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Subject Comments of the Chamber of Commerce on Coordinated Communications NPRM (2005-28)

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January 13, 2006

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VIA EMAIL (coordination@fec.gov) and HAND DELIVERY

Mr. Brad Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Written Comments of the Chamber of Commerce of the United States (Notice 2005-28, Coordinated Communications) and Request to Testify

Dear Mr. Deutsch:

The Chamber of Commerce of the United States submits the attached comments in response to the Notice of Proposed Rulemaking published at 70 Fed. Reg. 73946, *Coordinated Communications* (Dec. 14, 2005). A paper copy will follow via hand delivery.

In addition, Jan Witold Baran respectfully requests an opportunity to testify on behalf of the Chamber at the public hearings scheduled for January 25 and/or 26, 2006, on this matter.

Sincerely,

Jan Witold Baran

Counsel to the Chamber of Commerce of the United States

BEFORE THE FEDERAL ELECTION COMMISSION

Notice of Proposed Rulemaking	)	
	)	70 Fed. Reg. 73946 (Dec. 14, 2005)
Coordinated Communications	)	

COMMENTS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

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January 13, 2006

TABLE OF CONTENTS

Page

I. ABOUT THE CHAMBER

The Chamber of Commerce of the United States ("Chamber") submits these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking ("NPRM") announced in the December 14, 2005 Federal Register, Proposed Rulemaking on Coordinated Communication. The Chamber was incorporated in 1916 in the District of Columbia. It is a non-profit, non-stock corporation exempt from taxation under I.R.C. § 501(c)(6). It is the world's largest not-for-profit business federation, representing three million businesses, 3,000 state and local chambers, 830 business associations, and 87 American Chambers of Commerce abroad. The Chamber's members include businesses of all sizes and industries from every corner of America. On their behalf, the Chamber involves itself in various lobbying, electoral, and litigation activities, in furtherance of which the Chamber is daily engaged in internal and public communications with members, legislators, and regulators about vital public policy issues.

II. PRELIMINARY STATEMENT

The FEC's NPRM announces the Commission's consideration of specific changes to the regulations governing what communications are to be considered "coordinated" with Federal candidates and political party committees. The FEC is undertaking this rulemaking in response to the judicial invalidation of a particular provision of its regulations, which the United States Court of Appeals found infirm under the Administrative Procedure Act ("APA"). Specifically, the Commission previously had adopted regulations, at 11 C.F.R. § 109.21, at the direction of Congress in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA"), to regulate "coordinated general public political communications." See *Final Rules and Explanation and Justification on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421 (Jan. 3, 2003). This rulemaking was initiated on September 24, 2002, see *Notice of*

Proposed Rulemaking on Coordinate and Independent Expenditures, 67 Fed. Reg. 60042 (Sept 24, 2002). The Chamber submitted comments on that rulemaking on October 11, 2002.

After reviewing the NPRM and considering the legal and practical implications of the various proposals for its members, the Chamber of Commerce has several concerns. As a threshold matter, the Chamber reminds the Commission that it must exercise the utmost care and circumspection in regulating this area of core political speech. The Chamber communicates with legislators and the public on a daily basis regarding hundreds of policy priorities. Thus, the Chamber is acutely sensitive to any regulatory standard that could punish, and thereby chill, those legitimate activities. Most critically, the Chamber urges the Commission to recognize and respect the need of regulated entities for clarity and predictability in planning their activities. No organization should have its core mission and First Amendment rights subjected to vague and inscrutable standards which fail to provide guidance as to how to comply and invite post hoc accusation and recrimination.

Specifically, the Chamber urges the Commission to hew closely to the direction of the D.C. Circuit and go no farther in rewriting its regulations than necessary to satisfy its constitutional and procedural obligations and to provide clear guidance. The regulated community is in dire need of clarity and predictability with respect to laws imposing criminal and civil liability for core political speech and advocacy. The Commission should not seize this opportunity to undertake a wholesale rewriting of the coordination rules, as some of the proposed alternatives do. Rather, it should review the comments and concerns of the regulated entities participating in this proceeding in order to develop and justify a bright line rule that will provide much needed clarity, and retain the substance of current rules for at least another election cycle

so that regulated entities can become familiar with the requirements, and the FEC can observe the practical consequences.[1]

III. BACKGROUND

A. The Statutory Scheme Governing "Coordinated Communications"

The BCRA repealed the FEC's previous rules on coordinated communication, and instructed the FEC to:

> promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address-
>
> (1) payments for the republication of campaign materials;
> (2) payments for the use of a common vendor;
> (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and
> (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

2 U.S.C. § 441a note; BCRA § 214(b)-(c).

The rules subsequently adopted by the FEC established a three-prong test for determining whether a communication is coordinated, and thus whether the communication constitutes an in-kind contribution to a candidate, a candidate's authorized committee, or a political party committee. Under the Commission's definition, a communication is a coordinated communication if it is paid for by a person other than a candidate, his or her authorized committee, a political party committee, or an agent of any of the foregoing persons and it satisfies one of the content standards and one of the conduct standards outlined in the regulation. 11 C.F.R.§ 109.21. This definition is critical because if a communication by an entity – be it a corporation, PAC, or individual – is deemed a coordinated communication, it is considered an in-

[1] The Chamber respectfully requests that Jan Baran be allowed to testify at the hearings on this rulemaking, on January 25 or 26, 2006.

kind contribution to the candidate, authorized committee, or political party committee with which it is coordinated. 11 C.F.R. §§ 100.16 & 109.20(b). And, if a communication is coordinated, it is brought within the prohibitions and limitations of the Federal Election Campaign Act ("FECA"), which, among other things, prohibits corporate contributions and limits contributions by PACs to $5,000 per election per candidate. Thus, coordinated corporate communications under these regulations are illegal corporate contributions.

