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bcc
Subject Comments of CCP, Coordinated Communications

Dear Mr. Deutsch:

Please find attached comments on behalf of the Center for Competitive Politics on the Commission's Notice of Proposed Rulemaking, Coordinated Communications.

Thank you,

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Center for Competitive Politics

Stephen M. Hoersting
Executive Director

January 13, 2006

VIA ELECTRONIC MAIL

Mr. Brad C. Deutsch
Assistant General Counsel
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

coordination@fec.gov

Re: Comments on *Notice of Proposed Rulemaking on Coordinated Communications*, 70 *FR* 73946 (Dec. 14, 2005)

Dear Mr. Deutsch:

The undersigned submits the following comments on behalf of the Center for Competitive Politics ("CCP") a not-for-profit, educational organization whose mission, through legal briefs, studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive political process. CCP's application to the Internal Revenue Service for tax-exempt status under 26 U.S.C. §501(c)(3) is pending.

THE CONTENT PRONG – ITS IMPORTANCE, ITS HISTORY

The coordination provisions of the Federal Election Campaign Act are among the least understood and most far reaching of the Act.

We begin with the understanding that, "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). In the case of coordinated communications, they affect not only independent speech rights but also important rights of association.

For many years the FEC operated under the assumption that any disbursement of money for a public communication that was coordinated with a campaign was a "coordinated expenditure." This approach, however, did violence to the Supreme Court's

decision in *Buckley,* which defined "expenditure" much more narrowly than any disbursement of funds, at least when public communications by speakers other than the candidate and his campaign committee, were at stake. Rather, the Court defined "expenditure" as being limited to "express terms [that] advocate the election or defeat," of a candidate, or what became known as "express advocacy." 424 U.S. at 44. Nothing in *Buckley* suggests that the Court did not intend for the same definition of expenditure to apply in the context of "coordinated" expenditures. In other words, before spending can be considered a "coordinated expenditure," and so treated as a contribution, two prongs must be met: the spending must be "coordinated" (conduct), and it must constitute an "expenditure" as the term is used in the Act, as interpreted by *Buckley* (content).

Accordingly, in 2000, after losing several court cases and engaging in other long, ultimately fruitless investigations, the Commission began to limit its findings of "coordinated expenditures" to cases in which there was an actual "expenditure" as defined by the Act. That is to say, absent "express advocacy," the Commission would decline to find coordinated expenditures in matters involving public communications. *See* Statement of Reasons, Chairman David M. Mason and Commissioner Bradley A. Smith, MUR 4538 (Alabama Republican Party).

In the Bi-partisan Campaign Reform Act of 2002 ("BCRA"), Congress included a provision requiring the FEC to redraft its coordination rules, and added electioneering communications to the content that could be regulated under the Act's coordination provisions at 2 U.S.C. §441a(a)(7). The current regulation was the result of the Commission's efforts.

The reason *Buckley* defined "expenditure" narrowly was to avoid the vagueness concerns inherent in the statutory term, "for the purpose of influencing" an election. The Court of Appeals, citing concerns of overbreadth, had interpreted that phrase to be limited to speech that advocated the election or defeat of a candidate, *Buckley v. Valeo,* 519 F.2d 852-53 ((D.C. Cir. 1975). But the Supreme Court went further. Noting that, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," the Court held that anything less than a bright line standard could chill protected speech about political issues. *Buckley,* 424 U.S. 1 at 41. Hence the creation of the "express advocacy" standard. 424 U.S. 1 at 44, n. 52. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court made clear that other legal standards might also be sufficiently clear to avoid vagueness problems – specifically the 30 and 60 day prior to an election limits on references to a candidate – but never suggested that a standard that did not satisfy vagueness concerns would be permitted.[1] The concerns that motivated the *Buckley* and *McConnell* courts to draft bright line rules – the concerns about the chilling effects of imprecise rules – are nowhere more important than in the consideration of "coordinated" communications.

Section 441a(a)(7) sets forth three, and only three, separate and distinct things that, when coordinated with either a candidate or political party, result in in-kind

[1] The Constitutional battle over the "electioneering communications" provisions of BCRA had to do with overbreadth, not vagueness.

contributions to that candidate or party: expenditures, §441a(a)(7)(B)(i)-(ii); electioneering communications, §441a(a)(7)(C); and republication of campaign materials, §441a(a)(7)(B)(iii). The absence of any of the three brings an investigation immediately to a close as a matter of statutory law. "Expenditure" is a statutory term of art, which, as we have seen, is limited in scope.

Cash transfers to a candidate's campaign committee are given for the purpose of influencing an election. Although the Court has recognized that political contributions are a form of protected speech under the First Amendment, the Court decided in *Buckley* that they are speech by proxy that can be limited, in part because the contributor retains other independent avenues of communication, which cannot be limited constitutionally. *Buckley v. Valeo*, 424 U.S. 1 (1976). If, at a candidate's urging, an individual buys ten vans and hires ten drivers to get-out-the-vote on election day, that is an expenditure of funds for the purpose of influencing a federal election and will be treated as an in-kind contribution by operation of section 441a(a)(7)(B)(i). The Commission may extensively investigate van purchasers, that is, individuals engaged in this kind of independent economic activity for ties to candidates and officeholders, with little concern of "chilling" any fundamental constitutional right. The same cannot be said of speech, however. There is a fundamental First Amendment right to engage in independent political speech, recognized from *Buckley* through *McConnell,* that is chilled by coordination investigations, especially those in which the respondent can be aware of no bright line that tells him which topics awaken the Commission's jurisdiction. Without a meaningful content standard a respondent cannot adequately conform his conduct and speak freely, or if he speaks on a lobbying topic and is wrongfully roped into an investigation, can assert no affirmative defense that will bring the investigation to an early close.

