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Via Electronic Mail

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COMMENTS OF JON HUTCHENS
ON THE FEDERAL ELECTION COMMISSION'S PROPOSED RULES
REGARDING COORDINATED AND INDEPENDENT EXPENDITURES

On behalf of our client, Jon Hutchens, Garvey Schubert Barer respectfully submits the following comments in response to that Notice of Proposed Rulemaking, *Coordinated and Independent Expenditures,* 67 Federal Register 60,042 (proposed July 24, 2002) (to be codified at 11 C.F.R. pt. 100 *et seq.*) ("NPRM"). We appreciate the opportunity to present Mr. Hutchens' views in this important and historic rulemaking proceeding.

I. Identification of Jon Hutchens and Nature of His Business

Jon Hutchens has been involved in national, state and local politics and providing services in connection with campaigns for various candidates and causes since 1983. Since approximately 1990, his services have been primarily buying media spot time on behalf of various political clients, through a corporation with offices in the District of Columbia and Colorado known as Media Strategies & Research.

At any given time, during any given campaign, Mr. Hutchens may place media buys for various clients, who, simultaneously, may include political party committees, candidates and their committees, and other entities and individuals interested in legislative and policy issues. Mr. Hutchens does not use information concerning its media plans imparted by one client in executing the instructions or making recommendations on behalf of others, nor does he share with any client information given by another. To do so would compromise the professional relationship of trust and confidence that is core of any service business. If Mr. Hutchens shared sensitive strategic information with other clients, or used information paid for by one client to benefit another, he soon would lose that trust and confidence, and be out of business.

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His role is limited to executing decisions concerning media plans and strategies that have already been made by others. He has no role in deciding the content of the communication or the target audience, or the markets in which it is to be run. He has no role in deciding the target geographic markets or demographic sectors of the electorate. He has no role in deciding the "saturation" or frequency of airing of communications in those markets. He does not distribute the ads to the media outlets which run them. In short, he has no role in creating, producing or distributing the communications.

He adds value through his knowledge of and relationships with media outlets that allow his clients to achieve the broadest desired "reach" possible for the lowest cost by having Mr. Hutchens buy spot time for them, and his expertise in interpreting commercially-available ratings data to help the client select the most cost-effective outlet for its paid media communications. To the extent that he makes recommendations, clients give him predetermined strategic parameters including timing, geographic and demographic target audiences, and budget, and he makes recommendations as to specific outlets and spot buys that execute those objectives in the most efficient way.

Media buyers have no autonomous authority to decide how money is spent. Rather, they interpret ratings data and employ their knowledge of media outlet spot time rate structures to make recommendations to decision-makers about how to gain the greatest "reach" for their message given their budgetary constraints, and geographic and demographic targets communicated by the client. That is the extent of the buyer's involvement in media strategy decisions. The client decides how and where to spend the money, and the media buyer executes those decisions. If a client ever considers the effect on its own media strategy of the media activities of another political actor at all, Mr. Hutchens is not the source of such information. He is not authorized to adjust or calibrate the media buys ordered by one client because of the buys ordered by another, nor does he do so. His services are limited to executing the media spending decisions made by each of his clients.

Because they occupy one of the last, and most visible, links in the chain of decisions and actions that result in often highly-controversial public political communications, media buyers in Mr. Hutchens' business have been lightning rods for accusations of coordinated ad spending between regulated entities, and the investigations that inevitably follow. Mr. Hutchens' company has spent tens of thousands of dollars and a great deal of time and effort responding as a witness to information and document subpoenas over the past few election cycles.

To his knowledge, Mr. Hutchens has never been found to have been an instrument of coordination of public communications under pre-BCRA rules. This is so because he does not share or discuss media strategy information imparted by one client with other clients, or use his knowledge about one client to act for the benefit of another, even though the clients may be aligned politically. He executes media buying decisions made by each of his clients on an independent, non-coordinated basis.

As a practical matter, a media buyer would not be a suitable conduit for such surreptitious coordination. Media buyers are highly visible, and they leave behind an extensive "paper trail." These include orders for media buys, and proof of fulfillment that FCC-licensed broadcasters are required to place in files available for public inspection in certain circumstances.

In view of the foregoing, the fact that his clients are invariably drawn from the Democratic side of the political spectrum does not itself fairly support an inference that Mr. Hutchen's services raise coordination concerns. As in all service businesses, people hire those who they know and trust. In the world of campaign-related services, relatively rigid political alignment is the norm, in most sectors. Most vendors, even those performing low-level non-strategic services, usually do not cross party lines. These include database vendors, fact-gatherers and researchers, and the audiovisual production technicians involved in producing ads, including camera operators.

