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Rosemarie C. Smith
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Federal Election Commission Supplemental Notice of Proposed Rulemaking 1999-27: General Public Political Communications Coordinated with Candidates

Dear Ms. Smith:

The Coalition respectfully submits comments in response to the Supplemental Notice of Proposed Rulemaking ("Proposed Rules") published in the Federal Register on December 9, 1999.[1] On behalf of The Coalition, I hereby request the opportunity to testify at the hearing on the Proposed Rules on February 16, 2000.

The Coalition is an unincorporated association comprised of various business associations. In April of 1996, these associations joined together to articulate a unified message about the need for lower taxes, budget reform, and less government regulation of the business sector. In 1996 and 1998 it advertised its messages on television and through direct mail.

I. Introduction

In the area of political communication, the core of the First Amendment, freedom to speak out about issues without fear of prosecution is essential. The monumental confusion caused by the absence of a definition of "coordination" has had a chilling effect on speech protected by the First Amendment. Accordingly, The Coalition commends the Commission for undertaking this rulemaking process to clarify and solidify what constitutes coordination. As an organization that exists to speak for its members about issues, The Coalition appreciates the opportunity to comment on the FEC's proposed rules.

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[1] 64 Fed. Reg. 68,951 (1999).

The Coalition also recognizes that the Commission faces a dilemma. On the one hand, the Commission must avoid vague regulations which, even if constitutional, could be incomprehensible to the regulated community. On the other hand, clear, unambiguous regulations pose the threat of being unconstitutionally overbroad by encompassing speech that cannot be regulated. Under these circumstances, and for the reasons stated below, the Coalition urges the Commission to maintain two guiding principles in formulating and ultimately enacting coordination regulations. First, ensure that the final result is an understandable and unambiguous legal framework that allows maximum freedom for all individuals and entities to communicate. Second, begin with a bright line rule: if there is no express advocacy, there is no coordination for FEC purposes.

II. Comments on the Supplemental Notice of Proposed Rulemaking

Buckley v. Valeo[2] foresaw issue advocacy that included clearly identified federal officeholders and candidates and intended to protect such communications:

> 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.[3]

To assure that such issue advocacy would not be chilled, and that speakers would not "hedge and trim" their advocacy to avoid speculation as to their "intent and meaning," Buckley held that FECA's speech restrictions could apply only to express advocacy of the election or defeat of clearly identified candidates.[4] The test was to be precise and objective, turning on the words used and not the intent of the speaker.[5]

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2 424 U.S. 1 (1976).

3 Id. at 39-40.

4 Id.

5 Id.

In applying its test, for example, Buckley construed both the "in connection with" and the "for the purposes of influencing" standards of FECA to require express advocacy.[6] It explained that otherwise both formulations would be too vague to satisfy the First Amendment. Id. On the same rationale, Massachusetts Citizens for Life, Inc. v. FEC, held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b" of FECA.[7]

Elementary principles of the First Amendment lead to the same conclusion. Where a speaker such as The Coalition must distinguish between permitted and forbidden speech, "precision of regulation must be the touchstone."[8] The boundary between speech that is unregulated (and constitutionally protected) and speech that is regulated must be "clearly marked" so that there is no need for cautious speakers to steer wide of the forbidden zone, or to "hedge and trim" for fear of crossing an obscure line.[9] To provide the necessary precision, Buckley mandated an objective examination of the language used to determine if it "in express terms advocate[s] the election or defeat of a clearly identified candidate."[10] To drive home that the specific language used is controlling, Buckley went on to explain that the express advocacy standard "would restrict the application . . . to communications containing express words . . . such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[11] The district court in Maine Right to Life Committee recognized Buckley's intent: "[T]he Supreme Court has been most concerned not to permit intrusion upon 'issue' advocacy—discussion of the issue on the public's mind from time to time or the candidate's positions on such issues."[12]

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6 424 U.S. at 40-45.

7 479 U.S. 238, 248-50 (1986) (emphasis added).

