"Mitchell, Cleta"
<CMitchell@foley.com>
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To <coordination@fec.gov>
cc
bcc
Subject Comments of Cleta Mitchell

Please find attached my comments in response to the NPRM 2005-28. Please contact me if you have any questions. Thank you.

Cleta Mitchell, Esq.
Foley & Lardner, LLP
3000 K Street, NW
Washington, D.C. 20007
cmitchell@foley.com
(202) 295-4081 (direct)
(202) 672-5399 (fax)
(202) 431-1950 (mobile)

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FOLEY

FOLEY & LARDNER LLP
ATTORNEYS AT LAW
WASHINGTON HARBOUR
3000 K STREET, N.W., SUITE 500
WASHINGTON, D.C. 20007-5143
202.672.5300 TEL
202.672.5399 FAX
www.foley.com

WRITER'S DIRECT LINE
202.295.4081
cmitchell@foley.com EMAIL

CLIENT/MATTER NUMBER
999100-0101

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By Electronic Mail: coordination@fec.gov

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

Re: Comments on Notice of Proposed Rulemaking 2005-28 ("NPRM"): Coordinated Public Communications

Dear Mr. Deutsch:

These comments are submitted by the undersigned as a legal practitioner in the field of federal campaign finance law. I also would like to testify at the public hearing on the NPRM to be held later this month.

The Commission has posed numerous questions with multiple subparts and complex alternatives. This is not an attempt to answer each question and every subpart. Certain questions will not be addressed in these comments but I am pleased to respond to questions about any portion of the NPRM during the public hearing.

Overview

There are certain paramount principles related to consideration of the regulations at issue. Not only are free speech and associational rights implicated by all restrictions on election-related speech, but in this context -- communications about policy issues, legislation and government actions --the First Amendment's protection of the citizens' right to petition the government imposes an additional burden on the Commission. There is much from *Buckley v. Valeo,* 424 U.S. 1(1976) that is instructive and which bears remembering during the Commission's deliberations on the subject of 'coordinated public communications', to-wit:

> "…the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Buckley v. Valeo,* 424 U.S. @ 49 (1976).

There are three basic principles which should undergird the Commission's deliberations during this rulemaking:

1. Compliance with the unfortunate order of the DC Court of Appeals;

2. Promulgation of regulations which clearly delineate the communications that are subject to the Commission's jurisdiction and those which are not, thereby discouraging frivolous and expensive FEC complaints and enforcement actions in which ideological and partisan organizations use the FEC as a taxpayer funded weapon in partisan or ideological arsenals;

3. Protection of the First Amendment rights of the citizenry to petition the federal government on legislative issues, policies and government actions or proposals, *even* during periods of time in close proximity to elections.

In modern times, Congress has all but abandoned any pretense of concluding its work prior to the commencement of the fall general election campaign season. The Commission should take into account the empirical data of the recess and adjournment dates of the United States Congress for purposes of separating legitimate legislative communications about issues and legislation and the imputed 'electioneering' purpose(s) arbitrarily presumed by virtue of some arbitrary date within a certain proximity to an election. The tendency of Congress to push major decisions to the days and weeks leading up to an election or, even worse, the lame duck sessions held *after* elections has worsened in recent years. Twenty five years ago, the Heritage Foundation issued a report showing that Congress passes many more public laws in an election year than in a non-election year. "In some recent Congresses, the number of public laws passed-during the second sessions has been nearly double that of the first session." Postponing Decisions: The Lame Duck 96th Congress, The Heritage Foundation, by, Thomas R. Ascik, Backgrounder #127, September 30, 1980.

In the twenty five years since the Heritage Foundation report, the earliest adjournment date for Congress was October 4 (1996). All other adjournment dates have been scattered through October, November or December, even during election years, with congressional recesses at various times and durations during the months of September and October. (from the Report of the Session Dates of Congress, from the Office of the Clerk, U.S. House of Representatives, found at www.clerk.house.gov)

The point is that Congress continues to work and to enact major legislative initiatives later and later each year – and the public has a right to be engaged in legislative activities involving public communications at every moment when Congress is still deliberating. To presume that *any* public communication made during the days and weeks that coincide with election season must have an election-related purpose is to ignore the realities of modern-day lawmaking by the national legislature.

