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Joan Claybrook, President

October 11, 2002

VIA E-MAIL

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

RE: NPRM 2002-16, "Coordinated and Independent Expenditures"

Dear Mr. Vergelli:

Public Citizen's Congress Watch respectfully submits the following comments on the Notice of Proposed Rulemaking regarding proposed changes to existing regulations on coordinated and independent expenditures published in 67 Federal Register 60042 (September 24, 2002), in accordance with the Bipartisan Campaign Reform Act (BCRA).

In addition to submitting these written comments, we request that Craig Holman, Legislative Representative at Public Citizen's Congress Watch, be given an opportunity to testify at the Commission's public hearing on the matter scheduled for October 23rd and October 24th.

Sincerely,

Frank Clemente
Director
Public Citizen's Congress Watch

Craig Holman
Legislative Representative
Public Citizen's Congress Watch

October 11, 2002

Federal Election Commission
Notice of Proposed Rulemaking
Notice 2002-16
Coordinated and Independent Expenditures

Comments of Public Citizen's Congress Watch

I. Introduction

A key component of the Bipartisan Campaign Reform Act of 2002 addresses the mutually dependent concepts of "coordinated" and "independent" expenditures.[1] The primary objective of providing clear and accurate definitions and regulations governing coordinated and independent expenditures is to preserve the integrity of contribution limits under federal campaign finance law. Congress has recognized that some of the prior regulations on coordination between political committees had not adequately protected the federal contribution limits, and thus specifically repealed FEC regulations defining "coordinated general public communications" and instructed the Commission to develop new rules on coordinated communications between candidate committees, non-party committees and party committees. [BCRA, Title II, Sec. 214(c)][2]

Public Citizen agrees with the assessment of Congress that the Commission's prior regulations of coordination have not reasonably captured a large amount of coordinated campaign activity between political committees and candidate campaigns, and thus have not adequately protected the integrity of contribution limits to candidates. The proposed regulations under consideration today make significant strides forward in more accurately addressing the real-world practices of campaign coordination. Most notably, the inclusion of "agents" of a campaign or party working with a political committee, rather than simply the candidate, as a potential indicator of coordination is a substantial improvement in the regulation.

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[1] "Coordination" refers to the extent in which expenditures by one or more political committees make expenditures that benefit a candidate due to prior communication, consultation or cooperation between the candidate and the political committees. If the expenditure is deemed coordinated with the candidate, it is designated a contribution to the candidate's campaign. Conversely, if the political committee(s) spends on behalf of a candidate but without coordination with the candidate's campaign, the expenditure is considered an "independent expenditure" outside the contribution limits to the candidate.

[2] The Federal Election Commission has been grappling with its coordination regulations repeatedly since 1995. In addition to changes in political climate, several court rulings have resulted in reconsideration of the rules. The U.S. Supreme Court decision popularly known as *Colorado I*, for instance, revoked the presumption of coordination between party committees and candidates. [Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 US 604 (1996)] A federal district court in Washington D.C. issued another decision applicable only to that district which established a very narrow definition of coordination, essentially requiring that a candidate request campaign expenditures by another committee in order for those expenditure to be considered coordinated. [FEC v. Christian Coalition, 52 F.Supp. 2d 45 (D.D.C. 1999)]

Nevertheless, there are some concerns about the proposed regulation that should be reconsidered. These concerns are discussed below.

II. Comments on the Proposed Regulation Affecting "Coordination"

This comment generally focuses on provisions of the proposed regulations in order of importance. Topics of which Public Citizen has no comment at this time have been omitted.

A. 11 CFR Part 109, Subpart C—What Does 'Coordinated' Mean?

> "Coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." [Sect. 109.20(a)]

Comment: **The renewed focus on *agents* of candidates and party committees more accurately reflects coordination activity. This is a constructive first step toward defining coordination.**

It is critical that the concept of coordinated campaign activity extend beyond communication and consultation with the candidate or candidate's committee and include agents of the candidate's campaign who have been in a decisionmaking capacity within the election cycle. Coordination of campaign activity between political committees, candidate campaigns and party committees has often been in the form of these committees sharing the same campaign consultants, pollsters or chief fundraisers with intimate knowledge of candidate or party campaign strategy who, in turn, participate in developing strategy for other political committees involved in the same election.

B. 11 CFR Part 109, Subpart A—Scope and Definitions of "Agent."

> "The Commission seeks comments 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 as an agent."

Comment: **The definition of "agent" offered in the proposed regulation is sufficiently narrow to guard against over-breadth; only persons in a decision-making capacity are included in the coordination provision. To further limit this definition to agents "acting within the scope" of their authority would so narrowly define agent coordination as to remove agents from the equation in many important instances. If a decision-making agent of a candidate or party assists in the campaign strategy or communications of another group to the benefit of the same candidate or party, that fact should be sufficient to demonstrate coordination, even if that agent provided such assistance in an unofficial capacity.**

"Agent" is defined as a person with decision-making authority over campaign strategy and operations in the candidate or party committee. The proposed regulation offers a list of activities used to gauge such decision-making authority, which includes the creation, production or distribution decisions of any campaign communication. [Section 109.3] This definition requires that a person have extensive authority in the campaign committee and be intimately involved in deciding campaign strategy and operations and the production and distribution of campaign communications. Thus, under this definition, an "agent" will not include those who are routine campaign staff, peripherally involved in a campaign or who otherwise provided limited goods or services.