The Commission has been discussing the need for notice in the area of coordination for years, and has gone from the vague and vexing "electioneering message" standard of the late 1990s -- which was nothing more than a *post hoc* evaluation of the respondent's subjective intent to see if four Commissioners could divine from every possibly relevant document or witness what was the speaker's true "purpose" -- to the content standard analysis adopted by the Commission, and lauded by the *Shays* Appellate Court as an effort to provide bright lines. The clarity that a content standard provides, and the lack of clarity that will arise without it, no matter how carefully drawn the conduct standard employed by the Commission, was explained by one Commissioner as follows:

> [T]he conduct standard alone does not provide an adequately bright line to prevent the specter of investigation and litigation from chilling constitutionally protected speech. When a person decides to make independent political expenditures, he opens himself up to two potential burdens under the Act. The first is to report those independent expenditures in excess of $250. *See* 2 U.S.C. §434(c). The second is to defend against allegations that the advocacy was somehow authorized by or coordinated with a candidate, which, if true, would lead to still greater limits on the person's political activity. *See* 2 U.S.C. §431(17).

> Respondents can spend substantial sums defending themselves against such allegations, and this possibility will cause many speakers to avoid engaging in what ought to be constitutionally protected speech. Thus, a bright line is needed. A content test … provides such a bright line. If a financier of general public communications is not willing to defend against charges that his speech was authorized by a candidate, or prefers not to disclose the sources of his funding, *see e.g. NAACP v. Alabama*, 357 U.S. 449 (1958), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), he can simply delete from his message words [delineated in a well-defined content standard] and speak on any other topic of his choosing. If he is investigated nonetheless, he can be assured that the investigation will be short, non-intrusive, and inexpensive, merely by demonstrating the absence of [elements of the content standard] in his communications. Absent a content standard, however, no such immediate defense is available.

Statement for the Record of Commissioner Bradley A. Smith, MUR 4624, (The Coalition) p.4 (Nov. 6, 2001).

Or, as stated by the D.C. Circuit in *Orloski*, "a subjective test based on a totality of the circumstances … would inevitably curtail permissible conduct." *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). *Orloski* warned of other practical problems, many of which are on exhibit in several Commission matters.

> [A] subjective test would also unduly burden the FEC with requests for advisory opinions … and with complaints by disgruntled opponents who could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters. It would further burden the agency by forcing it to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. It would also considerably delay enforcement action. Rarely could the FEC dismiss a complaint without soliciting a response because the FEC would need to know all the facts bearing on motive before making its "reason to believe" determination.

Id. at 165. The Commission forgets this at its peril. The expensive, lengthy investigation and exoneration of The Coalition in MUR 4624, covering four years, 60 individual committees, and thousands of documents; like the similar four-year investigation and exoneration of the AFL-CIO in MUR 4291; and the six-year investigation and exoneration of the Christian Coalition, consisting of eighty-four depositions, 100,000 pages of documents, and Federal appellate litigation – each could have been readily avoided by the simple promulgation and application of a meaningful content standard. "The objectionable quality of vagueness and overbreadth does not depend [just] upon [the] absence of fair notice to a[n] accused … but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a … statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 423-433 (1963). A content

standard provides advanced notice to actors of what types of speech the FEC will investigate, and reduces the risk of capricious enforcement more effectively than a purely conduct based standard.

Because coordination investigations have the potential to chill independent grassroots lobbying or other issue advocacy, the coordination regulations are all about setting parameters for communications, and not about non-expressive economic activity. This is why the term "independent expenditure" is defined in the Act as a communication, *see* 2 U.S.C. §431(17); why the other triggers under the coordination provisions of section 441a(a)(7) – electioneering communications and republished campaign materials -- are communications; and why the Commission has wisely named this rulemaking "Coordinated Communications." 70 *FR* 73946 (Dec. 14, 2005). The statute also makes clear that investigations cannot spring from just any variety of communication. To deem the term "expenditure" a catchall in the coordination provisions and a basis for regulating any communication would be to drain the phrase "for the purpose of influencing" of any meaning. And it would have the effect of making republication, as well as Congress's most recent enactment in this area, coordinated electioneering communications, superfluous and nonsensical. It is the Commission's duty to set out meaningful parameters for that critical phrase in the definition of expenditure, the phrase "for the purpose of influencing a Federal election." This requires a content standard.

Before the FEC adopted a content standard in its coordination investigations, first as a matter of practical enforcement policy beginning in 2000, and later in the current coordination regulations, the specter of a coordination investigation served as a kind of Hobson's choice for publicly spirited individuals and politically interested grassroots lobbying organizations. Organizations had to decide whether to surrender the right to interface with lawmakers to preserve one's right to engage public advocacy, or *vice versa*. If conduct were the sole criteria for determining whether a public communication was a "coordinated expenditure," certain organizations that run advertising would always have enough contact with officeholders to at least trigger a lengthy investigation. Major citizens groups, such as the Sierra Club, regularly petition public officials but also speak to fellow citizens through public advertising on a regular basis. Earth First, the AFL-CIO, the Chamber of Commerce, the NRA, Handgun Control Inc., NARAL, NRTL, and hundreds of other groups all speak to officeholders regularly, while at the same time communicating their stands on issues to the public through grassroots communications. These organizations will naturally communicate with their legislative allies, and so have myriad contacts with candidates for public office. While such a group may not coordinate its activities with such candidates so as to satisfy the "conduct" standards of 109.21(d), - that is, they may never share material information of any kind - its contacts with officeholders and candidates will be extensive enough that the allegation of "coordination" will be available to political rivals virtually any time the group takes to the airwaves or other advertising on issues.

