his campaign.'"[2]

Not only did the Commission fail to appeal the district court's controversial decision, it embraced it by repealing its longstanding coordination regulations and codifying the court's standard into new rules. *See* 65 Fed. Reg. 76138 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23.

The new rules, however, were even more restrictive than the district court's opinion. Although the court nowhere held that an actual "agreement or collaboration" was necessary to find coordination, the new regulations set forth this standard, permitting a finding of coordination where there have been "substantial discussions or negotiations between the spender and the candidate...the result of which is collaboration or agreement." 11 C.F.R. 100.23(c)(2)(iii). The new rule, like the *Christian Coalition* decision, was itself controversial; Commissioners Thomas and McDonald said it was "far too narrowly drafted and will make evasion of the [FECA] commonplace."[3]

Following adoption of the new FEC coordination rule, and in direct response to the widespread criticisms, Section 214 was included in the BCRA, which repeals the 2000 rule and directs the FEC to promulgate new coordination rules that do not require "agreement or formal collaboration" before the FEC can conclude that an expenditure is coordinated. Senator Feingold explained the intent behind this provision:

> The concept of "coordination" has been part of Federal campaign finance law since Buckley v. Valeo. It is a common-sense concept

---

[2] *See* Statement for the Record of Commissioners Thomas and McDonald in *Federal Election Commission v. Christian Coalition* (Dec. 20, 1999).

[3] *See, e.g.*, Statement of Reasons of Commissioner Thomas and Chairman McDonald in *In re The Coalition, et al.*, MUR 4624 (FEC Sept. 7, 2001); *See also* Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air*, MUR 4982 (FEC Apr. 23, 2002); *see generally* Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 Cath. U. L. Rev. 133 (1999); Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 Admin. L. Rev. 575 (2000).

> recognizing that when outside groups coordinate their spending on behalf of a candidate with a candidate or a party, such spending is indistinguishable from a direct contribution to that candidate or party...An effective restriction on outside groups coordinating their campaign-related activities with federal candidates and their political parties is needed to prevent circumvention of the campaign finance laws...
>
> Absent a meaningful standard for what constitutes coordination, the soft money ban in the bill would be seriously undermined. In the place of outside special interests donating six figure checks to the national parties to be spent on Federal elections, these entities could simply work in tandem with the parties and Federal candidates to spend their own treasury funds--soft money--on federal electioneering activities. This would fly in the face of one of the main purposes of the bill to get national parties and Federal candidates out of the business of raising and spending soft money donations...
>
> This current FEC regulation fails to cover a range of de facto and informal coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill. For example, if an individual involved in key strategic decision-making for a candidate's political advertising resigned from the candidate's campaign committee, immediately thereafter joined an outside organization, and then used inside strategic information from the campaign to develop the organization's imminent soft money-funded advertising in support of the candidate, a finding of coordination might very well be appropriate. The FEC regulation, however, would find coordination neither in this circumstance nor in various other situations where most reasonable people would recognize that the outside entities' activities were coordinated with candidates. This would leave a loophole that candidates and national parties could exploit to continue controlling and spending huge sums of soft money to influence federal elections....To remedy this problem, the bill requires the FEC to reexamine the coordination issue and promulgate new coordination rules. *These rules need to make more sense in the light of real life campaign practices than do the current regulations.*

148 Cong. Rec. S2144-45 (daily ed. March 20, 2002)(emphasis added). Senator McCain elaborated on the intent of Section 214:

> It is important for the Commission's new regulations to ensure that actual "coordination" is captured by the new regulations. Informal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration. In drafting new regulations to implement the existing statutory standard for coordination – an expenditure made "in cooperation, consultation or concert, with, or at the request of suggestion of" a candidate – *we expect the FEC to cover "coordination" whenever it occurs, not simply when there has been an agreement or formal collaboration...*
>
> Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill. The FEC is required to issue a new regulation, and everyone who has an interest in the outcome of that rulemaking will be able to participate in it, and appeal the FEC's decision to the courts if they believe that is necessary.

Id. at S2145 (daily ed. March 20, 2002)(emphasis added).

B. Party expenditures. The Commission's treatment of coordination in expenditures by political parties has evolved on a separate track. In an enforcement action against the Colorado Republican Party arising out of the 1986 Senate election, the FEC took the position, based on its regulations, that all campaign expenditures made by a political party should be conclusively presumed to be coordinated with a candidate.