8 Buckley, 424 U.S. at 41 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

9 Id. at 41-43 & n.48.

10 Id. at 44.

11 Id. at 44 n.52.

12 914 F. Supp. 8, 12 (D. Me. 1996), aff'd 98 F.3d 1 (1st Cir. 1996), cert. denied, 118 S. Ct. 52 (1997).

Courts have also been concerned that the government not intrude on the public's association with its officials. In Clifton v. FEC,[13] the court specifically warned the FEC against inhibiting the public's ability to confer and discuss public matters with their legislative representatives or candidates for such offices:

> [W]e think it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues. . . .
>
> It is no business of the executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives.[14]

Finally, a standard of coordination that includes issue advocacy raises a fundamental constitutional concern as it operates as a direct limit on core First Amendment speech and association. If coordination is found, speech that otherwise would be fully protected becomes unlawful. Therefore, under the principles discussed above, if these Proposed Rules are to impose restrictions on speech, they must be precise and objective. The only apparent way to satisfy that constitutional requirement is a clear and unambiguous standard that is only applicable to express advocacy.

A. Issue Oriented Organizations

Issue oriented organizations, such as the members of The Coalition, will have lobbying contacts with legislators and political leaders. In those contacts, the political landscape may be discussed, and the legislators and political leaders will express their opinions on what various interests groups should do to advance their issue interests. An issue oriented organization, particularly in an election year, may hear all sorts of discussions by all sorts of political persons and groups. Suspicious eyes (i.e., political/issue adversaries and potential FEC complainants) always will perceive opportunities for communication and suggestion that could have influenced an organization's public communication. Thus, if coordination is broadly or vaguely defined, an

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[13] 114 F.3d 1309 (1st Cir. 1997), cert. denied, 118 S. Ct. 1036 (1998).

[14] Clifton, 114 F.3d at 1314.

organization's only sure way to avoid an FEC investigation is to avoid any speech that identifies any candidate or public official. That alternative is not acceptable constitutionally.

Under a vague or overbroad standard, any speech referencing a clearly identified candidate is subject to possible challenge, depending on how the surrounding circumstances are evaluated. As noted above, however, Buckley was emphatic, that it intended to protect issue advocacy that mentioned candidates.[15] Indeed, it was to protect such speech that Buckley required express words soliciting support or opposition for a candidate. If the Commission abandons Buckley's express language requirement, issue oriented organizations could be confident of avoiding an investigation only by steering wide of much speech that bears on legislative and public policy issues of vital concern to its members.[16]

The First Amendment cost of a vague or overbroad coordination standard is too high. Our form of government depends upon extensive public discussion of the issues. Those who are most interested and knowledgeable about the issues are groups like The Coalition and its members who have a strong public policy focus. If their speech is to be restricted at all, it must only be pursuant to clear, bright-line, objective standards that are narrowly tailored to the precise interest being protected.

B. FEC v. The Christian Coalition

The Proposed Rules seek to incorporate the United States District Court for the District of Columbia's coordination standard stated in FEC v. Christian Coalition.[17] In many regards, the Commission has chosen a worthy guidepost.

The court states (and the Proposed Rules note) the proper guidelines for setting a coordination standard:

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15 424 U.S. at 42.

16 See id. at 11 n.7 (quoting the circuit court's reason for finding § 437a unconstitutionally vague and overbroad because it was "'susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance'") (emphasis added).

17 52 F. Supp.2d 45 (D.D.C. 1999).

> [T]he 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 contact between candidates and corporations and unions.
>
> . . . .
>
> First Amendment clarity demands a definition of "coordination" that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association.[18]

The court also applies its standard appropriately, generally not finding coordination between the Christian Coalition and candidates.

The court erred, however, in two respects pertinent to the Proposed Rules.[19] First, it did not adopt a standard that exempts issue advocacy from "expressive coordinated expenditures."[20] By not

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[18] Id. at 88-89, 91.