1. The FEC's Content Standards

The regulations defining coordinated contributions contained four content standards. If a communication satisfies one of these four, and the conduct standards described below, it is considered a coordinated communication. Conversely, if a communication is of a type not described by any one of these four content standards, an entity has not made a coordinated communication regardless of any interaction with federal candidates or political parties. *See Explanation and Justification on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 426-28 (Jan. 3, 2003). The four standards are: (1) communications that come within the definition of electioneering communications. 11 C.F.R. § 109.21(c)(1);[2] (2) communications that involve the redistribution, republication, or dissemination of campaign materials such as flyers, brochures, yard signs, etc. *Id.* § 109.21(c)(2); (3) a "public communication" that expressly advocates the election or defeat of a clearly identified federal candidate is subject to the coordination rules. *Id.* § 109.21(c)(3); (4) "public communications" that refer to a political party or clearly identified candidate for federal office, that are distributed within 120 days of an election, convention, or caucus, and directed to voters in the jurisdiction of the clearly identified

[2] An electioneering communication is a broadcast, cable, and satellite communication that refers to a clearly identified federal candidate and is broadcast within 30 days of a primary and 60 days of a general or special election. 11 C.F.R. § 100.29. An electioneering communication must also be able to be received by 50,000 or more persons in the relevant Congressional District or state.

candidate or a jurisdiction in which the political party has one or more candidates appearing on the ballot. Id. § 109.21(c)(4).

2. The FEC's Conduct Standards

In order to establish coordination, suspect conduct must fulfill one of five conduct standards. No agreement or formal collaboration need be present for the FEC to find coordination, id. § 109.21(e), however, "[a] candidate's or a political party committee's response to an inquiry about the candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards." Id. § 109.21(f).

There are several conduct standards that, if satisfied, can render a communication improperly "coordinated." First, a communication "created, produced, or distributed" at the request or suggestion of a candidate, authorized committee, political party committee, or an agent of any of the foregoing, is coordinated. Also, if the person paying for a covered communication suggests how it is to be "created, produced, or distributed" and the candidate, authorized committee, political party committee or agent of the foregoing assents to the suggestion, then the covered communication is coordinated. Id. § 109.21(d)(1)(ii). Second, a covered communication is coordinated if a candidate, authorized committee, political party committee, or agent of any of the foregoing is materially involved in decisions regarding any of the following: "the content of the communication; the intended audience for the communication; the means or mode of the communication; the specific media outlet used for the communication; the timing or frequency of the communication; or the size or prominence of a printed communication, or the duration of a communication by means of a broadcast, cable, or satellite." Id. § 109.21(d)(2)(i-vi). Third, a communication is coordinated if it is created, produced, or

distributed after one or more substantial discussions about the communication between the person paying for the communication (or its employees or agents) and the candidate who is clearly identified in the communication, his or her authorized committee, his or her opponent or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing.[3] Fourth, a communication can be considered coordinated if it satisfies certain criteria related to common vendors. Finally, a communication can be treated as coordinated if the communication is paid for, or made based on the information provided, by a former employee, independent contractor, or the employer of a former employee or independent contractor, provided certain other criteria are met. Id. § 109.21(d)(5)(i)-(ii).

B. The Instant Rulemaking

This rulemaking is the product of a legal challenge brought by Congressmen Shays and Meehan seeking judicial review of the regulations adopted by the FEC. Relevant to the instant rulemaking, they challenged the new rules on coordination. Specifically, they "object[ed] to the fact that under this regulation, unless the communication constitutes 'express advocacy' or is a republication of a candidate's own materials, the regulation only bars coordinated communications within 120 days of an election, primary or convention." Shays v. FEC, 337 F. Supp. 2d 28, 57 (D.D.C. 2004). The District Court agreed that the coordination rule was infirm because "the FEC's exclusion of coordinated communications made more than 120 days before a political convention, general or primary election, as well as any that do not refer to a candidate for federal office or a political party and any not aimed at a particular candidate's electorate or electorate where a named political party has a candidate in the race, undercuts FECA's statutory

[3] "A discussion is substantial . . . if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication." *Id.* § 109.21(d)(3).

purposes and therefore these aspects of the regulations are entitled to no deference." Id. at 64-65.

The FEC appealed to the D.C. Circuit, which similarly invalidated the 120 day portion of the rule, but did not agree with the District Court that the entirety of the rule was infirm. The Court of Appeals concluded that while the FEC's reasoning – that time, place, and content may illuminate communicative purpose and thus distinguish FECA "expenditures" from other communications – was acceptable, the specific 120-day time-frame was arbitrary and capricious. To address the Court's concern that the 120 day time period set forth in the previous version of the regulation was not adequately justified by the Commission, the FEC invites comments on seven alternative formulations of the coordination rule, some of which are far more sweeping than required to satisfy the APA obligations identified by the D.C. Circuit in Shays v. FEC.