Hence, some type of content standard is critical for the FEC, not only to protect the legitimate speech rights of citizens, but also to manage its own enforcement load and

protect itself from endless, politically motivated complaints. *See Orloski,* 759 F.2d. at 165 (D.C. Cir. 1986).

ALTERNATIVE PROPOSALS FOR REVISING THE CONTENT PRONG

Alternative 1 – Retain the 120-day rule and bolster the Explanation and Justification

The Commission asks whether it should retain the current regulation, the 120-day content standard and bolster the explanation and justification.

This is the proper course of action.

The Court of Appeals has asked the Commission to undertake a factual inquiry in determining whether 120 days, or some other time period, adequately captures speech made for the purpose of influencing Federal elections. CCP submits that Congress had the relevant studies before it when it passed BCRA. Specifically, Congress relied on two studies by the Brennan Center in developing the concept of "electioneering communications," broadcast ads that mention a candidate within 60 days of a general election, or 30 days of a primary. The *McConnell* Court also relied on these studies in determining that the "electioneering communication" provisions were not overly broad. These studies demonstrate that the content standard adopted by the Commission, and in particular the 120 day standard of 11 C.F.R. §109.21(c)(4), are appropriate for achieving Congress's aims, protecting the rights of citizens from the chilling effect of investigations, and properly preserving the FEC's enforcement resources. In fact, if anything these studies demonstrate that the 120-day period is probably too long, and should be replaced by the same 60-day window used by Congress in deciding when it was appropriate to presume that a public communication carried an electioneering purpose.

First, we note that the Brennan Center's *Buying Time* studies make clear that there are real issue ads that deserve protection. "Interest groups sponsored both genuine issue ads (urging action on a public policy action or legislative bill) and electioneering ads (promoting the election or defeat of a federal candidate). Craig B. Holman and Luke P. McLoughlin, Buying Time 2000: Television Advertising in the 2000 Federal Elections, 56 (2002). The Center found that "[i]n the 2000 election, *genuine issue ads are rather evenly distributed throughout the year*, while group-sponsored electioneering ads make a sudden and overwhelming appearance immediately before elections." *Id.* (Emphasis added). Conversely, the Buying Time studies relied on by Congress and the Supreme Court found that "electioneering ads" are aired close to an election:

- "Approximately 60% of all federal election ads were aired in the six weeks prior to the election;" *Id.* at 53;
- "In the final four weeks of the campaign… groups aired 60% of their ads." *Id.;*

- "Group sponsored electioneering ads make a sudden and overwhelming appearance immediately before elections;" *Id.* at 56;
- "The weeks immediately prior to the election, *especially after Labor Day,* are the time for electioneering and advertisements about candidates for office;" *Id.* at 58 (emphasis added);
- "As in 1998, genuine issue advocacy became overwhelmed by group-sponsored electioneering issue ads with the increased proximity to Election Day. *Id.*

The 2002 *Buying Time* study did not consider the effect of other cut-off dates on electioneering ads, but the 2000 study did. That study found that 95% of advertisements promoting candidates were aired after July 1 of the election year. Jonathan S. Krasno and Daniel E. Seltz, Buying Time: Television Advertising in the 1998 Congressional Elections, p. 110, Figure 4.22 (2000). July 1 can fall no more than 129 days before a general election. Thus, **pursuant to the studies relied on by Congress and the Supreme Court, roughly 95% of electioneering ads – that is, ads that are not genuine issue ads – are covered by the Commission's 120 day rule expressed in §109.21(c)(4).** But in fact, the numbers are even higher, since *all* state primaries are scheduled so that at least some ads run prior to July 1 will also fall within the 120-day content rule. Additionally, remember that other coordinated activity falls within the rule of §109.21 at all times – specifically, republication of campaign material, and ads including express advocacy.

In sum, the data shows conclusively that Congress's intent to treat coordinated electioneering communications as contributions is not frustrated by the 120-day rule of §109.21(c)(4). Quite the contrary, the 120-day rule captures more than 95% of the public communications that are not "genuine" issue communications. How much more is not revealed by the studies, but given that in every state the time period extends for a larger portion of the year, up to 120 days, and given the studies' findings that electioneering ads are run close to elections, the number of non-genuine issue ads that might not be subject to coordination rules is probably near zero.

Thus, if anything, the 120 period may be overkill. A 60-day period -- that adopted by Congress for electioneering communications -- would capture over 80 percent of what the Buying Time Study considered coordinated electioneering ads, while providing meaningful protection to genuine issue ads that the Supreme Court has held ought to be protected. *See* Krasno and Seltz, p. 110, Figure 4.22.

To the extent added data is needed to justify the content standard – and the Center does not believe more is – the Center recommends that the Commission focus on independent expenditures made by the six national party committees in the 2004 cycle. BCRA required that such communications be reported within 48 or 24 hours (depending upon the calendar), which provides the Commission solid data as to when the party committees were acting. The 2004 cycle was also the first in which all dollars collected by national party committees were equally scarce, equally employable and equally valuable: all hard dollars. Unlike, previous cycles, where there were different types of

dollars available to party committees to be used for different purposes, in the 2004 cycle any dollar a national party committee raised was a dollar it could spend as it wished, in the most valuable method available: full throated and unvarnished advocacy of the election of its candidate or the defeat of his opponent. Thus the timing of the national party decisions in this area are indicative of when sophisticated actors believe elections are influenced by public advertising.