II. Comments

A. General Observations

Mr. Hutchens welcomes the efforts of the Commission to create clear, consistent standards relating to the activities of agents and vendors. Business people in Mr. Hutchen's position, and their clients, need certain and clear standards of conduct. Complex, unclear or conflicting provisions will have a profound chilling effect on the willingness of clients to work with Mr. Hutchens, out of fears that merely associating with him may expose them to the risk of enforcement proceedings. In addition, such provisions would represent a continuing invitation to political opponents of a vendor's clients to drag the vendors, who are themselves generally not the focus of election regulation or the political beneficiaries of coordinated expenditures, into protracted, distracting, and expensive investigations. These inquiries waste not only the time and money of innocent vendors, but also squander scarce enforcement resources of the Commission. Clear, simple rules will curtail such recurring "fishing expeditions" in future campaigns.

As a starting point, Mr. Hutchens urges the Commission not to adopt any permutation of conduct standards that may result in coordination based merely on the *position* and *knowledge* of a person alleged to be the instrument of coordination. In the proposed common vendor rules, for example, the Commission requires not only that a relationship with a candidate or party committee be such that it puts the vendor in a position to convey or act on the candidate or committee's strategic plans, but also that the vendor actually convey or act on such information for the benefit of the person paying for the communication. Proposed 11 C.F.R. 109.21(d)(2). This is the right approach.

The Commission is correct in focusing its conduct standards on *actions*, not the mere position or knowledge of information on the part of those involved with the communication in question. At their core, the evils to which the "coordination" rule is addressed are defined by interaction, in the form of cooperation, consultation, or concerted conduct, between political

actors. The plain language of Section 441(a)(7)(B) of BCRA reflects this focus on actions, not position and mere knowledge (expenditure coordinated when made by any person " in cooperation, consultation or concert with, or at the request or suggestion of . . .."). Congress mandated that agreement or formal collaboration no longer be required (*see* NPRM, 67 Fed. Reg., at 60,052), in recognition that influence of one actor on the creation or distribution of the communications of another could be present absent such direct formal intercession. But there is no indication that Congress intended that coordination could ever be predicated merely on the knowledge of one actor (or his agent), which is neither shared nor acted upon by another, or merely as result of circumstances which put a person in a position to know of the plans of different actors. Indeed, the Commission expressly acknowledges that although *formal* collaboration will no longer be required, "the conduct standards proposed in paragraph (d) of section 109.21 would require some degree of collaboration." *Id.*

Mr. Hutchens is concerned about any rule potentia imputing liability for coordination to one or more of his clients based merely on Mr. Hutchens' position as media buyer for more than one client simultaneously, and the knowledge he has gained in the course of his work for those clients. Were the Commission to adopt any rule which rendered a client liable for coordination merely because Mr. Hutchens purchased media time for another client and gained knowledge of the other client's media plans in the course of that work (without communicating or acting on such information for the benefit of the first client), then Mr. Hutchens would be faced with a Hobson's choice, during each campaign cycle, to work only with certain types of political actors (e.g., only candidates, or party committees, or advocacy groups), which would severely constrict his client base and revenues. Many entities that value his services would be denied access to them. Moreover, an unscrupulous actor could manipulate the rules to deprive another entity of the benefit of Mr. Hutchen's services, merely by engaging him.

B. Proposed Rule 109.3: Definition of "Agent"

The potential for such mischief lurks in the definition and application of the term "agent," as set forth in proposed section 11 C.F.R. 109.3, particularly, in the context of the "create, produce or distribute any communication at the request or suggestion" and "substantial discussion" conduct standards in proposed 11 C.F.R. 109.21(d)(1) and (d)(3), and the "material involvement in decisions" conduct standard in proposed 11 C.F.R. 109.21(d)(2).

The NPRM states:

> The proposed revised definition of 'agent' would focus on whether a purported agent has 'actual authority, either express or implied, to engage in one or more specified activities on behalf of specified principals. The specified activities would vary slightly depending on whether the agent engages in those activities on behalf of a national, State, district, or local committee of a party committee, or on behalf of a Federal candidate or officeholder. . . . . The

> activities specified in the proposed rule would closely parallel activities associated with coordinated communications as described in proposed 11 C.F.R. 109.21(b), and would include requesting or suggesting that a communication be created, produced or distributed, making or requesting that certain campaign-related communications, and material involvement in decisions regarding specific aspects of communications . . . . Thus, a person would be an agent when (1) expressly authorized by a specific principal to engage in specific activities; (2) engages in those activities on behalf of that specific principal; and (3) those activities would result in coordination if done directly by a candidate or political party official.