It is not the job of the Commission to protect incumbent officeholders *from* the citizens by restricting communications about legislators and legislation; rather, it is the job of the Commission to insure that the citizens' rights to communicate about officeholders and legislation are not injured by whatever regulations are ultimately promulgated by the FEC.

My responses to the proposed alternatives follow.

Alternative #1:

No, the Commission should not reenact the 120-day time period as part of the definition of coordinated public communications. There is no evidence that the 120 day period is reasonably related to elections so as to justify its re-adoption. The election 'season' does not begin until after Labor Day. The media plans for all campaigns with which I have ever been associated envision the purchase of political advertising in the four weeks preceding an election and week by week prior to that (counting backwards *from* the date of the election) depending on the availability of funds for the media budget. Communications during July and August prior to a general election cannot reasonably be said to be election related *simply* by virtue of the time period.

Response to Questions:

1. The 120-day time period is too broad.

2. The alternative potentially will include communications that are not made for an election-related purpose and should, therefore, not be treated as in-kind contributions.

3. The Court of Appeals' concern with 'corruption' or the 'appearance of corruption' must be weighed against the impermissible infringement on First Amendment rights of citizens to petition the government. The congressional August recess is a period of high level grassroots lobbying activity, many times involving public communications to encourage citizens to attend town hall meetings being held by members of Congress or to otherwise communicate with their legislators during that period. It is not 'corrupting' for organizations and citizens to communicate to and about members of Congress during the time when members are in their home states and districts and presumably should welcome as much public discussion of issues as can be generated.

4. Congress expressed no intent that communications should be tied to a 120-day time period; the only expression of congressional intent as relates to communications is a 30/60 day period before an election for purposes of electioneering communications.

Alternative #2:

The Commission should adopt a different time frame, supported by the empirical evidence on which the Supreme Court in *McConnell v. FEC,*(citations omitted) relied to uphold BCRA's Title II restrictions on 'electioneering communications' paid for with corporate or labor union funds, to wit, the thirty (30) days before a primary election and sixty (60) days before a general election ("the

30/60 day period"), with an additional safeguard as part of the content prong to insure that legitimate legislative communications are not inadvertently swept into the definition.

The 'reform community' spent many years and a great deal of money on studies to demonstrate that the 30/60 day period is the actual 'election season' and then went to great pains to demonstrate to the Supreme Court that the 30 / 60 day period is reasonably related to elections so as to justify restrictions on radio and television communications.

The merits brief filed in *McConnell,* by BCRA sponsors was quite clear about the 30/60 day period: "Title II of BCRA …suppl(ies) an effective, objective standard for whether an ad is campaign-related. Under Title II, an ad is subject to disclosure and source requirements if it is broadcast, mentions a candidate, is geographically targeted to the candidate's electorate, and is run in the 60 days before a federal general election or the 30 days before a primary. That bright-line test is the product of objective data and experience, which confirm the common-sense reality that in these carefully limited circumstances, ads naming a candidate are very likely intended to convey—and almost certainly will convey—an electioneering message." (emphasis added)

Based on such arguments and evidence, the *McConnell* court recognized the 30/60 day period enacted by Congress as a permissible factor in restricting radio and television communications. The FEC should adopt the statutory time period, developed by the reform community, supported by their studies, upheld by the Supreme Court and apply the 30/60 day period as appropriate for defining communications for these purposes.

The Commission should also adopt a safe harbor provision in the regulations to exclude from the definition of coordinated public communications any such communication about a specific legislative proposal pending or being considered during the 30/60 day period as more fully discussed below at page 7.

Response to Questions:

1. The 30/60 day time period has been approved by both Congress and the Supreme Court as the period of time reasonably related to elections so as to meet constitutional standards for government regulation of speech during that period. It is not too narrow; rather, it is reasonably related to the electoral purpose.

2. The 30/60 day time period will not inadvertently include communications that are not made for an election-related purpose *provided* that the Commission adopts a safe harbor provision that excludes communications made about a specific legislative or policy proposal contemplated for action during the 30/60 day time period. With such a safe harbor provision, legitimate legislative communications would, therefore, not be treated as in-kind contributions, nor should they be.