Coordinated expenditures are less valuable a marker because the party committees spend such dollars for items other than communications. Often, once the 441a(h) contributions in Senate races were expended, for example, the party committees would draw down their 441a(d) expenditures for many reasons, including to buck-up reluctant challengers of their own party by providing early polling, and other such services.

State party committee spending is less relevant because while State party committees were required to spend 100% hard dollars for any public communication in an even-numbered year that PASO's a candidate, the state parties still had the ability to raise soft dollars in the even numbered year for spending in the odd numbered year in state races. But the national parties had no such motivation. Additionally, the State party committees were dedicated to raising the funds necessary to conduct exempt volunteer activities, such as volunteer mail and literature drops.

Alternative 2 – Adopt a different time frame

The Commission asks whether it should adopt a time frame covering the period from January 1 of each election year through the day of the general election, particularly in Presidential contests.

Whether or not the standard applies to Presidential races, it is too broad. Such a standard does not allow for grassroots lobbying, which can and does occur in election years, and between primary and general elections. As discussed above, grassroots lobbying is precisely the type of constitutionally protected independent speech activity that is chilled by the investigations that follow from no content standard. But a sweeping content standard is equally bad, because the more it sweeps, that is, the less it is pegged to speech that is for the purpose of influencing elections, the less protection it provides to those engaged in other permissible forms of communication. Grassroots lobbying includes communications that mention candidates, targeted to voters in the home State or district, or, in the case of a President, targeted to voters nationwide. The Congress meets in election years, and incumbent Presidents conduct official business during election years. And the Buying Time studies conclude that legitimate issue advertising occurs at all times of the year. *See* Holman and McLoughlin, *supra*.

The Commission should not presume that all communications that mention candidates in an election year are reasonably intended to influence federal elections (and not to influence official, legislative or executive conduct). Too broad a standard can chill protected grassroots lobbying and issue development. And the Commission should not overly expand the 120-day time period, particularly as the United States Supreme Court

is deciding the juxtaposition of grassroots lobbying and electioneering prohibitions within just 60 days of an election (let alone 120 days or beyond) in *Wisconsin Right to Life v. FEC*, No. 04-1581 (2005).

The Commission asks whether, at the 120-240 day period before an election whether the fourth content standard could capture only public communications that promote, attack, support or oppose a candidate or political party.

CCP does not believe the Commission may employ the PASO test at all in the coordinated communications context. For a discussion of this, please see the discussion of Alternative 4, below.

Alternative 3 – Eliminate the time restriction from 11 CFR 109.21(c)(4)

The Commission seeks comment on whether the fourth content standard without a time frame would still be effective in distinguishing communications made for the purpose of influencing a Federal election from communications made for other purposes, such as communications made for the purpose of lobbying for or against certain legislation.

The error the Commission makes here is in reversing the presumptions. The Commission should presume always that speech is protected under the First Amendment, and that it is only coordinated speech made for the purpose of influencing an election, coordinated electioneering communications, and coordinated republications that are within the Commission's purview. To leave open the time frame on the theory that those who are really engaged in speech not for the purpose of influencing a federal election may prove it to the Commission, or may seek a separate dispensation, is entirely backward. The Commission is reasonable in its belief that election-influencing communications are generally susceptible of temporal definition and limitation. The Commission should continue to determine where that temporal limitation is. As noted above, CCP believes it is well within 120 days of an election, convention or caucus.

Alternative 4 – Replace the Content Standard in 11 CFR 109.24(c)(4) with a "PASO" Test

The Commission asks whether it should replace the content standard with a PASO standard or test.

In this rulemaking, it is the task of the Commission to define the term "expenditures" in the coordination context, in the context of section 441a(a)(7). The terms "electioneering communication" and "republication" in the coordination context are understood. It is the statutory term "expenditure" that the Commission is clarifying, and specifically, what the *Buckley* court called its critical phrase: "for the purpose of influencing." When Congress introduced PASO in 2002, it created black-letter law; a new term of art, yet nowhere said that PASO is coterminous with the statutory term "expenditure" or its critical phrase "for the purpose of influencing." Congress did not redefine "expenditure" when it adopted BCRA, and has yet to conflate "PASO" and

"expenditure" in subsequent legislation. What's more the term PASO, as found in type-iv federal election activity, for example, was upheld in *McConnell* as applied to sophisticated political actors; candidates, party committees, and, in limited circumstances to the activities of certain tax exempt organizations. The Court did not reach the question of whether PASO can apply to ordinary citizens -- the persons most in need of a well-defined content standard -- and chose instead to uphold the primary electioneering communication provision, which does not include PASO and is not at all vague. *See McConnell*, 540 U.S. 93, 190 n.73 (2003) ("We uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition.")

Adopting PASO as a definition of expenditure is sloppy statutory interpretation unworthy of the Commission. What's more, it is prohibited by operation of 2 U.S.C. §434(f)(3)(B)(ii). If, as proposed, the Commission adopts as a content standard a public communication that promotes, supports, attacks or opposes a candidate to federal office as a meaningful guidance on the term expenditure in 441a(a)(7)(B)(i), it would conflict with Congressional intent elsewhere in the Act. If adopted, the proposal would essentially say that a "PASO public communication" is an "expenditure" for purposes of coordination. But the back-up definition of electioneering communication itself is essentially a "PASO public communication," and the statute says, at section 434(f)(3)(B)(ii), that "[t]he term electioneering communication does not include [] a communication which constitutes an expenditure or independent expenditure under this Act". Indeed, black letter law does not permit the Commission to use PASO to define communicative expenditures, no matter how many days the communication occurs from an election.