In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ["*Colorado I*], the Supreme Court held this prophylactic treatment to be unconstitutional because, at least under some circumstances, a party can make independent expenditures. The particular expenditure at issue in *Colorado I* – spending by a party prior to the nomination of its candidate -- was held to "fall within the scope of the Court's precedents that extend First Amendment protection to independent expenditures." *Id.* at 614.

The Court specifically noted that the pre-nomination ad run by the party was developed "independently and not pursuant to any general or particular understanding with a candidate...And we therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution." *Id.* The Court stressed that "the constitutionally significant fact...is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617.

The Court in *Colorado I* left open the issue of whether *coordinated* spending by a party could be constitutionally regulated. *Id.* at 624. It addressed this issue in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ["*Colorado II*"]. Harkening back to *Buckley*, a 5-4 majority in *Colorado II* underscored "the good sense of recognizing the distinction between independence and coordination." *Id.* at 447. The Court recognized that there is a "*functional, not a formal*" definition of contribution, which includes" expenditures made in coordination with a candidate. *Id.* at 443 (emphasis added). Of particular importance, the Court noted that independent expenditures are only those "without any candidate's approval (or wink or nod)..." *Id.* at 442.

Justice Souter explained for the majority:

> There is *no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate*, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. *Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits.*

Id. at 464 (emphasis added). The Court went on to hold that limitations on coordinated party spending are subject to "the same scrutiny we have applied to political actors, that is, scrutiny appropriate for a contribution limit . . . ." Applying that scrutiny, the Court concluded that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Id.* at 465.

The rule established by the *Colorado* litigation was that parties could make unlimited hard money expenditures for their candidates, so long as the expenditures were "truly independent," but that expenditures by parties coordinated with their candidates could, like contributions, be subject to a limit.

Section 213 was added to the BCRA to require that, after nominating a candidate, a party must choose between making independent and coordinated expenses. It may not make both. According to Senator McCain:

> This provision fully recognizes the right of the parties to make unlimited expenditures. But it helps to ensure that the expenditures will be truly independent, as required by Colorado Republicans I, by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate. We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election

> campaign. After the date of the nomination, the party is free to choose to coordinate with a candidate or to operate independently of that candidate. If it chooses the former, it is subject to the limits upheld in Colorado Republicans II. If it chooses the later, it is free to exercise its right upheld in Colorado Republicans I to engage in unlimited hard money spending independent of the candidate.
>
> 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. This will prevent one arm of the party from coordinating with a candidate while another arm of the same party purports to operate independently of such candidate. This provision is intended to ensure that a party committee which chooses to engage in unlimited spending for a candidate is in fact independent of the candidate.

148 Cong. Rec. S2144 (daily ed. March 20, 2002).

The Commission's task in this rulemaking is to enact regulations that give best effect to the congressional objectives in Sections 213 and 214: first, to ensure that effective rules on coordination are implemented to replace the post-*Christian Coalition* regulation that was deemed by Congress to be unrealistically narrow, and second, to faithfully implement Congress' direction that political party committees make either coordinated or independent expenditures once they have nominated a candidate, but not both.

Comments on Proposed Rules

In crafting its new rules, the Commission should carefully heed the statement of Senator Feingold that "these rules need to make more sense in the light of real life campaign practices than do current regulations." 148 Cong.Rec. S2145. Congress was so displeased by the Commission's post-*Christian Coalition* regulations -- precisely because they failed to respect this principle -- that it took the extraordinary step of legislatively repealing those rules and instructing the Commission to try again.

As Justice Souter suggested in *Colorado II,* the Commission should take a "functional, not a formal' approach to this issue. The Supreme Court itself has always done so. In *Buckley,* it held that only expenditures that are "totally independent" of a candidate or party do not raise the threat of corruption. 424 U.S. at 47. In *Colorado I,* it held that spending was independent only where it was "not pursuant to any general or particular understanding" with a candidate. 518 U.S. at 614. And in *Colorado II,* the Court said that independent expenditures are only those "without any candidate's approval (or wink or nod)." 533 U.S. at 442.

In light of this guidance from both Congress and the Supreme Court, the Commission's regulations should embody the practical, functional realities of how coordination with a campaign actually occurs – not through a formalized, authorized agreement, but through a "wink or nod," or pursuant to a "general understanding." If the Commission does not take account of real world practicalities, it will repeat the same mistake it made in the post-*Christian Coalition* rulemaking: writing rules based on a formalism about collaboration that simply will fail to capture the realities of politics, and in so failing, will turn a blind eye to massive evasion of the law.