67 Fed. Reg., at 60,043.

The difficulty arises from the fact that Mr. Hutchens may perform certain enumerated activities at the request of or on behalf of a specified principal, and be deemed an agent for purposes of communications for which Mr. Hutchens buys media spots, while at the same time performing similar or identical functions for another purchaser of political media, without sharing the plans of one client with another, or acting on the plans of one client for the benefit of another. This "dual agency" creates the potential that, merely because a media buyer executes the media-buying directions of a candidate/party, or has some degree of involvement in placement of the spots created by a candidate/party, the buyer will be deemed the surrogate of the candidate/party in performing services for another person paying for different political communications.

The Commission must draw the rules carefully, to ensure that liability for coordination can only result from *actual conduct* by a purported agent that compromises the independence of the communications placed, on the one hand by candidates/parties, and, on the other, by other political actors, rather than by virtue of the agent's position alone.

The Commission specifically requested comment on whether the scope of the definition of "agent" should explicitly state that a person must be acting within the scope of his or her authority while engaged in the action in question (e.g., making a request, engaging in a substantial discussion) before he or she is considered an agent. The Commission also requested comment on two related questions: Should the person be required to convey information that was only available to the person because of his or her role as an agent for the candidate or political party committee? Should a person be considered an agent if he or she bases his or her recommendations to a third party on information that was gained only due to that person's role as an agent for the campaign? NPRM, 67 Fed. Reg., at 60,043.

We respectfully submit that all of these questions should be answered emphatically in the affirmative. It is particularly critical to make it absolutely clear, in the general definition of

"agent," that: (a) a person's actual authority must include the referenced actions and further; (b) such actual authority include either: (i) conveying information gained exclusively as a result of his or her role as agent; or (ii) recommending that another person take the referenced actions or taking the referenced actions on behalf of another, based on information gained exclusively as a result of the person's role as agent for the campaign; and (c) that the person actually conveys or acts on such information within the scope of his or her authority referenced in parts (i) or (ii) above. The rule should require that all of the factors enumerated above in (a), (b) and (c) be present.

Such a standard will ensure that coordination only results from actions taken by a person, with the actual authority of the principal, which compromise the independence of communications, as opposed to a finding based on the mere position of a purported agent and the information to which he or she may be privy.

The proposed standards in their present form are deficient, in that they do not embody a definitional overlay requiring a person purported to be the instrument of coordination: (a) to have the actual authority from his principal to serve as a pipeline for information to another regulated person, or to act on the information of the principal for the benefit of the other; and (b) to actually engage in either type of conduct within the scope of such authority. Without such actual authority from the principal, and action upon it by the agent, a principal could be subjected to coordination liability due to the mere position and knowledge of its agent, without even being aware of the fact that the agent also works for another.

1. Agency And "Request or Suggestion" & "Substantial Discussion"

The Commission has proposed a conduct standard at 11 C.F.R. 109.21(d)(1) which would be satisfied if the person creating, producing or distributing the communication *or its agent* does so at the request or suggestion of a candidate, authorized committee, or political party committee, *or the agent of any of the foregoing*. The same would be true if the person paying for a communication *or its agent* requests or suggest that a candidate, authorized committee or party committee, *or agent thereof*, created, produced or distributed a communication. In a situation where the media buyer wears the same hat for different clients, his position alone may be deemed to constitute "agent-to-agent" interaction, resulting in coordination, even when the buyer conveys no information between clients, and does not act on one client's information for the other's benefit.

The Commission should clarify that use of a common media buyer whose authority on behalf of one client does not include requesting or suggesting that another client create, produce or distribute a communication, should not result in a finding of coordination.

In addition, a simple and direct way to avoid anomalous results under this conduct standard would be for the Commission to clarify that a media buyer who may serve the same function for multiple parties and merely purchasing media time slots for communications is not

engaging in "distribution" of the communication for either client, for purposes of the "request or suggested" rule. As discussed previously, media buyers do not distribute or deliver the spots to any outlet, or decide where they will run. They merely execute the buying decisions of their clients.

Similarly, proposed 11 C.F.R. 109.21(d)(3) creates a conduct standard addressing payments for communications made by a person after substantial discussion about the communication with a candidate or political party. Again, in the context of this rule, the standard is satisfied if the discussion occurs between an *agent* for the payor, and an *agent* of the candidate/party. The Commission should clarify that the mere knowledge of the plans, projects, etc., of one principal on the part of a common agent, without discussion or communication to the other principal by such agent, should not result in coordination.

2. Agency and "Material Involvement in Decisions"

The Commission has also proposed a conduct standard at 11 C.F.R. 109.21(d)(2) that would result in coordination if a candidate, authorized committee, or political party committee, *or the agent of any of the foregoing* is "materially involved in decisions" regarding certain specific, enumerated aspects of a public communication, paid for by someone else. *Id.*, at 60,050.

The proposed list of aspects of the public communication includes material involvement in: (i) the content of the communication; (ii) the intended audience; (iii) the means and mode of communication; (iv) the specific media outlet used; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication or duration of a communication on a television, radio, or cable station, or by telephone.