IV. THE FEC MUST BE MINDFUL OF WELL-ESTABLISHED CONSTITUTIONAL LIMITATIONS THAT PROTECT FUNDAMENTAL CONSTITUTIONAL RIGHTS

Public policy is decided by elected officials. When an active legislative issue is before incumbent officials for action, interested persons have a compelling need to address those issues and to receive speech concerning those issues. In order that such speech is able effectively to petition for redress, often it must identify the government officials who will make critical decisions. A key function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. The regulation of communications by the Chamber and similar groups about or between organizations, individuals, legislators, and candidates for elective office is fraught with peril because the government is injecting itself into core political, expressive, and associational rights expressly protected by the Constitution. Indeed, it is incumbent upon the FEC to "attempt

to avoid unnecessarily infringing on First Amendment interests." AFL-CIO v. FEC, 333 F.3d 168, 179 (D.C. Cir. 2003). Several fundamental political and expressive rights are implicated by any rulemaking in this area, and counsel regulatory caution and restraint.

A. Coordination Rules Threaten the Exercise of the Right to Petition

The First Amendment guarantees "'the right of the people ... to petition the Government for a redress of grievances.' The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." McDonald v. Smith, 472 U.S. 479, 482 (1985). The Supreme Court has made clear that the right to petition the government is "implicit in '[t]he very idea of government, republican in form." Id. (quoting United States v. Cruikshank, 92 U.S. 542, (1875)). Indeed, the Supreme Court has noted the history of the right to petition predates the formation of these United States:

> The historical roots of the Petition Clause long antedate the Constitution. In 1689, the Bill of Rights exacted of William and Mary stated: '[I]t is the Right of the Subjects to petition the King.' 1 Wm. & Mary, Sess. 2, ch. 2. This idea reappeared in the Colonies when the Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. See 1 B. Schwartz, The Bill of Rights-- A Documentary History 198 (1971). And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances. See, e.g., Pennsylvania Declaration of Rights (1776).

McDonald, 472 U.S. at 482-483. This venerable tradition was recognized by the founders. "James Madison made clear in the congressional debate on the proposed amendment that people 'may communicate their will' through direct petitions to the legislature and government officials." McDonald, (quoting 1 Annals of Cong. 738 (1789)).

Government actions which threaten to interfere with or burden the right to petition must be undertaken with the utmost caution and circumspection. Indeed, as one court has observed in the context of coordinated communication:

> the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contract between candidates and corporations and unions."

FEC v. The Christian Coal., 52 F. Supp. 2d 45, 88-89 (D.D.C. 1999).

B. Coordination Rules Threaten the Exercise of the Right to Free Expression

Political speech and communication are core First Amendment values that are not to be encroached upon lightly. The First Amendment commands categorically "Congress shall make no law ... abridging the freedom of speech," a command that applies with full force to corporate speech. Indeed, it is well established that corporate speech on public issues is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," Thornhill v. Alabama, 310 U.S. 88, 103 (1940), and is part of "the free flow of information" protected by the First Amendment, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). That is why the Supreme Court repeatedly has concluded that corporate speech is deserving of the same high level of First Amendment protection afforded to speech by individuals. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); Consol. Edison Co. of N.Y. Inc. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 19 (1986); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657, 699-701 (1990) (unanimous as to "strict scrutiny" standard of review); McConnell v. FEC, 540 U.S. 93, 330 (2003) (Kennedy, J., dissenting) ("All parties agree strict scrutiny applies....").

The right of free speech includes the right to receive information from willing speakers, including corporations. See Bellotti, 435 U.S. at 783 ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from

limiting the stock of information from which members of the public may draw"); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] ... necessarily protects the right to receive it.") (internal citation omitted). Pertinent to the instant rulemaking, the First Amendment protects the right to receive political, social, and other information related to the functioning of government, see Kleindienst v. Mandel, 408 U.S. 753, 763 (1972) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)), including information about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." Mills v. Alabama, 384 U.S. 214, 218-19 (1966). Were that not so, the First Amendment's universally recognized purpose of assuring free discussion of public affairs could not be achieved. See id.; Kleindienst, 408 U.S. at 763 (citing Red Lion Broad. Co., 395 U.S. at 390).

In short, corporate speech on public issues receives the same high degree of First Amendment protection as speech by individuals. Although McConnell sustained a prohibition on corporations engaging in electioneering communications, it did so because "the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office" and electioneering communications "are the functional equivalent of express advocacy." 540 U.S. at 205-06. That rationale itself implies its own limitation – suppression of individual, organizational, or corporate speech must be no broader than is strictly necessary.

Indeed, McConnell did not abandon the "express advocacy" requirement for regulation of speech by nonparty groups like corporations; the Court merely explained that, when faced with a constitutionally precise and tailored restriction, the "express advocacy" test would not necessarily serve as a limiting construction because the statute would not need it. See

McConnell, 540 U.S. at 689 (because the electioneering provisions are "both easily understood and objectively determinable .... the constitutional objection that persuaded the Court in Buckley to limit FECA's reach to express advocacy is simply inapposite here."). Thus, the "express advocacy" standard lives on, to be applied where statutes or Regulations fail to achieve the constitutionally required precision to avoid overbreadth and vagueness concerns. See Anderson v. Spear, 356 F.3d 651, 663-65 (6th Cir. 2004). This standard should guide the FEC's discretion in formulating rules, like those proposed in this rulemaking, that burden core First Amendment rights.