In this light, we offer the following comments on the proposed regulations:

We agree with the proposed regulations in **Parts 100, 102, 104** and **105**. In particular, we agree that the term "consultation" should remain as part of the definition of "independent expenditure" in proposed Section 100.16(a). There is no evidence to suggest that Congress intended to weaken this definition, or make it less inclusive. As the commentary to the proposed regulations points out, the BCRA includes the "consultation" standard in closely related provisions, *e.g.* 2 U.S.C. 441a(a)(7)(B)(ii). Conversely, but for similar reasons, the proposed rule correctly includes the term "agents" in the scope of coordination with political parties in section 100.16(a).

Part 109.

Subpart A

Section 109.1 – We have no comment on this section.

Section 109.3 – The proposed regulation defines "agent" for purposes of the coordination regulation to encompass only those who have "actual authority" – either express or implied -- to engage in certain specified activities on behalf of a principal.[4] The regulation accordingly excludes those who have "apparent" authority. This approach – to narrowly construe the term "agent" – is consistent with the definition which the Commission adopted for its Title I rules, a position with which we disagreed in those rules.

In taking this position, the proposed rules inappropriately narrow the Commission's current and longstanding approach. Current section 109.1(b)(5) defines "agent" for purposes of the rules on independent expenditures to mean both those with actual authority or "any person

[4] The commentary in one important sense mis-states the rule. After noting that the proposed regulation focuses on whether a purported agent "has 'actual authority, either express or implied,'" 67 Fed.Reg. at 60043, the commentary then states that a person "would be an agent when…expressly authorized by a specific principal to engage in specific activities…." *Id.* This description ignores the proposed rule, however, which permits *implied* as well as express actual authority.

who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures."

Thus, the Commission's longstanding approach has been to define "agent" for these purposes to encompass those who have either "actual" or "apparent" authority to act on behalf of a candidate or party. This makes good sense. A person who works for a campaign and appears to speak for the campaign – indeed, appears to have the authority to spend money for the campaign – could certainly provide information to an outside spender that would be a credible basis for coordinated expenditures. The Commission has presented no rationale for abandoning this approach.

But even this existing rule is not broad enough. A finding of coordination should be predicated on the fact of coordination, however it occurs. It should not depend on whether a campaign worker is actually authorized to transmit information, but on whether information is actually transmitted, whether authorized or not. Information can be transmitted by those who are not authorized to do so, yet the information can nonetheless serve as an effective basis for *de facto* coordination.

For instance, a lower level campaign worker might be present in important campaign strategy sessions, and might acquire valuable inside information about the plans, strategies and needs of the campaign. That worker might not be authorized to make any decision, or to transmit any information. Yet that worker could in fact transmit the information to an outside spender, and for all practical purposes that spending would then be coordinated with the campaign. Yet, under the proposed rules, that worker would not be considered an "agent" of the campaign and no legal coordination would result. In this sense, it is important to recognize that even those who possess no actual authority to act as an "agent" of a campaign might nonetheless serve to transfer information for or on behalf of a campaign.

This hypothetical illustrates why the Commission's approach in sections 109.3(a)(4) and (b)(4) is too narrow. Both those sections deem an "agent" to be only a campaign or party worker who has actual authority "to be materially involved in decisions regarding" the content, audience, media or timing of a campaign ad. Yet someone who was involved in such decisions, even if not in a "material" way, or someone who participated in such *discussions* – whether or not they were involved in the actual "decisions" – could nonetheless transfer information about the campaigns plans and needs that would result – and should be treated by the regulations as resulting – in a coordinated expenditure.

The proposed rule does provide that a person who is actually authorized "to provide material or information" to assist another person in creating an ad would be considered an "agent" for purposes of coordination. Section 109.3(b)(5). But someone who sits in on campaign strategy meetings and then provides information to an outside spender, even if they are not actually authorized to do so, should be treated as facilitating a coordinated expenditure – at

least absent a showing that the campaign explicitly prohibited the sharing of the information, and took reasonable steps to implement that prohibition. The salient fact is less *who* is passing information, or whether they are actually authorized to do so, and more the fact that information is actually passed and what it is.

In short, the net impact of the Commission's proposed rule is to let people who work in campaigns and who have access to inside strategic and political information then pass that information on to an outside group for that group to use in crafting ads that support the candidate. And under the Commission's rule, that would not constitute "coordination" if the person who transmitted the information was not himself a material decision-maker for the campaign, or was not "actually" authorized to transmit the information. This result violates common sense, congressional intent as well as the Supreme Court's considerably more real world understanding of the concept.