Media buyers in the position of Mr. Hutchens who work for candidates, authorized committees, and party committees may, in some cases, have some degree of involvement (albeit no substantial decision-making role or authority, *see infra*) in selecting the means or mode of communication (e.g., broadcast or cable), and the specific media outlet used (e.g., the particular broadcast station or cable system). Thus, under the proposed definitions of "agent," which incorporate by reference the "material involvement in decisions" standards (*see* proposed 11 C.F.R. 109.3(a)), it is possible that merely providing information or recommendations to a candidate/party client about means/mode and specific outlets might make Mr. Hutchens an "agent" for purposes of the coordination rules. If he could also be deemed the agent of another party placing another communication, again, merely by virtue of his position as the campaign's agent with some degree of material involvement in decisions regarding the communications of the other party, a finding of coordination could result.

This rule itself needs to state explicitly what the Commission was obviously assuming: Actual communication of the candidate/party's information or action upon it for the benefit of the paying person should be required to constitute "material involvement." The NPRM stated:

> "the Commission would focus on the materiality of *the information conveyed and its specific use. A candidate or political party committee would be considered 'material involved in the decisions' enumerated* ***if either shares material information about the campaign plans, projects, activities, or needs with the person making the communication. Likewise, a candidate or political party committee would be 'materially involved in decisions' if the candidate, political party committee, or agent conveys approval or disapproval of the other person's plans, projects, activities, or needs with the person making the communication."*** NPRM, 67 Fed. Reg. at 60,050 (emphasis added).

In response to the Commission's invitation to comment on the wording and scope of the "materially involved" standard, we respectfully suggest that the foregoing formulation captures the essence, and should be incorporated into the final rule.

Moreover, we respectfully suggest that a media buyer's involvement in selecting the means/mode and/or specific media outlets in the performance of the buyer's tasks are valuable technical services that are not significant or material to the substance or strategy of the communications. We therefore suggest that the Commission delete subsections (iii) and (iv) from the list of aspects of decision-making in proposed rule 11 C.F.R. 109.21(d)(2) that can result in coordination if other requisites are met.

Apart from the specific aspects of communications, we reiterate "material involvement" and "decisions," as applied to agents, must be defined clearly to require that a purported agent act in a way that compromises the independence of separate communications; i.e., conveying information, or acting on it for the benefit of another.

C. 11 C.F.R. 109.21(d): Proposed Common Vendor Rule

The Commission seeks comment about whether purchasing media spot time should be added to the list of common vendor services in proposed paragraph (d)(4)(ii), for purposes of the "conduct" standard. Mr. Hutchens comments as follows:

Mr. Hutchens favors the approach adopted in the Commission's proposed "common vendor" rules, which define nine specific, exclusive types of campaign-related services performed by vendors which could create a relationship that may satisfy the "conduct" element of the coordination. Mr. Hutchens agrees with the existing language of paragraph (d)(4)(ii) of the proposed rule. That proposed rule, by omission, reflects the view that merely purchasing time slots for radio, television, or other media, should not be among the enumerated services covered in proposed paragraph (d)(4)(ii).

The Commission has already determined that only the use of a common commercial vendor employed to *create, produce, or distribute* the communication at issue implicates coordination concerns. Indeed, that is the first element of the Commission's proposed three-part test to determine whether employment by a person paying for a communication of a vendor who has a relationship with a candidate or party committee satisfies the "conduct" prong of the proposed coordination formula. *See* proposed paragraph 109.21(d)(4)(i).

As noted previously, media buyers do not create, produce, or distribute communications to the public, all of which functions are generally handled by other vendors. Media buyers merely purchase airtime during which the communication is run. Also, as noted previously, these services, while valuable, but they do not materially influence the substance or strategy of the communications. Others, usually the agencies hired to design and produce ads, determine content, make the spots, and deliver them to the media outlets which air them. If the paying person's employment of a media buyer who does none of the three things enumerated in paragraph (d)(4)(i) does not satisfy the first element of the proposed common vendor test, then neither should the use of the same media buyer by a candidate or party committee satisfy the second "relationship" element of the test. Thus, the Commission's existing proposal harmonizes and makes consistent paragraph (d)(4)(iii) with the three general categories of influential conduct reflected in paragraph (d)(4)(i).

Beyond that, Mr. Hutchens commends the structure and substance of this proposed rule as a template for all other conduct standards. The common vendor rule requires both actions which put an alleged instrument of coordination in a position acquire knowledge which could compromise the independence of a communication, and either communication of, or action upon, such information. Common vendors, at whatever tier, who avoid such conduct should never be at risk of being deemed an instrument of coordination.

Once again, we appreciate the opportunity to submit comments on Mr. Hutchens' behalf.

Very truly yours,

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