C. Coordination Rules Threaten the Exercise of the Right to Associate

Freedom of association is a critical part of the liberties protected by the First Amendment. See Buckley v. Valeo, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression."). Indeed,

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed .... Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citation omitted). Organizations like the Chamber embody that tradition of collective action in pursuit of common goals. The Chamber, like many of the organizations facing increased regulation by virtue of the FEC's pending rulemaking, routinely engages in petitioning and speech activities on behalf of larger groups and collections of individual interests. These activities are effective in part because of the size and collective import of the constituency the organization represents. The Chamber's

activities are aimed at communicating with its members, the general public, and policy-makers to achieved desired goals through education and persuasion. Any regulation of the communication that results from or is intended to advance the policy priorities of organizations' constituents threatens the vitality of the organization. In particular, regulations that do not provide clear guidance, or that sanction intrusive investigations and burdensome penalties based solely on the content of expressive activity and/or inferences drawn from constitutionally-protected meetings between organizations and others, including officials or candidates, will chill the legitimate exercise of those protected activities. See, e.g., Asbestos School Litigation v. Giles, 46 F.3d 1284, 1295-96 (3d Cir. 1994) ("we have some concern that requiring Pfizer to stand trial for civil conspiracy and concert of action predicated solely on its exercise of its First Amendment freedoms could generally chill the exercise of the freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate.").

V. THE COMMISSION SHOULD ADOPT A MINIMALLY BURDENSOME BRIGHT LINE REGULATION THAT IS ADEQUATELY JUSTIFIED BY REASON AND CONGRESSIONAL INTENT

A. The FEC Should Not Reach Beyond the Issues Necessary to Comply with the Directive in *Shays v. FEC*

The NPRM raises numerous issues that were not litigated in the underlying litigation, and proposes several fundamental changes which are not necessary or appropriate to satisfy a reviewing court that the FEC has complied with its obligations under the APA. In the interest of stability and predictability, the FEC should try to keep as much of its current, unchallenged, and presumably lawful regulation in place, to afford the regulated community time to live with and understand the regulations. Campaign finance regulation has been in a state of intense turmoil and uncertainty for the past five years. The regulated community deserves at least one election

cycle in which few things of major consequence change dramatically. As such, the FEC should strive to preserve as much of its current regulation as possible, and change elements only as required by the D.C. Circuit's decision in Shays v. FEC. The FEC can address the narrow and straightforward APA problem identified by that Court without sua sponte revisiting or re-writing large or unnecessary portions of its coordination regulations. Maintaining as much of the status quo as possible for at least one election cycle would benefit the FEC as well by preserving scarce agency resources for other regulatory initiatives, and giving it the opportunity it to observe and collect evidence about how its regulatory choices operate in practice.

B. The FEC's Regulation of Coordination Must Be Clear and Narrowly Tailored

Even if it were appropriate or desirable to undertake a more searching review of its regulations, the vagueness of many of the proposed standards for coordinated communication offends many of the basic constitutional principles require precision in governmental prohibitions on conduct or expression. See Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997) (noting risk that vague statutes may chill protected expression). As the Supreme Court explained in Grayned v. City of Rockford, 408 U.S. 104 (1972),

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms.

> Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (emphases added) (citations and quotations omitted).

Subjecting groups like the Chamber to the threat of penalties for the exercise of their expressive and associational rights should be undertaken with the utmost care and precision. Such precision is notably lacking from several of the proposals contained in the NPRM.

> [S]tatutes restrictive of or purporting to place limits to those (First Amendment) freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb * * * and * * * the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation.

Baggett v. Bullitt, 377 U.S. 360, 373 (1964) (quoting United States v. Congress of Indus. Orgs., 335 U.S. 106, 141-42 (1948) (Rutledge, J., concurring). As Justice Rutledge noted, "[b]lured signposts to criminality will not suffice to create it." Id. at 142.

In this regard, the inderterminacy of most of the proposals is evident when contrasted to the definition of "electioneering communications." In the BCRA, Congress took pains to define "electioneering communication" precisely, in order to provide guidance and predictability to the regulated community, and to survive constitutional scrutiny on judicial review. The Supreme Court in McConnell approved of Congress' efforts and concluded that precision of the statute on this matter rendered unnecessary the "express advocacy" narrowing construction applied in Buckley.

> [BCRA's] definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in Buckley. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least

> 50,000 viewers or listeners. These components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in Buckley to limit FECA's reach to express advocacy is simply inapposite here.

McConnell, 540 U.S. at 689 (citation omitted). By contrast, the standards set out in the NPRM provides little or no concrete guidance for organizations to lawfully engage in advocacy, petitioning, political speech. The uncertainty that plagues many of the proposed alternatives may chill legislative and expressive activities. The possibility of liability for lawful activities, and the chilling effect that such a possibility would have on legitimate activity, offends the political, expressive, and associational freedoms protected by the First Amendment.

Further, because the proposed regulations infringe on the right and ability to engage in free expression of political ideas, the over- or under-inclusiveness of the regulation could be fatal to its ability to survive constitutional scrutiny. "A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative)." Republican Party of Minn. v. White, 416 F.3d 738, 751 (8th Cir. 2005) (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 122 n. (1991) (stating that a regulation is not narrowly tailored if it is overinclusive); Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989) (holding that the underinclusiveness of a statute raises "serious doubts" about whether the statute actually serves the state's purported interest); Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990) (finding that a less restrictive means was available to advance the state's interest); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986) (same)). "In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such

regulation to be as precisely tailored as possible." Republican Party of Minn., 416 F.3d at 751 (emphasis in original).