In response to questions raised in the commentary, the Commission should certainly not limit the scope of agency even more than has already done by the proposed rules. To explicitly require that a purported agent be "acting within the scope of his or her authority as an agent" would simply provide campaigns the opportunity to dis-own an agent by claiming the person who did in fact transmit information to an outside spender had no actual authority to do so. This would create a highly artificial test – and would facilitate circumvention of the law – by allowing campaigns to "wink and nod" at the transmission of campaign plans and strategies to an outside spender, but disclaim that the person who transmits the information was acting within the scope of his authority. Under the proposed restrictive test, this person would not be an "agent" of the candidate, and thus no finding of coordination would occur as a matter of law, even though there clearly would be coordination as a matter of fact.

Finally, the proposed regulations create a disjunction between the standard for an "agent" of a party, and an "agent" of a candidate. One can be an agent of a candidate if one has actual authority "to provide material or information to assist another person in the creation, production or distribution of any communication." Section 109.3(b)(5). The same standard should apply to "agents" of parties as well. *See* Section 109.3(a)(5).

Subpart B

Section 109.10. We have no comment on this section.

Section 109.11. We have no comment on this section.

Subpart C

Section 109.20. We have no comment on this section.

Section 109.21(a). This section creates a separate definition for "coordinated communications." As a threshold matter, the FECA and the BCRA do not apply a different

standard of "coordination" to expenditures that have one kind of content versus another. All payments of whatever nature, whether for communications or not, are considered to be coordinated if they are made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or party. 2 U.S.C. 441a(a)(7)(B). This is the standard set forth in the proposed rules for the definition of "coordination" at section 109.20, but section 109.21 establishes a related but different test for "coordinated communications." If the Commission wishes to maintain a separate test for coordination of "communications" as opposed to other kind of expenditures, it should make clear that this definition falls under the umbrella of the more general test specified in section 109.20, which sets forth the appropriate statutory standard.

We also think the terminology of the proposed regulation is confusing. The heading to section 109.21 states: "What is a 'coordinated communication'?" By putting the phrase in quotes, the heading implies the term "coordinated communication" is a defined term of art. Yet the text of the proposed regulation itself does not even use this term, instead stating that "A communication is coordinated with a candidate, an authorized committee...." For consistency, the regulation should state, "A 'coordinated communication' is a communicated coordinated with a candidate, an authorized committee..."

Section 109.21(b). Section 109.21(b)(1) should include communications coordinated with agents of either a candidate or political party committee. This is missing from the proposed regulation.

Section 109.21(c)(content standard). Proposed subsections (1), (2) and (3) are necessary but not sufficient to define the "content" standard of a "coordinated communication." None of the proposed alternatives for subsection (4) is satisfactory.

As an initial suggestion, we urge the Commission to instead consider adopting a regulation based on its pre-*Christian Coalition* rules, which were in effect for over 20 years. Those rules set forth in a comprehensive fashion the basic standards for coordination, that were then elaborated upon in Commission advisory opinions and enforcement actions. It was, in our view, wrong for the Commission not to take up the district court's invitation to appeal the *Christian Coalition* ruling, and then to compound the problem by rewriting its longstanding regulation to codify the most controversial parts of the ruling. Congress has now vacated that regulation, and it would be appropriate for the Commission to consider reinstating the regulatory standards in place prior to *Christian Coalition.*

If the Commission chooses to draft a rule based on an entirely different model, we recommend that in addition to proposed subsections (1), (2) and (3), the Commission adopt a "time frame" test that would impose only a conduct, but not a content, test for public communications immediately proximate to an election. Beyond that time frame, there should be both a conduct and a content test, but one that is a variant of the Commission's Alternative C.

Alternative A – any public communication that refers to a clearly identified Federal candidate – is both too broad and too narrow. It would sweep in communications that mention federal candidates even in the context of a lobbying campaign – a type of communication for which the Commission has always permitted coordination, and which the legislative history of the BCRA makes clear should not be regulated as a coordinated expenditure.

On the other hand, Alternative A would *not* capture public communications that are in fact coordinated with a candidate where the candidate is not mentioned. Although such communications do not refer to the candidate, they can clearly be of great value to the candidate's campaign if, for instance, they reflect and reinforce the themes and messages of the campaign, particularly if broadcast or otherwise disseminated right before an election. The fact that the candidate or his agent has coordinated the communication indicates the potential campaign value of the ad to the candidate, even if the name of the candidate nowhere appears.