Alternatively, the Commission invites comment on whether Alternative 4, instead of using a PASO standard, should create a safe harbor exemption from the coordinated communication rules for certain kinds of communications.

CCP believes that a well-defined content standard that says what is regulated best comports with the statute and jurisprudence in the coordinated context. It is unwise, in a First Amendment context, where independent speakers can be hailed before an investigative body, to have the Commission try to tackle the problem by defining what speech would be okay. It is better for the Commission to say where its jurisdiction lies, and what types of communications can trigger investigations.

Alternative 5 – Eliminate the time restrictions from 11 CFR 109.21(c)(4) for political committees only

The Court in *McConnell* did not say that all political party communications are for the purpose of influencing an election, or are presumptively for the purpose of influencing an election. Rather, it has said that Congress may ban soft money to party committees to prevent the circumvention of applicable hard money limits, and to keep from legislators the indirect pressure of large contributions. In eliminating time restrictions for political committees, the Commission would be presuming that all party committee communications are for the purpose of influencing an election. This is not

true. Though we hear little about it, parties still develop issues and platforms. Parties still engage in party building, even if they have to spend hard money to do so.

Alternative 6 – Replace the fourth content standard in 11 CFR 109.21(c)(4) with a standard covering public communications made for the purpose of influencing a Federal election

This standard is insufficiently defined even to survive the Court's analysis of thirty years ago. It is precisely the point of *Buckley* that the phrase "for the purpose of influencing" is unconstitutionally vague, and that -- in the context of defining the line between independent speech and coordinated speech -- the term must be more carefully defined.

> [T]he disclosure provision raises serious problems of vagueness, … that may deter those who seek to exercise protected First Amendment rights. Section 434(e) applies to '[e]very person … who makes contributions or expenditures.' 'Contributions' and 'expenditures' are defined … in terms of money or other valuable assets 'for the purpose of influencing' the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems."
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> ***
>
> There is no legislative history to guide us in determining the scope of the critical phrase 'for the purpose of … influencing' … Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done, consistent with the legislative purpose, to avoid the shoals of vagueness.

Buckley at 76-79 (citations omitted). Likewise, it is the job of the Commission here to define the statutory phrase "for the purpose of influencing" not merely to restate it.

While the *McConnell* Court may have stated that the express advocacy standard is functionally meaningless, it did so in passing on Congress's latest legislative effort, BCRA's electioneering communication provisions, and invited Congress to pass still further legislation. *See McConnell*, 540 U.S. at 224 (2003)("We are under no illusion that BCRA will be the last congressional statement on the matter"). But the Court did not invalidate *Buckley* with regard to the interpretation it provided core FECA provisions; provisions such as "expenditure" and, more importantly, the statutory terms the Commission is now trying to illuminate -- "expenditures made … in cooperation, consultation, or concert, with … a candidate." 2 U.S.C. §441a(a)(7)(B)(i). Said the Court in *McConnell*,

> [A] plain reading of *Buckley* and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 93 L. Ed. 2d 539, 107 S. Ct. 616 (MCFL),* shows that the express advocacy restriction *is a*

> *product of statutory interpretation*, not a constitutional command. Both the concept of express advocacy and the class of magic words were born of an effort to avoid constitutional problems of vagueness and overbreadth in the statute before the *Buckley* Court. Consistent with the principle that a constitutional rule should never be formulated more broadly than required by the facts to which it is to be applied, *Buckley* and *MCFL* were *specific to the statutory language before the Court.*

McConnell, 540 U.S. 93, __; 157 L. Ed. 2d 491, 522-523 (2003) (emphasis added). That specific statute that *Buckley* illuminated is FECA; and *Buckley* illuminates the term expenditure and its critical phrase "for the purpose of influencing", while Congress does not amend it.

Simply stating that the standard is "for the purpose of influencing" reintroduces the chill corrected by *Buckley*, and the case-by-case analysis that would flow from merely using the phrase as a content standard would return the Commission to the nightmare days of the old electioneering message standard, which is in effect no standard at all. It is the era in which the AFL-CIO suffered a years-long investigation, and the Business Coalition and Christian Coalition courted destruction in their years long fights for ultimate exoneration.

Alternative 7 – Eliminate the content prong and replace it with the requirement that a communication be a public communication as defined in 11 CFR 100.26.

The Commission seeks comment on whether the conduct prong by itself, without any content prong, would be effective in distinguishing between public communications made for other purposes, such as public communication of lobbying for or against certain legislation, or for supporting charitable or other non-political causes.

CCP disagrees with this approach in the strongest of terms. "No matter what facts [the Commission] finds through [an] investigation, the requisite jurisdiction for the investigation itself must stand or fall on the purely legal claim …". *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 390 (D.C. Cir. 1981). In *Machinists*, the D.C. Circuit had to determine whether to enforce a Commission subpoena against a "draft" committee where it was unclear whether the Commission had statutory authority even to regulate draft committees. *Id.* The D.C. Circuit stated that any alleged compelling interests the Commission may assert in seeking the information can be compelling and granted effect if the Commission first has authority to regulate a particular type of speech or activity. *Id.* But the Court held that "the highly sensitive character of the information sought simply makes it all the more important that the court be convinced that jurisdiction exists." *Id.* at 389. The statute the Commission is construing does not say that "public communications made in cooperation" are contributions. It says that expenditures made, electioneering communications made, and republications of campaign materials made in cooperation are contributions. *See generally*, 2 U.S.C. §§ 441a(a)(7)(B) & (C). Everybody knows what electioneering communications are, and have a good idea of what a republication of campaign materials

would look like. The Commission needs to set forth what "expenditure" means in this context. "Public communications" is a category greater than "expenditures," and to import it to section 441a(a)(7) by making it the content standard that define "expenditures" is to commit a statutory violation. What respondents need from the Commission is an affirmative legal defense to stop an unwarranted investigations into "public communications" that never could be or are quite unlikely to be "for the purpose of influencing an election." *See* CCP's discussion of the Content Prong, Its History and Its Importance at p.1, above.