C. The Rules Must Be Consistent with and Relate to the Only Basis for Regulation of Political Expression: Combating Improper Influences on Federal Elections

The legitimacy of Congress' regulation of campaign financing rests on a Congressional and judicial recognition that the government's interest is limited to activity and communication that is designed or intended to improperly influence federal elections. For example, the Supreme Court in Buckley clearly understood the government's legitimate concern to be limited to restricting candidate advocacy rather than true issue speech. That is why, in crafting a narrowing construction intended to cure vagueness and overbreadth, Buckley focused on speech using explicit words that expressly advocated the election or defeat of clearly identified candidates. Buckley, 424 U.S. at 43-44. When Congress concluded that the Buckley Court's standard -- express advocacy -- proved ineffective in restricting corporate candidate advocacy, Congress created and the Supreme Court in McConnell approved the electioneering communication standard. McConnell said that corporate issue speech was not so rigidly protected that the mere adoption of the form and guise of issue speech precluded regulation of the speech. McConnell, 540 U.S. at 193. Instead, the issue was one of substance: the government was equally entitled to reach so-called sham issue ads that "do not urge the viewer to vote for or against a candidate in so many words [but] are no less clearly intended to influence the election." Id. (emphasis added). McConnell simply applied prior rulings accepting a compelling governmental interest in protecting candidate elections from corruption. McConnell, 540 U.S. at 206 n.88 (noting "unusually important interests [in] '[p]reserving the integrity of the electoral process'") (citing and quoting Bellotti, 435 U.S. at 788-89). The Supreme Court held that corporate advocacy for

or against candidates poses such a threat and justifies a departure from the First Amendment's categorical command that Congress "make no law" abridging free speech. Id. at 205 (collecting authority). Indeed, the Court held the electioneering communication standard to be sufficiently tailored because "the vast majority" of ads within its language were the "functional equivalent" of express advocacy and "clearly had [the same] purpose." Id. at 206; see also Colo. Right to Life Comm., Inc. v. Davidson, 395 F. Supp. 2d 1001, 1020 (D. Colo. 2005) ("if the government wishes to justify a regulation of corporate political activity under [McConnell], it must demonstrate that the regulated activity is 'the functional equivalent of express advocacy.'"). Thus, the purpose of and scope of this sort of regulation is limited to specific types of communication made for the specific purpose or with the clear effect of improperly influencing a federal election.

Similarly, the D.C. Circuit majority opinion in the case that generated this rulemaking confirms that

> [the] Bipartisan Campaign Finance Reform Act of 2002, Pub.L. No. 107-155, 116 Stat. 81, took aim at two perceived demons of federal electoral contests: 'soft money,' i.e., use of unregulated political party activities to influence federal elections, and 'sham issue ads,' i.e., ostensibly issue-related advocacy functioning in practice as unregulated campaign advertising. These two tactics, ... infused federal campaigns with hundreds of millions of dollars in federally unregulated funds....

Shays v. FEC, 414 F.3d 76, 79 (D.C. Cir. 2005) (emphases added). Thus, a long line of judicial decisions, summarized by the court in Shays, id. at 79-80, makes pellucid that the only permissible rationale for Congressional restriction on core political speech and activity is to safeguard the integrity of the process of federal campaigns and elections. More specifically, the legislative history of BCRA's coordination provisions confirms that Congress' concern for circumvention of campaign finance restrictions through improper coordination was motivated by

the possibility of that circumvention influencing federal elections. Indeed, Senator Feingold made clear that coordination was to be more precisely defined in order to eliminate "a loophole that candidates and national parties could exploit to continue controlling and spending huge sums of soft money to influence federal elections."[4]

Communications that expressly advocate election or defeat are unambiguous about their influencing purpose. However, regulation of coordinated communication temporally distant from an election is not logically related to, or in furtherance of, the only permissible goal of campaign finance regulation, namely, to regulate communication that unambiguously is intended to influence improperly a federal election. Indeed, the expansion of the definition of coordination beyond some clearly defined period in which communications can be presumed to influence a federal election improperly conflates a possible effect of all political speech on elections with a purpose to effect those elections. For that reason, many of the FEC's proposals would sweep far more speech than necessary into the definition of "coordinated communication" and would unlawfully infringe on the ability of groups like the Chamber to engage in political speech, sometimes in consultation with or about candidates and legislators, on important public policy issues.[5]

To be sure, Congress recognized that there is a great deal of legitimate lobbying, advocacy, and communication with and about legislators and candidates about public policy.

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[4] 148 Cong. Rec. S 2145 (daily ed. Mar. 20, 2002) (statement of Sen Feingold).

[5] Indeed, the Supreme Court in Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) ("Colorado I") relied on the temporal distance of a communication from the selection of a candidate in finding that there was no unlawful coordination. There, "before the Colorado Republican Party had selected its senatorial candidate for the fall's election, that Party's Federal Campaign Committee bought radio advertisements attacking Timothy Wirth, the Democratic Party's likely candidate." Id. at 613-14. The Court also concluded that exchange of general strategy information and unrelated contacts could not establish coordination of the particular advertisements at issue, and rejected a general presumption of coordination. Id.