Alternative B attempts to address this problem by including a public communication that "promotes or supports or attacks or opposes" a Federal candidate, a standard used in Title I of the BCRA to define one category of "Federal election activity" applicable to state parties. 2 U.S.C. 431(20)(A)(iii).[5]

We have maintained throughout this rulemaking that the "promote/attack" standard should not be applied directly to the activities of outside individuals or entities to regulate their behavior under the election laws, as opposed to the activities of candidates and political committees, including party committees – all of which "are, by definition, campaign-related." *Buckley*, 424 U.S. at 79. Alternative B would run afoul of this distinction by requiring outside spenders to assess whether their communications meet the "promote/attack" standard.

Alternative C adopts an approach that has merit to it, but should not be confined to a time frame, as proposed. Even outside a period of 120 days before an election, *coordinated* public communications can greatly benefit a candidate – and it is the fact of coordination itself which should raise suspicions that the communication is being made for campaign purposes. Alternative C would allow a large class of overtly coordinated expenditures to go unregulated simply because they fall outside of a time frame proximate to the election.

As an alternative, we suggest the following two-step approach.

First, any communication which meets the conduct standard of the regulation should be treated as a coordinated communication if it is made within 60 days of a general election or 30 days of a primary election of the candidate with whom the communication is coordinated, and is

---

[5] The term is also used by reference in Title II, 2 U.S.C. 434(f)(3)(B)(iv), setting bounds on the Commission's discretionary authority to craft regulatory exemptions to the definition of "electioneering communication."

targeted to the electorate of that candidate.[6] Importantly, there need be no reference to the candidate (or his party) in the communication. To put it another way, an outside spender cannot coordinate on any public communication with a candidate in the time period immediately proximate to an election, no matter what the content of the communication.[7]

This rule would cover ads coordinated with an outside spender that helpfully reflect or restate a candidate's themes and messages. Such ads can be an important and useful part of a campaign, and should be treated as a coordinated expenditure if in fact coordinated with a candidate under the proposed conduct standards.

This test echoes important elements of the Title II definition of "electioneering communications" – broadcast ads that mention federal candidates that are made within 60 days before a general election or 30 days before a primary and are targeted to the electorate of that candidate. Such ads are deemed by the BCRA to have a *per se* electoral nature that justifies a presumption they be subject to election law regulation. That presumption is reinforced where such ads are in fact coordinated with a candidate.

Thus, for purposes of Section 214, when a candidate engages in coordinated conduct with an outside spender on a public communication run in this same pre-election period and is targeted to the electorate of that candidate, the law should presume an electoral purpose that supports treating the communication as a coordinated expenditure.

Second, a different test should apply outside the 60/30 day time frame. An ad that meets the conduct test of coordination should also be subject to the content test proposed by the Commission in Alternative C – that is, it mentions a candidate and is targeted to the electorate of the candidate mentioned, and it makes statements about the record, character, qualifications or fitness of the candidate or his party.[8] This would allow coordination on true "lobbying" ads, even if they refer to a candidate, but will capture ads that are likely to be campaign ads, or ads directly beneficial to the candidate's campaign, and that mention the candidate and are coordinated with the candidate.

---

[6] For these purposes, we suggest that the Commission adopt the same definition of "targetting" that is used in its Title II definition of "electioneering communication." *See* 11 C.F.R. 100.29(b)(3).

[7] The Commission could, however, consider whether to exempt from this rule a "pure" lobbying ad, such as the exemption that we proposed for the Title II rules defining "electioneering communication." *See* Comments of Common Cause and Democracy 21 on Notice 2002-13: Electioneering Communications (filed August 21, 2002) at 12. Other narrowly tailored exemptions might be appropriate as well.

[8] The language in the proposed regulation requiring "express" statements is too restrictive and should be dropped.

Section 109.21(d)(conduct standard). We agree with the proposed "request/suggestion" standards in subsection (1), including both subclauses (i) and (ii). Subclause (ii) – expanding the "request/suggestion" standard to encompass suggestions by an outside spender that a candidate assents to – is an important addition to this test.

Subsection (2) too narrowly includes "material involvement" only in "decisions" regarding the content, audience, mode or timing of an ad. It should also include involvement in "discussions" about an ad, which can as easily lead to *de facto* coordination as involvement in the decisions themselves. The subsection should be amended to read, "A candidate…is materially involved in discussions or decisions regarding…"

We support the standard articulated in subsection 3.[9]

In subsection (4), relating to common vendors, we urge the Commission to eliminate the subclause (iii) requirement. Whenever a candidate and an outside spender use any of the common vendors listed in subclause (ii), there should be a rebuttable presumption of coordination on an ad, even in the absence of a specific showing that the common vendor used or conveyed information about the candidate or information previously used by the vendor. The presumption should be rebutted only with a showing that inside information was not used.