C. 11 CFR Part 109, Subpart C—What Is a 'Coordinated Communication'?

> The proposed regulation establishes a three-part test of what is a coordinated communication. The three parts include: (i) the ad is paid for by a person other than the candidate, party or their agents; (ii) the ad meets specific content criteria; and (iii) the ad meets specific conduct standards, and offers three different options for a fourth criteria.

Comment: **The content standard for defining a coordinated communication should be kept simple and straightforward, and not over-complicate the test with subjective content criteria. Alternative A for Paragraph (c)(4), which limits the content standard to electioneering communications that identify a federal candidate or communications that substantially replicate candidate election materials, is more than enough. In fact, the content standard could be further streamlined to include only one criteria, such as:**

> **"The communication replicates, reproduces, republishes, distributes, or disseminates, in whole or substantial part, a broadcast or written, graphic, or other form of campaign material designed, produced, or distributed by the candidate or party committee or their agents."**

Alternative B for Paragraph (c)(4), specifying that the communication must not only identify a federal candidate, but also promote or attack the candidate, far exceeds the intent of BCRA and is very difficult to measure. BCRA's bright-line test makes no effort to define an electioneering communication based on whether it promotes or attacks candidates. Such a standard injects a purely subjective assessment into the equation, of which reasonable people may disagree. Alternative B would obfuscate the content standard.

Alternative C for Paragraph (c)(4) attempts to elaborate on Alternative B. A subjective standard for measuring whether an ad is electioneering—which is not part of BCRA—

remains in Alternative C, only with more specific criteria, such as whether the ad discusses the "character" of the candidate or the candidate's "fitness" for office. Such subjective criteria for the content standard runs counter to BCRA, muddies the waters, and complicates the task of the Commission in implementing the law.

A far more relevant standard than content in assessing coordination is the conduct standard.

Comment: **The conduct standard is a more accurate and meaningful test for assessing coordination than the content standard. Most of Paragraph (d) of the proposed regulation constitutes a useful set of criteria in determining coordination, with one important caveat: the provisions covering common vendors and former employees/contractors would require exhaustive investigative work by the Commission and are not practical as written.**

Paragraph (d) of the proposed regulation—which establishes a conduct standard based on (i) request or suggestion of a candidate, party or agent; (ii) material involvement in the decision-making process; (iii) substantial discussion between the person paying for the communications and the candidate, party or agent; (iv) common vendor; (v) former employee or contractor; and (vi) conduct pertaining to the communications—generally provide a constructive model for evaluating coordination. Most significantly, the proposed regulation includes the hiring of common vendors and former staff and contractors of candidate and party committees as strong indicators of coordination between political committees and the candidate and party.

However, rather than offering a presumption of coordination when a political committee employs the professional services of common vendors or former staff members and contractors, the Commission would be required to get the vendor or employee to *admit* they had discussed material information regarding the campaigns in order to prove coordination. This is both unnecessary and extremely difficult to substantiate. This provision should be simplified as a presumption of coordination as follows:

> **"In the same election cycle in which the communication occurs, the committee retains the professional services of an individual or entity that, in a non-ministerial capacity, is providing or has provided campaign-related services—including but not limited to polling or other campaign research, media consulting or production, direct mail, or fundraising—to a candidate who is pursuing election or nomination to the same office as any candidate clearly identified in the communication."**

D. 11 CFR 109.35—Definition of Party Committees

> The proposed regulation redefines party committees into two distinct entities: national party committees as one entity and state party committees (including local subsidiaries) as another entity in terms of the coordination restrictions.

Comment: **The invention of two distinct party entities within the same party contradicts both logic and the spirit and letter of BCRA. National and state party committees of the same party should be defined as committees of a single party for purposes of coordinated and independent expenditures.**

BCRA has established a series of safeguards to ensure that soft money is not co-mingled with other party funds and filtered back into federal elections through the interaction of federal, state and local party committees. One of these safeguards is a restriction on the transfer of funds and/or spending authority between party committees used for party coordinated expenditures and party independent expenditures. [Sect. 441(a)(d)(4)(A)] The following paragraph of BCRA further specifies that committees of the same party at the federal, state and local levels "shall be considered a single political party" for these purposes. It is neither constructive to BCRA's intent to clarify the conditions of coordinated versus independent party expenditures nor justified by the letter of the law to subdivide committees of the same party into two distinct entities.

III. Conclusion.

Public Citizen appreciates the opportunity to offer its recommendations in this important stage of implementing the Bipartisan Campaign Reform Act of 2002. Public Citizen's Congress Watch looks forward to working with the Commission in the development of federal campaign finance regulations.