Senator Feingold, in remarking on the infirmities of a previous version of the coordination legislation, noted that the criticized language "caught much more, including perhaps legitimate conversations between Members of Congress and groups about legislation without touching on a campaign."[6] Senator McCain sought to craft a compromise that would allow the FEC "to enforce the law and at the same time not prevent any organization from legitimate communication within that organization."[7] Indeed, Senator McCain, in the floor debate on the final version of the legislation directing the FEC to regulate coordination, recognized that legitimate lobbying does and should occur:

> nothing in the Section 214 should or can be read to suggest ... that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate. ... We do not intend for the FEC to promulgate rules, however, that would lead to a finding of coordination solely because the organization that runs ads has previously had lobbying contacts with a candidate.[8]

Congress clearly intended that legitimate lobbying and advocacy not be limited by the regulation of coordination. Thus, the import of the case law and the legislative history demonstrates the touchstone of any regulation of coordinated communication is the coordinated communication's relation to a campaign. A temporal bright line reflects this necessary relationship.

To satisfy its obligations under the APA, the FEC must provide a reasoned explanation for its definition of coordinated communication, including any time limits or periods in which certain presumptions do or do not apply, that is consistent with Congress' directive and its own

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6 147 Cong. Rec. S3184 (daily ed. Mar. 30, 2001) (statement of Sen Feingold).

7 Id. (statement of Sen McCain).

8 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

obligation to protect First Amendment prerogatives. The FEC can accomplish this in three ways: first, it can reaffirm the 120 day limitation, or safe harbor, in the current rules with information and evidence gathered in this rulemaking; second, it can rely on Congress' determination about temporal relationships to elections serving as evidence of a purpose of influencing an election, evinced by the 30 and 60 day cut off periods Congress chose with respect to electioneering communications; or third, it can choose another safe harbor or temporal limitation by extrapolating from its regulations on the valuation of polling data, see 11 C.F.R. § 106.4(g), which regulations demonstrate the FEC's own recognition that as information or communications become temporally more removed from an election, their value and ability to influence that election diminishes significantly. Any of these three options would provide the regulated community with the guidance and predictability needed to exercise their undisputed constitutional rights free from fear of unwitting coordination.

1. Retention of the 120 Day Period in the Current Regulations

The FEC can retain the 120 day period contained in the current regulations by relying on evidence adduced in this proceeding. To the extent that evidence supports a conclusion that the majority of communication activity occurring outside the 120 day period is unrelated to the purpose of improperly influencing a federal election, the FEC may be able to address or prove unfounded the D.C. Circuit's concern about the 120 day period's underinclusiveness. The Court was concerned that substantial communication outside the 120 day period was really intended to or had the effect of improperly influencing a federal election, but was left unregulated because of the time limit. However, it is likely that evidence will support the logical conclusion that as communication is temporally more distant from a federal election, its ability to effect that election, and hence its value to a campaign, diminishes.

While the Commission may be able to justify its exclusion from regulation of some communication outside the 120 day period based on evidence submitted in this proceeding, thereby allaying any concerns about the 120 day period's underinclusiveness, it is important to remember that the 120 day period is likely overinclusive of protected communication and advocacy, as the Chamber noted in its previous comments on coordination, because substantial legitimate lobbying and advocacy occurs within that 120 day period but is nonetheless proscribed by regulation.[9]

2. Adoption of the 30/60 Day Periods from the Definition of Electioneering Communication

Should it determine there is not an adequate basis in the record for retention of the 120 day time frame in the current regulations, the Commission could reason by analogy to the 30 and 60 day time periods set forth in the definition of "electioneering communication" to provide a time period for coordination. To comply with constitutional limitations and achieve consensus, Congress provided a bright line to guide the regulated community. Along with other precise indicia, Congress used those time periods as a way to clearly distinguish permissible from suspect, communications. The definition of "electioneering communications "is carefully crafted to make sure we have a narrow provision identifying the time period of 60 days and 30 days. We ban only union and corporation money. So the entities know which provisions affect them in the election." 147 Cong. Rec. S3035 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe) (emphasis added); see id. at S3033 (statement of Sen. Jeffords) ("We also worked to make our requirements sufficiently clear and narrow to overcome unconstitutional claims of vagueness and

[9] Because so much legitimate activity occurs within the 120 day period, the Chamber supports a shorter period in order to be more narrowly tailored, but 120 days would provide at least some clear guidance to the regulated community and would minimize any unconstitutional chilling effect the regulations might have.

overbreadth.") (emphasis added). These time periods have been judicially sanctioned and would provide a solid basis for the FEC to craft a safe harbor for coordinate communications. Though the D.C. Circuit seemed skeptical of reliance on this 30/60 day timeframe from what it considered a distinct statutory provision, the Court was actually troubled by the fact that the FEC had not relied on the "electioneering communication" provision in its rulemaking, but was simply providing a "post hoc rationalization" Shays, 414 F.3d. at 101, that did not explain why a standard two or four times as great at that in the "electioneering communication provision" was a reasonable decision.