OTHER ISSUES REGARDING THE CONTENT PRONG

1. The "directed to voters" requirement in 11 CFR 109.21(c)(4)(iii)

In the event that the Commission decides to retain a content prong, the Commission seeks comment on modifying the requirement in the fourth content standard that a public communication must be directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.

If the standard the Commission is illuminating is "for the purpose of influencing an election to Federal office," then the Commission is within its rights to require that those communications actually reach voters who can vote in the applicable election.

The current regulation, which lacks a required minimum number of voters reached, has not presented any difficulties to, or created any more confusion for, those seeking to comply with it. What is important is that the broadcast method be within the control of the speaker. Republications, rebroadcasts or e-mail forwards that that result in the communication reaching voters the speaker did not intend would be reached should not trigger regulation. The Commission should make this clear.

The Commission asks whether the express advocacy and republication of campaign material content standards should also contain a "directed to voters" standard.

The Commission's mission here is to fill gaps in and to define section 441a(a)(7). The electioneering content standard has a directed-to-voters standard because the statutory definition of electioneering communication subsumes directing communications to voters. Coordinated electioneering communications are contributions by operation of section 441a(a)(7) (and not just because electioneering communications are directed to voters in the district) -- as are coordinated republications of campaign materials, whether or not the materials republished are directed to voters in the district. The Commission in this rulemaking is trying, admirably, to determine what "expenditures" means in a coordinated context, and specifically what kind of communications are "for the purpose of influencing an election." In determining what it means for a communication to be for the purpose of influencing an election, it is proper for the Commission to determine whether the communication is directed to voters. But "for the purpose of influencing",

the key phrase in the term "expenditures", is only one trigger for coordination under section 441a(a)(7)(B). In short, the Commission may not add a directed-to-voters requirement for republication because the statute does not allow it.

2. Federal candidate endorsements of, and solicitations of funds for, other Federal or non-Federal candidates or State ballot initiatives.

The Commission invites comment regarding the application of the coordinated communication test to situations in which Federal candidates endorse, or solicit funds for other Federal and non-Federal candidates or State ballot initiatives.

In its last rulemaking, the Commission made a minor but material error in defining "coordinated communications." The Commission used the word "that" where it should have used "a." The payment prong of the regulations, 11 CFR 109.21(a)(1), provided as follows: "A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication: (1) Is paid for by a person other than *that* candidate, authorized committee, political party committee, or any agent of any of the foregoing". The Commission should redefine the payment prong to return to its decades long recognition that federal officeholders cannot corrupt each other; that backbenchers are not corrupted by endorsements from their President or Senator; and that backbenchers cannot corrupt their standard bearer, whether or not the respective federal candidates review or approve endorsement communications. No policy of FECA or BCRA is fostered by preventing federal-candidate endorsers from reviewing the endorsement ads of federal-candidate endorsees.

The Federal Election Campaign Act of 1971, as amended, ("FECA") was upheld as a means of preventing the actual and apparent "corruption spawned by the real or imagined coercive influence of large financial contributions." *Buckley v. Valeo*, 424 U.S.1, 25 (1976). The Bipartisan Campaign Reform Act of 2002 ("BCRA") added three core provisions to FECA. It required national party committees to fund all activities with Federal funds. It redrew, for State and local party committees, the boundary between Federal and non-Federal election activities. And it strengthened disclosure and funding requirements for advertisements run by entities other than political committees close to an election. Much like FECA, BCRA was upheld as an "effort to confine the ill effects of aggregated wealth on our political system." *McConnell, supra*, slip. op. at 118. Neither FECA nor BCRA, however, were promulgated or upheld to prevent any alleged "corruption" between one hard-dollar Federal campaign account and a hard-dollar Federal campaign account of another candidate.[2] There is no discussion of such activity in the anti-corruption rationale of *Buckley*; nothing in the anti-circumvention rationale of *FEC v. Colorado Republican Federal Campaign Committee*, 121 S. Ct. 2351 (2001); and nothing in the anti-circumvention rationale of *McConnell v. FEC, supra*. Preventing

[2] CCP is aware of 2 U.S.C. § 432(e)(3). But CCP notes that this provision was never a basis for the Commission to include the value of reviewed endorsement spots run by authorized committees in previous coordination regulations. Nothing in BCRA mandates a change in Commission practice in this area.

"corruption" between Federal candidate committees is simply not a core concern recognized by Congress or the Courts. There is no reason to believe BCRA now requires the Commission to begin prohibiting review of federal-candidate endorsement ads paid by other federal candidate committees, under a theory of coordinated communications.

In its rulemaking on "General Public Political Communications Coordinated with Candidates and Party Committees", 65 *FR* 76138 (Dec. 6, 2000), the Commission stated that its rules applied to expenditures "paid for by separate segregated funds, nonconnected committees, individuals, or any other person *except candidates, authorized committees, and party committees." Id.* at 76142 (emphasis added). It is no secret that Congress viewed this rulemaking with disfavor. In BCRA, Congress ordered the Commission's December 2000 regulations repealed within 270 days of the passage of BCRA. *See* BCRA Sections 214(b) and 402(c)(1), Public Law 107-155, 116 Stat. 94 and 112, (Mar. 27, 2002).