3. The Court of Appeals' concern with 'corruption' or the 'appearance of corruption' must be weighed against the impermissible infringement on First Amendment rights of citizens to petition the government. It surely cannot be the intent of the Court of Appeals to wholly ignore the realities

of congressional decision-making and the timetable when such decisions are made. The 30/60 day time period will capture all communications that could be construed as 'corrupt' and with an appropriate safe harbor provision, will except *only* those which have a clearly discernible legislative purpose.

4. The 30/60 day period was enacted by Congress as it related to a particular type of public communications. The Commission should adopt the same time period approved by Congress for all purposes related to public communications.

Alternative #3:

No, the Commission should not eliminate all time period restrictions. Such a decision would impose undue burdens on the First Amendment rights of citizens to communicate with legislators, about legislation and issues at times which are far removed from the election season.

Of course, members of Congress, including the plaintiffs in the litigation giving rise to this rulemaking, Reps. Shays and Meehan, would dearly love never again to be the subject of irritating, annoying citizen communications referencing them, their positions on issues, their votes on legislation, or any other reference to them at any time by 'outside groups'. Incumbents would love for the Commission to make it illegal for 'outside groups' to speak the name of a member of Congress to the general public – ever.

Surely the Court of Appeals cannot sanction such an incumbent protection plan. The First Amendment was not designed to protect the government from its citizens, but with *no* time limitation governing coordinated public communications, that is precisely the effect.

Again, a review of the merits brief filed in *McConnell* by the BCRA sponsors discloses further argument, evidence and discussion of their belief that communications during the 30/60 day period are most likely to be for an 'election related purpose' and those *outside* that window are not. ("The data confirm that 78% of interest group ads mentioning a federal candidate— and 85% of ads mentioning a presidential candidate—were aired within 60 days of the general election. Goldstein Rep. 19 tbl. 4 (JA 1169-71). In contrast, group ads that did *not* mention candidates were distributed fairly evenly through-out the year. *Id*. at 3 (JA 1155). … As an election nears, interest groups substitute ads that mention a candidate for ads that do not. SA 721-26(K). …Former consultant Douglas Bailey sums up: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." SA 720(K); *see* Bailey Dec. ¶ 12 (JA 27)). (emphasis added)

The BCRA sponsors, having convinced Congress and the Supreme Court that the 30/60 day period *is* the election-related period and that communications during that period are most likely for an election-related purpose surely cannot now be allowed to expand the election-related period to all day, every day, year in and year out.

Response to Questions:

1. The absence of *any* time restrictions is overly broad and surely cannot withstand the constitutional scrutiny of any court attempting to balance differing First Amendment considerations. Absent a specific order of the United States Supreme Court, the Commission should not remove all time restrictions from the definition of a coordinated public communication

2. Having *no* time restrictions whatever will surely sweep into the covered definition public communications that bear absolutely no relationship to elections, other than the inextricable relationship between issues and elected officials described by the Supreme Court in *Buckley,* cited at the beginning of these comments.

3. The Court of Appeals' should be concerned with 'corruption' and the 'appearance of corruption' which will surely be a danger as Congress further is shielded from public scrutiny, public criticism and public education of the actions, decisions, votes of members of Congress. It cannot be that *only* the media corporations and their employees should ever be allowed to speak in an unfettered manner about members of Congress and their actions. The antiseptic nature of public scrutiny is a key to combating corruption and the appearance of corruption. There is more than one source of potential corruption: and an insulated Congress, free from worry about public criticism by citizens and citizens groups, breeds a corrupting environment. The public's right to engage in vigorous communications with and about Congress without subjecting such communications to government investigation, regulation and scrutiny at times *other* than the 'election – related' period should be insured by the Commission specifically *because* to do otherwise would be the very corrupting force that the Court of Appeals should be concerned about.

4. Congress has expressed no intent that citizens should *never* be able to communicate about its members without being subject to government regulation. But even if Congress were to enact such a provision, it would be their own self-interest which would drive such legislation. Members of Congress may hate those pesky constituent and interest group communications that they can't control. Such is life in a free country with First Amendment constitutional protections of such irritants.