[19] The court's holding on express advocacy may be relevant in application if the Commission ultimately enacts a coordination standard that applies only to express advocacy. The Coalition therefore notes that although the court selected "an express advocacy standard [that] covers only a narrow class of communications," id. at 62, it should have followed prevailing legal authority and adopted a bright-line, "magic words," test. Buckley, and the vast majority of courts subsequently addressing this issue, thus requires that the message clearly identify a specific candidate and encourage his or her election or defeat with specific words such as "vote for," "elect," "defeat," or "Jones2000." Buckley, 424 U.S. at 44 n.52; see Maine Right to Life Committee v. FEC, 914 F. Supp. 8 (D. Me. 1996), aff'd 98 F.3d 1 (1st Cir. 1996), cert. denied, 118 S. Ct. 52 (1997); FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), aff'd 92 F.3d 1178 (4th Cir. 1996) (table); see also Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp.2d 248 (S.D.N.Y. 1998) (citing with approval the approach of the First and Fourth Circuits in ruling that the FEC's context definition of "express advocacy" was impermissible). But see Furgatch v. FEC, 807 F.2d 857, 864

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limiting FEC investigations to communications containing express advocacy, the court has not only chilled discussion of public issues, but also chilled association with federal officials. Second, the court's coordination standard in some respects is unconstitutionally vague and will accordingly cause an unacceptable number of individuals and organizations to refrain from associating with federal candidates, or if they have associated with candidates, refrain from speaking out on public issues.

C. Proposed Rules

The FEC's Proposed Rules benefit from the Commission's incorporation of Christian Coalition, but also suffer from the case's shortcomings. Thus, the Proposed Rules do not recognize the Supreme Court mandated distinction between express and issue advocacy, thereby violating First Amendment speech and association rights. And, they are unconstitutionally vague and therefore do not provide the regulated community with enough notice regarding what does and does not constitute coordination. As the Commission's past experience has shown, regulations enacted in anticipation of clarifying them through enforcement actions are unacceptable.[21] Likewise, the Advisory Opinion process is not meant to be a replacement for clear and concise regulations.[22]

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(9th Cir. 1987), cert. denied, 484 U.S. 850 (1987). The court's attempt to broaden this standard, even if intended to be only so slightly, is contrary to this precedent and impermissibly chills discussion of public issues.

[20] Christian Coalition, 52 F. Supp.2d at 86-89.

[21] In MUR 4116, all five Commissioners (one seat being vacant) agreed that the Commission should not pursue a charge based on a coordination theory until the coordination standard was clarified. Accordingly, the Commission unanimously voted to dismiss MUR 4116, rejecting the Office of General Counsel's recommendation to proceed to litigation.

The Statement of Reasons of Commissioners Thomas, McDonald, and McGarry said (at 6) that internal Commission disputes over the meaning of coordination had led to "patently unfair . . . unequal treatment" and had defeated the Commission's obligation "to apply the law consistently and uniformly." They listed (at 6 n.6) seven MURs in addition to MUR 4116 in which they said inconsistent results had been reached. The Statement of Reasons of Commissioners Aikens and Elliot argued (at 4) that regulatory clarification of the "vague and amorphous definition of coordination" was needed before pursuing further charges based on that standard.

[22] See Chamber of Commerce v. FEC, 69 F.3d 600, 606 (D.C. Cir. 1995) (finding the FEC's

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In several instances the Proposed Rules apply a subjective test. Creators of issue ads would be investigated about their decision-making process in making the ads and objectives when communicating with a candidate about the issues they seek to communicate. That approach is directly at odds with Supreme Court precedence. As Buckley explained, the First Amendment will not tolerate a standard that puts the speaker at the mercy of "whatever inference may be drawn as to his intent."[23] In short, without added precision, the coordination concept cannot be fairly, consistently, or constitutionally enforced.