The Commission should eliminate the proposed subclause (iii) standard. That additional test will, as a practical matter, be almost impossible for the Commission to enforce. It will be

---

[9] We note however that the legislative history makes clear that under no circumstances would discussions in a lobbying meeting between an individual or group and a Member about a legislative issue be the sole basis for a finding of conduct that leads to coordination, unless campaign plans and strategies were part of the discussion. Senator McCain said:

> [N]othing in section 214 should or can be read to suggest, as some have said, that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate. Obviously, if the group and the candidate discuss campaign related activity such as ads promoting the candidate or attacking his or her opponent, then coordination might legitimately be found, depending on the nature of the discussions. We do not intend for the FEC to promulgate rules, however, that would lead to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate.
>
> 148 Cong.Rec. S2145 (March 20, 2002)

The Commission should consider issuing a rule to state expressly this protection for lobbying contacts.

virtually impossible to prove that a vendor actually used information that he was privy to because of his status as a vendor common to both the candidate and the outside spender. The fact of the common vendor itself should be sufficient: it is the identity of the same person performing key communication or strategy functions for both the candidate and the spender that in itself establishes legal coordination. To add the subclause (iii) requirement that there be additional proof that information was used or conveyed requires, essentially, a showing that the common vendor coordinated with himself – a fact that is either so obvious as to not require proof, or logically impossible to prove.

Much the same is true of subsection 5, relating to former employees of candidates. Where you have a former employee who is, or is employed by, an outside spender, there should be a rebuttable presumption of coordination. To proceed as the proposed rule does, where the burden will be on the Commission to demonstrate that the former employee actually used material information about the candidate in making the outside expenditure, will impose a threshold that as a practical matter will rarely if ever be met.

Rather, the burden should be shifted to the spender to show that it did *not* use information known to or provided by the former employee of the candidate. This test, however, should be limited to a defined class of high level employees of a candidate that includes those most likely to possess material knowledge about the candidate's political plans, needs and strategies. Just as the proposed regulation addressing common vendors covers a defined list of certain types of vendors most likely to have material information, *see* section 109.21(d)(4)(ii)(A) through (I), so too the Commission should similarly define a list of employees of a candidate most likely to possess material political information.

Section 109.21(e). We strongly agree with this section, which is based on section 214(c) of the BCRA. That section states that the Commission's new regulations on coordination "shall not require agreement or formal collaboration to establish coordination."

Section 109.22. We have no comment on this section.

Subpart D

Section 109.30. We have no comment on this section.

Section 109.31. We agree with the proposed regulation.

Section 109.32. We agree with the statement of the coordinated party spending limits set forth in 2 U.S.C. 441a(d).

Section 109.33. We agree with the proposed regulation, with the proviso that the right of assignment of a party's coordinated spending limit does not override the BCRA requirement that a party – including the national and state party committees, integrated as a whole – choose to

make either independent or coordinated expenditures after a candidate is nominated, but not both.

Section 109.34. We agree with this proposed regulation, which states that all coordinated party expenditures shall be attributable to the party's section 441a(d) limit, whether the expenditures are made prior to or after a candidate is nominated.

Section 109.35. This section implements Section 213 of the BCRA, 2 U.S.C. 441a(d)(4), which requires a party "on or after the date on which a political party nominates a candidate," to choose to make either coordinated expenditures or independent expenditures, but not both.

The proposed regulations make a fundamental error in interpreting the statutory language. The statute plainly provides that all national party committees and all state party committees are to be integrated into a single group for purposes of making this election:

> For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established by a State political party (including any subordinate committee of a State committee) *shall be considered to be a single political committee.*
>
> 2 U.S.C. 441a(d)(4)(B)(emphasis added)

The proposed rule, instead, aggregates all national party committees into one group, and all state party committees into a separate group, and provides that each group makes a separate election as to whether to make independent or coordinated expenditures. *See* section 109.35(a), (b).