Alternative #4:

A PASO standard, clearly defined and well-delineated in the regulations, would be an important addition to the regulations and I would urge the Commission to adopt such a standard. Whatever the Commission does in this regard, however, must be clear and provide a bright line of guidance to the public because of the important constitutional principles at stake.

The Commission should NOT approach this subject on a 'case-by-case' basis through enforcement actions. That is the coward's way out. The citizens have a right to know in advance what communications will be subject to the FEC's jurisdiction and should not have to budget for legal fees in order to engage in the public policy debates on the issues of the day.

In addition, the Commission should most definitely adopt safe harbor provisions, and I would urge the Commission's adoption of the following safe harbor proposals:

- The communication is devoted exclusively to a particular pending legislative or executive branch matter even if it references a federal officeholder; or
- The communication's reference to a federal officeholder / candidate is limited to urging the public to contact that officeholder / candidate to persuade the officeholder /candidate to take a particular position on the pending legislative or executive branch matters; or
- The communication does not refer to an election, voters or the voting public or to anyone's candidacy; or
- The communication refers to a federal officeholder / candidate only as a sponsor of a proposed legislative or executive branch matter (e.g., McCain-Feingold, Shays-Meehan); or
- The communication is based on publicly available information or a summary or compilation of publicly available information

The Commission should adopt 'safe harbor' provisions that are referenced in the NPRM but the following proposed safe harbor provisions should be amended as follows:

- The communication references only the political ideology (e.g., "liberal", or "conservative", etc.) of a federal officeholder / candidate and not the political party affiliation; or
- The communication refers to the federal officeholder's / candidate's specific voting record, votes, or public positions on a specific legislative or executive branch issue, policy or matter;

Alternative #6

This alternative is categorically overbroad and should not be adopted. The suggested 'case-by-case' approach is a full-employment program for lawyers such as myself but is horrible public policy. Don't do it.

Alternative #7

This alternative is also categorically overbroad and should not be adopted. To decree that all public communications made after consultation with members of Congress would be subject to government regulation, scrutiny and investigation is to further separate Congress from voters, interest groups and citizens whose lives are impacted in every way by some act of Congress. Members of Congress should be encouraged to interact with people 'outside' their hallowed halls and individuals and organizations should not be subject to government regulation simply because they engaged in such interactions with elected officials.

This proposal is overly broad, is not supported by any evidence or expression of congressional intent and would further diminish the salutary role that citizen involvement with the inner-workings of Congress has upon our democratic system. An isolated, insular government

whose officials are protected by law from interaction with the citizens is not a government free from 'corruption'. It is a government bearing little resemblance to a representative democracy.

Directed to Voters

A public communication should be *targeted* to voters of a particular state or district who can vote for the referenced federal officeholder in *that* election cycle to trigger inclusion in these definitions. An incidental reference to a federal officeholder as part of a larger national advertising campaign should be excluded from the definition of a public communication for these purposes.

Request or Suggestion

The definition should clearly state that interactions between members of Congress or staff with citizens and citizens groups on legislative issues, strategy and policies do NOT automatically taint subsequent public communications regarding that issue, legislation or matter by the citizens or citizens group.

Publicly Available Information & Research Developed Exclusively by a Third Party

Any public communication that is based on publicly available information or a synopsis or compilation of publicly available information should be protected from government investigation. A provision should be included in the regulations that an FEC inquiry or investigation regarding a public communication should be immediately terminated upon the furnishing to the Commission of the publicly available information or summary on which the communication was based.

Likewise, if the public communication is based on research developed and paid for by the entity making payment for the communication, such research once provided to the FEC should be deemed sufficient to positively conclude that the public communication was not based on the needs, plans, activities or projects of a federal candidate or political party so as to terminate further investigation.

Party Coordinated Communications

This commenter, as outside counsel to the National Republican Senatorial Committee ("NRSC"), adopts and incorporates by reference the comments on this topic submitted by the NRSC general counsel.

Thank you for the opportunity to submit these comments. I will look forward to the opportunity to testify at the public hearing on this important subject.

Sincerely,

/s/ Cleta Mitchell

Cleta Mitchell, Esq.
Foley & Lardner LLP

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Attachments