It is also no secret that Congress was acutely aware of the details in the December 2000 rulemaking. In BCRA Section 214(c), Congress ordered the Commission to correct all perceived problems with this rulemaking. It ordered the Commission to address payments for republication of campaign materials, payments for use of a common vendor, payments for communications directed by former employees, and payments made after substantial discussion. *Id.* Congress ordered the Commission not to require "agreement or formal collaboration" to establish coordination. *Id.* And Congress even amended 2 U.S.C. § 441a(a)(7)(B) to address coordination between party committees and outside groups. *Id.* Despite its command of the details of the Commission's December 2000 rulemaking, Congress did not order the Commission to address coordination between one principal campaign committee and another. Indeed, Congress, in BCRA, ordered that the Commission "shall promulgate new regulations on coordinated communications *paid for by persons other than candidates, authorized committees of candidates*, and party committees." *Id.* (Emphasis added).

A "candidate" is defined as "an individual who seeks nomination for election, or election, to *Federal* office," etc. 2 U.S.C. § 431(2) (emphasis added). An "authorized committee" is defined as the "campaign committee … authorized by a [federal] candidate." 2 U.S.C. § 431(6). Thus these definitions ensure that we are talking about interactions between one Federal candidate and another Federal candidate.

Advisory Opinion 2003-25, the "Bayh AO," is different, however. The Bayh AO implicates a core provision of BCRA and warranted enhanced consideration from the Commission. The Bayh AO contemplates the use of a federal candidate's image in an endorsement ad for a mayoral candidate, paid with non-Federal funds, in an era of BCRA prohibitions on non-federal candidates running soft-dollars ads that "promote, support, attack or oppose" federal candidates. The Commission concluded that the ad run by the Weinzapfel Committee did not violate this provision. However, the Commission also considered whether the Weinzapfel Committee ad would constitute an in-kind contribution to Senator Bayh; a coordinated communication. *See* AO 2003-25. The Commission concluded it would not, because the communication did not meet the

content standard at 11 CFR 109.21(c)(4). *Id.* These sentiments were echoed by three Commissioners in concurrence. *See* Concurring Opinion of Vice Chairman Bradley A. Smith and Commissioners David M. Mason and Michael E. Toner (without benefit of a content standard Senator Bayh would have received an in-kind contribution). The Commission agreed that because Senator Bayh was "talking to camera" he obviously had some direction or control over the Weinzapfel message. *Id.*

The Commission also held that the Weinzapfel Committee met the payment requirement under 11 CFR 109.21(a) because the Weinzapfel Committee was *not* a [Federal] authorized committee of a Federal candidate. *See* AO 2003-25. But unlike the Weinzapfel Committee addressed in the Bayh AO, the Kerr Committee addressed in AO 2004-1 *is* a [federal] authorized committee of a Federal candidate, and therefore should not have met the payment prong, had the Commission's payment been properly drafted at the time.

The Commission should take this opportunity to redraft the payment prong at 11 CFR to read as follows: "A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication: (1) Is paid for by a person other than *a* candidate, authorized committee, political party committee, or any agent of any of the foregoing". Some may worry unnecessarily that rescinding Advisory Opinion 2004-1 would prevent political committees from sharing communications in which they split the costs. But this is not so, as such cost-splitting schemes are contemplated in the time/space allocation rules of 11 CFR Part 106, and were recently explained with regard to telephone bank communications by the Commission in a recent rulemaking. *See Final Rules for Party Committee Telephone Banks*, 68 FR 64517 (Nov. 14, 2003).

Additionally, there is no need to worry that, by replacing a "that" where an "a" should be, the Commission will be allowing party committees to exceed their section 441a(d) limits with impunity. Coordinated spending by party committees on behalf of candidates in excess of applicable section 441a(d) limits is addressed by the Commission in 11 CFR 109.37(a) ("A political party communication is coordinated with a candidate … when the communication … is paid for by a political party committee or its agent [and meets one of several content and conduct prongs]").

The Commission invites comment regarding the application of the coordinated communication test to situations in which Federal candidates solicit funds for other Federal and non-Federal candidates or State ballot initiatives.

Officeholders raise funds for other organizations all of the time. The purported value to the candidate of having that candidate's name appear in another organization's solicitation pieces is of no import. The relevant questions, post-BCRA, are what types of funds the officeholders are raising for party committees, for Federal and non-Federal candidates, and for State ballot initiatives. Such matters are adequately solved by the policies set forth in recent Advisory Opinions such as AO 2003-03 (Cantor), AO 2003-36 (Republican Governors Association) and 2005-10 (Berman and Doolittle). The value of

the names a candidate legitimately receives by signing another organization's solicitation mailer is a matter for another rulemaking, and is not a coordination issue. *See Termination of Rulemaking, Mailing Lists of Political Committees*, 68 *FR* 64571 (Nov. 14, 2003).

3. Proposed clarification of application of 120-day time frame requirement in 11 CFR 109.21(c)(4)(ii).

The Commission should not continue the error it promulgated in Advisory Opinion 2004-1, for the reasons listed above.

ISSUES REGARDING THE CONDUCT PRONG

1. The "request or suggest" conduct standard in 11 CFR 109.21(d)(1)

The Commission invites comment on whether, even if the Commission decides to retain the content prong of the coordinated communication test, it should provide that if the first conduct standard is satisfied, the communication would automatically qualify as a coordinated communication without also having to satisfy any of the standards contained in the content prong.