The Proposed Rules are also unconstitutionally overbroad. The overbreadth is manifested in two ways. First, by regulating the content of communications that is not express advocacy, it unconstitutionally inhibits protected speech. Second, the FEC's failure to define "Coordinated General Public Political Communications" is per se overbroad because any communication that includes a clearly identified candidate is potentially at risk.[24]

The Commission must take two initial steps to rectify these problems. First, make clear that regardless of whether an issue advocacy communication is coordinated with a candidate, the forthcoming regulations will not apply. Second, clearly delineate a standard that requires actual coordination on the express advocacy communication and not merely interaction with a candidate's campaign.

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definition of "member" in regulations and interpretations of what "member" actually means in subsequent Advisory Opinions to be "arbitrary and capricious").

[23] Buckley, at 43.

[24] FEC v. National Conservative Political Action Comm., 470 U.S. 480, 501 (1985) ("We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct."); see also Broadrick v. Oklahoma, 413 U.S. 601 (1973).

1. Specific Comments on Section 100.23: Coordinated General Public Political Communications

a) 100.23(a), (b), & (e)(1)

These sections do not clearly define the new term that serves as the foundation for the Proposed Rules: "Coordinated General Public Political Communications." Section (e)(1), "Definitions," simply defines the means through which Coordinated General Public Political Communications may occur (e.g., broadcasting station, newspaper or electronic medium). Sections (a) and (b) only slightly limit the regulations' application by stating who can make these communications ("persons other than candidates, authorized committees, and party committees") and by defining which communications will be treated as expenditures and contributions (a communication "that includes a clearly identified candidate and is coordinated with that candidate").

These provisions are unconstitutionally vague and overbroad, and potentially encompass issue advocacy that would not even have qualified under the Commission's ill-fated "electioneering message standard." Thus, without question these sections would discourage an ad such as the ad presented in Hypothetical II. Moreover, it would subject that ad to a potential enforcement action even if the ad was run five years prior to the Senator's election at a time when the Savings and Loan institutions were trying to restore public confidence during a statewide financial emergency, and featured all Members of the Texas delegation (from both parties). Finally, in addition to being vague, these sections in particular, and the Proposed Rules taken as a whole, fail because they have no nexus to federal elections and therefore regulate matters outside of the Commission's jurisdiction.

b) 100.23(c)(1)

Presumably in an attempt to restrict the vast, potential reach of these regulations, Alternative 1-B seeks to narrow the coordination standard by adding a geographical qualification. However, since "all politics is local," most issue advocacy is run in the geographic area represented by the public official/candidate. Thus, although the Commission admirably seeks to draw a bright-line exempting national legislative campaigns and other issue campaigns that identify non-local officials and candidates, it is in practice a bright-line separating reality from theory. The reality is that, in the vast majority of communications, the approach most likely to engage its intended audience is to address issues and individuals directly pertinent to the viewer. The people in Utah will generally not focus on Virginia Senator Charles Robb's position on issues; just as the residents of Alexandria, Virginia have little or no use for the "Local" section of the Salt Lake Tribune.

Beyond the realities of issue organizations wanting to spend limited resources on only the most effective communications, is the vagueness of the section's application. For example, what if a

national pro-choice group asks all Senators to sign a pro-choice pledge and then creates an ad showing all of these clearly identified Members at a signing ceremony? Does it make a difference if the ad is aired nationally, only in the states of the signers (suppose 25 states), or only in the states of the signers who are considered vulnerable in their upcoming elections (suppose four states)? Assuming all of the above hypotheticals are exempted—because the section states "distributed primarily" in the candidate's state—do the Proposed Rules intend this result of exempting the final hypothetical even if the vulnerable Senators had orchestrated the pledge and ad for their political advantage? Likewise, do the Proposed Rules seek a loophole that benefits only those organizations and individuals that have sufficient funds to speak inefficiently by airing ads in enough markets to avoid "primarily" airing the ads in the intended geographic area? By this reasoning, it would have been permissible for a well financed organization to finance national ads critical of signatories to the 1994 "Contract With America," but illegal for other interested but less endowed groups to do the same.