The FEC should accept the Court's implicit invitation to explain why Congress' narrow tailoring of this provision is analogous to the instant rulemaking. In its regulation of "electioneering communications" Congress was faced with the constitutionally delicate task of distinguishing between core First Amendment issue advocacy and communication that was "the functional equivalent of express advocacy." McConnell, 540 U.S. at 205-06. Here too, the FEC must walk the same fine line in parsing political communication. In so doing, the FEC is limited, as was Congress, to the only permissible purpose that overcomes the First Amendment: combating corruption and stopping circumvention that improperly influences federal elections. As such, the time limits which Congress determined were valid proxies for determining which communications have an effect on federal elections are an appropriate guide for FEC regulation here. The fact that these time limits have been explicitly validated by the Supreme Court as doing precisely that sort of narrow tailoring under the same rationale further supports their use here by the FEC. As such, it is of no moment that the "electioneering communication" provision regulates only one category of communications that may count as coordinated expenditures – the relevant analogy is to the time period which Congress and the Supreme Court concluded

represents adequate temporal proximity to conclude there is a likely improper effect on a federal election – the only relevant basis for federal regulation of core communication. The FEC is amply justified in applying this temporal framework to the regulation of coordination – in fact, it is the most prudent way to ensure that its regulations are constitutionally valid.

3. Adoption of the Time Periods in the Polling Data Framework in 11 CFR 106.4(g)

If it cannot justify the current 120 day period, and chooses not to adopt the 30/60 day time period found in the "electioneering communication" provision, the FEC has at its disposal another appropriate source for a temporal distinction that reflects when activity can be reasonably presumed to influence a federal election. The FEC has already acknowledged the obvious fact that temporal distance can diminish the efficacy, and hence the value, of information. For example, the FEC has laid out the framework for amortizing the value of polling data as a contribution or expenditure. In that framework, for purposes of determining the value of polling data to a candidate or political committee, the FEC allows a dramatic reduction in value of that data as the data ages.

> (g) The amount of the contribution and expenditure reported by a candidate or a political committee receiving poll results under paragraph (b) of this section more than 15 days after receipt of such poll results by the initial recipient(s) shall be--
>
> > (1) If the results are received during the period 16 to 60 days following receipt by the initial recipient(s), 50 percent of the amount allocated to an initial recipient of the same results;
> >
> > (2) If the results are received during the period 61 to 180 days after receipt by the initial recipient(s), 5 percent of the amount allocated to an initial recipient of the same results;
> >
> > (3) If the results are received more than 180 days after receipt by the initial recipient(s), no amount need be allocated.

11 CFR 106.4(g). This depreciation schedule has been in FEC regulations since 1977. Obviously the Commission concluded that there is a precipitous decline in perceived value over time of this information; at 16 days, it has lost half its value, while at 61 days it is worth only 5% of its previous value and on the 181st day there is no value at all. Though not a perfect analogy to coordinated communications, this approach can be instructive to the Commission as it approaches the development of bright line regulations or safe harbors for coordinated communication.

Fundamentally, Congress and the Commission seek to regulate coordinated communication not because it can possibly effect an election sometime in the future, but because certain coordinated communication, by virtue of its direct effect on an election, presumably has value to a campaign; that is why this category of speech was perceived by some to be a "loophole" allowing circumvention of existing contribution limits. Because the gravamen of the regulation properly focuses on value to a campaign or candidate, it is logical to conclude, as the FEC did with respect to polling data, that as communication becomes temporally more removed from the event – an election or primary – the integrity of which is the motivating force for regulation, its ability to effect that event (and hence its value to the campaign with which it is coordinated) diminishes and disappears. For this reason, if the FEC declines to rely on the electioneering communication provision, the Chamber urges the Commission to rely on its own previous determination that temporal distance diminishes value to a campaign, and as that value diminishes, so does any rational connection to the only legitimate state interest that justifies the regulation in the first place, namely, the improper influence of federal elections. Thus, the determination by the FEC that on the 61st day, information has lost 95% of its value is highly probative of a time period in which it would be appropriate to presume a communication has an

effect on an election. A period beyond 60 days would thus be an appropriate safe harbor for coordinated communication.

D. Several of the Alternatives Proposed in the NPRM are Problematic

The FEC has proposed seven alternatives to address perceived infirmities in its regulation of coordinated communication. Most of these proposals are unconstitutionally vague and fail to provide regulated entities with the necessary notice. Alternative One would be procedurally and legally satisfactory, provided the FEC justifies the 120 day time period based on evidence and information provided in the comments here. Alternative Two asks whether another bright line is more appropriate. The Chamber posits that either the 30/60 day time limits from the electioneering communication provision, *see* 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29, or the 60 day period recognized by the FEC in the context of polling data, 11 C.F.R. § 106.4, would be appropriate alternative temporal limitations.

Alternative Three is unacceptable because it eliminates the 120 day period but fails to replace it with another bright line or easily administered rule. Part of the Court of Appeals' critique of the content prong of the regulation is that it provided no adequate justification or explanation for the differential treatment of communication based solely on timing. One solution to that perceived problem is to avoid any of the timing issues completely by eliminating any temporal distinction under the content prong of the test, but this option is an over-correction that raises several critical constitutional and statutory considerations. The Commission should take the more prudent course and select and justify a clear time period.

Alternative Four is unacceptable because the PASO standard is an inappropriate and inadequate guide for evaluating the permissibility of communications that are otherwise

protected petitioning and speech activity. Standing alone, this standard is insufficiently precise to define unlawful speech. Without temporal limitations and a more precise content definition, Alternative Four is not narrowly tailored and cannot survive the strict scrutiny applicable to the regulation of speech by non-party groups.