No, incumbents can work with constituents on lobbying. An officeholder that suggests that his constituents engage in grassroots lobbying is not suggesting that the constituents engage in communications that are for the purpose of influencing an election.

The same is true of party committees, which engage in issue development and issue advocacy. The Commission may not presume that all communications a party committee requests or would run are for the purpose of influencing a federal election.

2. The "common vendor" and "former employee" conduct standards in 11 CFR 109.21(d)(4) and (5).

The Commission seeks comment on whether it should change the coordinated communication regulations to cover common vendors and former employees only if these common vendors and former employees are agents under the Commission's definition of agent in 11 CFR 109.3.

The Commission does have the authority to limit vendors and employees to agents – whatever the Commission ultimately decides an "agent" to be in its pending rulemaking -- because the statutory command in BCRA is that the Commission redraft its coordination regulations and "address" the activities of agents and common vendors and former employees. *See* BCRA Section 214(c). The Commission is taking into account and addressing the role of former employees and common vendors in this rulemaking. It is a regulatory agency possessing expertise in this area, and has the flexibility within BCRA's command to make such judgments.

The Commission also seeks comment on whether it should create a rebuttable presumption that a common vendor or former employee has not engaged in coordinated conduct if the common vendor or former employee has taken certain specified actions, such as the use of so-called "firewalls."

Yes, the Commission should adopt such a presumption. In a First Amendment context, and in an era of limited, skilled, consulting firms engaged in a cyclical business, it is important to remove the chill of participation by providing guidance. A practicing election lawyer can show to a layperson that the Commission has adopted this presumption and can, perhaps, assure or convince him or her to participate in a campaign with a lesser fear of legal jeopardy.

CCP believes that requirements of a firewall should be addressed on a case-by-case basis – especially as the firewall creates nothing more than a rebuttable presumption that the conduct standards were not violated. In other words, this rebuttable presumption can smooth, but cannot cut short, an investigation into coordinated activity in the same way that a well-defined content standard can.

3. The use of publicly available information in coordinated communications.

The Commission seeks comment on whether to create a safe harbor that would make clear as a matter of law that (1) the use of publicly available information in connection with a public communication by any person paying for that public communication does not satisfy and of the conduct standards, and (2) a candidate's or political party committee's conveyance of publicly available information to any person paying for a public communication does not satisfy any of the conduct standards.

And if the Commission adopts such a safe harbor, whose burden is it to establish that the material was publicly available at the time of publication?

CCP has no comment on these proposals except to say that publicly available information independently acquired cannot support a violation.

4. The relationship between conduct and content standards

The Commission asks whether the conduct and content standards are properly understood as dynamic and working in conjunction with one another, such that if the Commission broadens or eliminates the content standard, would it be appropriate to narrow or otherwise modify any of the conduct standards?

No, the standards are not each dynamic. And the standards together should not be seen as dynamic, malleable or operating inversely with each other. This is a very important point. The content standard is static and operates independently of the conduct standard. CCP has discussed what is at stake in the absence of content standards, and how the content and conduct standards do not operate inversely with each other. Each

has a separate function. In short, the content standard determines whether a respondent will go through an ordeal. The conduct standard determines how a respondent will fare once the ordeal begins.

But it is important to note that what might appear a respondent-friendly conduct standard can make the investigation far more brutal for the respondent than a "tougher" standard, as, in that situation, the Commission tries, quite rightly, to prove its case. The content standard must be well defined no matter what conduct standard the Commission ultimately adopts. As stated by former Commissioner Smith:

> Absent a content standard however, no such immediate defense is available if the Commission launches into an investigation into the alleged coordination with candidates. Further, such an investigation is likely to be highly intrusive, as is demonstrated by this case [MUR 4624 (The Coalition)] and another recent high-profile matter eventually resulting in no finding of a violation, MUR 4291 (American Federation of Labor and Congress of Industrial Organizations). The investigation can include extensive rifling through the respondent's files, public revelations of internal plans and strategies, depositions of group leaders, and the like. Such allegations and investigations may be avoided only by completely avoiding all contact with candidates, because even minimal contact could trigger a credible allegation. *Oddly, the less immediately obvious evidence there is that the conduct would meet the [conduct standard] the more intrusive the investigation is likely to be, as the Commission searches for evidence of the veracity of the complaint.* The effect of [a respondent-protective conduct standard in the absence of a meaningful content standard] becomes essentially the same as the rule struck down in *Clifton*; "it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office," and is therefore, "patently offensive to the First Amendment." 114 F.3d 1309, 1314 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

Statement for the Record of Commissioner Bradley A. Smith, MUR 4624, (The Coalition) p.4 (Nov. 6, 2001) (emphasis added). The need for a well-defined content standard is critical and cannot be ameliorated with a "tough" or, from the other point of view "permissive", conduct standard. The standards serve separate functions, and for this reason are in some sense unrelated.

ISSUES REGARDING THE PAYMENT PRONG

The Commission seeks comment on whether it should include "in whole or in part" into the payment prong, to make plain that the payment prong is satisfied if a person other than the candidate's authorized committee pays for only part of the costs of the communication.

The Commission should not include this language. Coordinated expenditures are contributions to the non-paying committee. If the committee pays its share, there is no contribution. This proposal, if adopted, would improperly capture communications properly attributed under the time and space rules set forth at 11 CFR 106.1(a)(1).

PARTY COORDINATED COMMUNICATIONS

CCP has no comments on this proposal or question.

CONCLUSION

CCP respects the efforts of the Commission in this area, and requests the opportunity to testify at a public hearing on these issues.

Respectfully submitted,

/s/ S M Hoersting

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