Although the language of the statute is clear enough on its face to indicate the mistake in the Commission's proposed approach, the legislative history on this point is simply overwhelming. On March 18, 2002, Senator Feingold included a section-by-section analysis in the Congressional Record. In pertinent part, it read:

> 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 (March 18, 2002)

To similar effect, Senator McCain said in a colloquy with Senator Thompson in explaining this provision that it provides "for this purpose only, that all 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. This will prevent one arm of the party from coordinating with a candidate while another

arm of the same party purports to operate independently of such candidate." Cong.Rec. S2144 (March 20, 2002).

Even opponents of the BCRA understood this provision to integrate national and state party committees into a single group for purposes of this choice. Senator McConnell inserted material into the Congressional Record on March 5, 2002 that set forth certain "technical corrections" he sought in the legislation. He described this provision as treating "all party committees (from national to local parties) as a single committee." On March 20, 2002, Senator McConnell said that this provision "treats all party committees, from State and local to the national party, as a single committee." Cong. Rec. S2121-22 (March 20, 2002).

Thus, both the BCRA's sponsors and its chief opponent agree on the interpretation of section 441a(d)(4)(B): it integrates all state and national party committees into a single unit for purposes of electing between post-nomination independent or coordinated expenditures.

The only contrary argument relates to subclause (C) of the statutory provision, which restricts transfers from a party committee that makes coordinated expenditures to a party committee that makes independent expenditures. The argument is that this provision is surplusage unless national and state party committees are aggregated separately.

First, the interpretation of subclause (B) should be based on the clear language and even clearer legislative history of subclause (B) itself. Given clear legislative language, and the clear and consistent legislative history of subclause (B), there is no need to resort to interpretation of subclause (C) as a guide to the meaning of subclause (B).

In any event, there is a reasonable interpretation of subclause (C) that is fully consistent with a proper interpretation of subclause (B). The anti-transfer provision in subclause (C) applies *pre-nomination* to preclude, for instance, a national party committee from making coordinated expenditures (which it may clearly do prior to nomination, pursuant to section 109.34) and then transferring funds to a state party to make independent expenditures. If the national party reaches its coordinated spending limit prior to nomination, such a transfer to state parties for independent spending on behalf of the same candidate would be a means to evade the national party's section 441a(d) limit.

Although in principle the national party could use its funds to make independent expenditures itself, the fact of its prior coordination may preclude it from being able to establish the requisite independence in fact to do so. Thus, the national party would have incentive to transfer funds to the state party to make the independent expenditures on its behalf. Subclause (C) prevents this evasion of the section 441a(d) limits by precluding the transfer of funds by the national party prior to nomination of a candidate. After nomination, of course, the aggregation provisions of subclause (B) take effect, and the national and state party committees must jointly elect to make either coordinated or independent expenditures.

At most, subclause (C) can be read simply as an extra protection to ensure against evasion of the basic requirement that party committees not make both coordinated and independent expenditures. Even if the aggregation provision of subclause (B) would effectively address the problem, subclause (C) nonetheless serves as an important backup protection.[10] Nothing in subclause (C) contradicts the proper meaning of subclause (B); its arguable redundancy should not lead the Commission to warp the proper construction of the subclause (B) aggregation provision.

Section 109.36. We strongly disagree with this proposed regulation, which opens the door for national party committees to make independent expenditures in presidential campaigns. The current regulations prohibit such expenditures. 11 C.F.R. 110.7(a)(5). There is no good policy reason to change this rule, and *Colorado I* specifically did not address, or require, the broad change proposed here. The Supreme Court there noted that "[s]ince this case involves only the provision [of section 441a(d)] concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns." 518 U.S. at 611-12.

To broadly allow national party committees to make independent expenditures on behalf of their presidential candidates is to invite abuse. Presidential candidates and their parties are so inextricably intertwined as to preclude any meaningful possibility that one can operate "independently" of the other. The degree of coordination that exists between a national party committee and its presidential candidate is typically far in excess of even the level of coordination between a party committee and its congressional candidates. Although, at least under very limited circumstances, *Colorado I* does acknowledge the possibility of true party independence in the context of congressional campaigns, the Court there specifically avoided reaching a similar conclusion with presidential campaigns.

There is no good reason for the Commission to reach out and change settled law here, where nothing in the BCRA requires this change, and where it is contrary to the thrust and purpose of the congressional effort in the BCRA to more tightly regulate independent spending by parties in order to ensure that it occurs only in instances of true independence. Accordingly, there should continue to be a conclusive presumption of coordination when a national party committee spends money on behalf of its presidential candidate.

Section 109.37. This section provides the standard for determining a coordinated communication by a political party.