Alternative Five does not directly affect the Chamber because it eliminates the time restriction for political committees only. However, the Chamber has two observations. First, political committees do not necessarily have fewer constitutional rights than individuals. This principle was recognized in Colorado I, 518 U.S. 604 (1996), and reaffirmed in McConnell. Second, the Chamber notes that the definition of political committee is unsettled, see, e.g., *Notice of Proposed Rulemaking on Political Committee Status*, 63 Fed. Reg. 11736 (March 11, 2004). The FEC should exercise caution in any undertaking that would expand the definition of political committee and subject otherwise exempt organizations to the definition of coordinated communication in proposed Alternative Five.

In Alternative Six, the FEC proposes to replace the fourth content standard with a standard covering public communications made for the purpose of influencing a federal election. Though at first blush this standard seems to relate the definition of coordination more appropriately to the purported purpose of influencing a federal election, it lacks the requisite precision or predictability because it does not contain any temporal limit or guideline. If the FEC chooses to make the purpose of influencing a federal election the guiding principle, it should use the same temporal limitations that rendered the definition of "electioneering communication" acceptable. In McConnell, the Supreme Court rejected an allegation of facial invalidity precisely because of the provision's focus on speech that would have a tendency to

influence an election. McConnell upheld the "electioneering communication"[10] provision on the ground that (i) it served the same compelling interest in limiting corporate candidate advocacy accepted by the Court in prior cases, and (ii) because of its temporal limits, it would not reach enough true issue advocacy to render the definition of electioneering communication overbroad and thus invalid on its face. Absent a temporal limitation that links the communication to the substantive evil that the Court has found to justify such restrictions, the proposed definition in Alternative Six is too broad and nebulous to provide a constitutionally acceptable proscription on protected activity. Such a loose standard would invite precisely the sort of political accusation and ad-hoc roving investigations that plagued earlier definitions. Regulated entities deserve more precise guidance before engaging in lobbying activity or communications involving policy issues, elected officials, or candidates.

In Alternative Seven, the FEC proposes eliminating the content prong of the coordinated communications test in 11 C.F.R. § 109.21(c)(4) and replacing it with the definition of public communication. 11 C.F.R. § 100.26 defines "public communication" as: "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet." This alternative suffers from a fatal flaw insofar as it provides no safe harbor or temporal limit. It thus is unrelated to the only legitimate purpose

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[10] In the BCRA, Congress enacted a new ban on "electioneering communications" – corporate speech broadcast during months prior to an election that referred to a federal candidate and could be received by a minimum number of possible voters. 2 U.S.C. § 434(f)(3)(C). The importance of the time period to the constitutionality of the definition of electioneering communication is clear even from the legislative history. Congress was "trying to make distinctions between true issue advocacy and election ads. . . . It is carefully crafted to make sure we have a narrow provision identifying the time period of 60 days and 30 days. . . . So the entities know which provisions affect them in the election." 147 Cong. Rec. S3035 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe) (emphasis added).

animating the regulation of core political speech and activity –the prevention of corruption and the circumvention of campaign finance regulation, with the goal of eliminating improper influences on federal elections. Thus, it would sweep too broadly and unlawfully chill several types of protected activity.

Finally, another more general issue raised in the NPRM causes the Chamber some concern. The NPRM identifies and questions the definition of "agent" for purposes of the conduct standard in the definition of coordination. Specifically, the FEC notes that it has commenced a rulemaking to address infirmities identified by the District Court in the regulation's definition of "agent" which definition excluded agency based on apparent authority. See 70 Fed. Reg. at 73955 n.17 (citing *Notice of Proposed Rulemaking on the Definition of "Agent" for BCRA Regulations and Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 70 Fed. Reg. 5382 (Feb. 2, 2005)). In that NRPM, the Commission sought comment "on whether persons acting with apparent authority should be included in the definitions of agent at 11 CFR 109.3 and 300.2(b)." In the present NPRM the FEC asks whether the current definition of agent, which does not necessarily include common vendors or former employees, is too narrow. In defining "agent" for purposes of this and other sections of campaign finance regulation, the Chamber simply urges the FEC to carefully consider the practical consequences of a broad definition of agent; without clear rules and bright lines, regulated entities might engage in unwitting coordination by virtue of an attenuated connection to a candidate or committee. The FEC must take care to ensure any rules it crafts are clear, provide practical guidance to the regulated community, and go no farther than necessary to combat the perceived problems related to federal elections identified by Congress and approved by the Supreme Court.

VI. CONCLUSION

The FEC is obliged to respect the First Amendment rights of the regulated community to engage in political advocacy through legitimate petitioning, speech, and association. Regulation of coordinated communications touches on each of these core political rights, and should be undertaken with the utmost circumspection. As such, the Chamber, which may be burdened by the regulations proposed in this NPRM, respectfully urges the FEC to craft a regulation of sufficient clarity to provide notice to the regulated community about what is proscribed and of sufficient circumspection to capture no more protected activity than necessary to combat the danger identified by Congress and sanctioned by the Supreme Court. The most effective way to do this is with a temporal safe harbor. Such a time period most closely and logically relates proscribed conduct and speech to the only justification offered by Congress and sanctioned by the Supreme Court as surmounting the Constitution's proscription on the abridgement of speech, association and political advocacy: eliminating corruption and its appearance from federal elections, and arresting the circumvention of campaign finance laws that protect those elections.

The Chamber has outlined above several ways that the FEC could include a safe harbor of 120 days or some other length in its regulation of coordinated communication. Without such a bright line, any regulation crafted by the FEC will be subject to constitutional challenge because fundamental First Amendment activities will be unnecessarily chilled.

Respectfully submitted,

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