Both alternatives 2-A and 2-B use the terms "request or suggestion" to describe actions by a candidate that may trigger "coordination." This term must be considered in light of statutory and constitutional constraints. In the context of independent expenditures, Congress made it clear that a "general request for assistance in a speech to a group of persons by itself should not be considered to be a 'suggestion' that such person make an expenditure to further such election or defeat." H.R. Conf. Rep. No. 94-1057, at 38 (1976). Moreover as the court noted in Christian Coalition, the standard for coordination, under the First Amendment, must be limited "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 contact between candidates and corporations and unions." Id. at 88-89. Therefore, what "request or suggestion" means must be restrictive. In that light, Alternative 2-A is not clear, let alone restrictive. Alternative 2-B, while more restrictive in its scope, suffers from the general deficiencies of the proposed rules which encompass communications that cannot be regulated. If the Commission sufficiently narrows the types of communications subject to the proposed rules, Alternative 2-B may be a starting point for defining coordination. However, there are other problems.

c) 100.23(c)(2) & (d)

Section (c)(2) uses the phrase, "exercised control or decision-making authority," but that phrase must be more clearly defined. For example, has the candidate exercised decision-making authority if he or she successfully persuades a sympathetic organization to stop running ads because

the candidate would just as well not be associated with that group—despite its support or opposition to that candidate's opponent?[25]

Similarly, is the candidate exercising control when she sets her voting record straight? Section (d) apparently attempts to answer this question in the negative by exempting "a candidate's or political party's response ["alone"?!] to an inquiry regarding the candidate's or party's position on legislative or public policy issues." However, what if the "response" includes "substantial discussions" over how to evaluate the candidate's legislative record and statements on positions? What if these discussions cause the speaker to change the ad or the candidate to change his or her position? What if the "response" yields information so incendiary that the group dramatically increases the volume of distribution and increases the frequency of placement to take advantage of the heightened public interest level?

Finally, what if the candidate's "response" was exactly what the FEC has in mind as an exempt response, but nonetheless generated a complaint from the speaker's adversaries? The speaker should not be forced to endure a drawn-out, expensive factual investigation merely to vindicate that the speaker and candidate did not overstep an amorphous coordination line.

d) 100.23(c)(3)

Section (c)(3) introduces the concept of "[a]fter substantial discussion or negotiation." The first and most elusive question is what does "substantial" mean? Even if substantial was susceptible to a definition that provided sufficient notice, however, many of the same questions dogging section (c)(2) still apply here. Moreover, this section raises other questions. For example, suppose a right to life group met with candidates running against each other. One candidate agrees to sign a "Pledge for Life," the other does not. The organization runs an ad about the horror of abortion which identifies many candidates, including the candidate at issue, who have refused to sign this pledge? Or, what if the candidate who signs the pledge becomes one of many candidates and celebrities featured in an ad explaining the group's commitment to end abortion? Is the signing candidate

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[25] See FEC v. Public Citizen, 64 F. Supp.2d 1327, 1330 (N.D. Ga. 1999) (noting that the Clark campaign discouraged Public Citizen's independent expenditure campaign against its opponent Representative Newt Gingrich because it "was concerned that the politically conservative voters . . . might well vote for Rep. Gingrich if it was perceived that a 'Ralph Nader group' was actively campaigning against Rep. Gingrich" and that Public Citizen's activity would "unleash independent expenditures in support of Rep. Gingrich").

vulnerable to charges of coordination with the right to life group in both hypotheticals because by signing the agreement, the candidate's "substantial discussion" with the group resulted in "collaboration or agreement"?

Conclusion

The Coalition applauds the Commission's efforts to create a clear and understandable coordination standard. The answer to most of the questions posed regarding the ambiguity and constitutionality of the Proposed Rules is to limit the Rules' application to express advocacy. Once that step is taken, the Commission generally will only need to create more precise definitions that limit the potential reach and more clearly identify the intent of the phrases and terms introduced. The Coalition appreciates the opportunity to comment on these important matters and stands ready to assist the Commission as it directs.

Sincerely,

Jan Witold Baran