---

[10] In this sense, it is similar to the provisions of Title I which prohibit the national parties from both "receiving" and "spending" soft money. 2 U.S.C. 441a(f)(A)(1). If the national parties cannot receive soft money, then they would have none to spend. Yet the statute imposes the seemingly redundant spending prohibition in order to reinforce the congressional objective.

Colorado I recognized the right, in principle, of political party committees to make unlimited hard money independent expenditures for their candidates. While the Court rejected a conclusive or irrebutable presumption that all party expenditures are, by definition, coordinated with its candidates, *see* 518 U.S. at 619 (noting that the question in this case is "whether the court of appeals erred as a legal matter in accepting the government's *conclusive presumption* that all party expenditures are "coordinated," (emphasis added)), the Court narrowly confined its decision to the specific facts of the case.

The fact pattern in the case was unique. There, the Colorado Republican Party made an expenditure criticizing then-Representative Tim Wirth, an announced candidate for the Democratic nomination to the Senate. At the time the expenditure was made, it was early in the election cycle – before either political party had selected a nominee for the Senate race, and three individuals were competing for the Republican nomination. *See id.* at 614. The party chairman testified that he had arranged for the development of the script at his own initiative, and no one else had approved it. *Id.* "[T]he only other politically relevant individuals who might have read it were the party executive director and political director, and...all relevant discussions took place at meetings attended only by party staff." *Id.* In the context of these unusual facts, the Court concluded that the expenditure "was developed independently, and *not pursuant to any general or particular understanding with a candidate.*" *Id.* (emphasis added).

Because "independent" expenditures are constitutionally protected, the Court concluded that the Republican Party's expenditures in this particular instance could not be subject to Section 441a(d)'s limit on expenditures. But, as Justice Breyer indicated in his plurality opinion, "the constitutionally significant fact, present equally [irrespective of whether an independent expenditure is made by an individual or by a political party] is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617. The plurality made clear that even a general understanding between the party and its candidate would be sufficient to undermine any assertion that party spending was truly independent from the candidate's campaign. *Id.*

Justice Kennedy's opinion concurring in the judgment and dissenting in part concluded, rightly, that in most cases the answer to the question of "whether a party's spending is made 'in cooperation, consultation or concert with' its candidate...will be yes." *Id.* at 629. (Kennedy, J. concurring). His opinion, joined by Chief Justice Rehnquist and Justice Scalia, indicates that a majority of the Court recognizes the inherent coordination that exists between candidates – particularly those candidates who have already received a party nomination – and their political parties. *See id.* at 629 (Kennedy J., concurring); *id.* at 648 (Stevens, J., dissenting)(joined by Justice Ginsburg, finding that "[a] party shares a unique relationship with a candidate it sponsors because their political fates are inextricably linked.").

The Court's analysis – with which we agree as a factual matter – more than supports the proposition that the activities of political parties and their candidates are so "inextricably linked" that a *rebuttable* presumption that coordination has taken place should be incorporated into the regulation. Party committees do coordinate strategy, staff and fundraising, as well as a host of

other aspects of campaign work, with their candidates. Providing a *rebuttable* presumption of coordination is necessary for the Commission to ensure that all independent expenditures by parties are truly free of actual or *de facto* coordination.

This is not inconsistent with *Colorado I.* The plurality opinion in that case carefully limited its holding to a rejection of a conclusive presumption of coordination. *Id.* at 619. It did not comment on the permissibility of a rebuttable presumption and it certainly did not preclude the Commission from adopting one. In fact, the foundation for a rebuttable presumption of coordination was laid by Justice Kennedy, when he observed that in most cases a party's spending will be "made 'in cooperation, consultation or concert' with its candidate." *Id.* at 629.

Because of the unique nature of the relations between political party committees and candidates, stringent criteria for independent expenditures made by political parties are necessary to ensure that these expenditures retain the character of "total independence" that was integral to the Supreme Court's invalidation of limits on independent expenditures in *Buckley.* As Justice Breyer pointed out in his plurality opinion in *Colorado I*, "the constitutionally significant fact...is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617.

Given this, we therefore urge the Commission to address the enhanced likelihood of coordination that exists when the source of the expenditure is the candidate's political party, by revising proposed section 109.37 to adopt a *rebuttable* presumption of coordination with respect to all party expenditures on behalf of their candidates.

Parts 110 and 114. We have no comment on the proposed regulations.

We appreciate the opportunity to comment on these proposed regulations.

Respectfully submitted,

/s/ Donald J. Simon

Donald J. Simon