United States Senate

WASHINGTON, DC 20510

May 17, 2000

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

Re: Proposed Rules on General Public Communications Coordinated with Candidates

Dear Ms. Smith:

Please accept these comments in opposition to the Commission's proposed rules governing communications that are coordinated with candidates. In our view, if made final, the proposed rules will open new and massive loopholes in the campaign finance laws enacted by Congress and upheld by the United States Supreme Court. The proposed rules on coordination are inconsistent with the letter and spirit of the Federal Election Campaign Act ("FECA").

The proposed rules contain an unduly narrow definition of "coordination." They provide that a communication is coordinated only: (1) if it is made in response to an explicit request or suggestion from a campaign; (2) if there has been substantial discussion or negotiation over the communication between a campaign and person making the expenditure; or (3) if a candidate or his agents exercise control over the communication. We believe that although these circumstances are certainly sufficient to demonstrate coordination, they are not necessary for coordination to have occurred. Limiting the definition in this way will allow significant activities to aid a candidate that any reasonable observer would conclude should not be deemed to have been conducted independently of the campaign.

If this narrow definition of coordination is adopted, candidates and their supporters will be able to evade the intent of the FECA. For example, wealthy individuals could hire their favored candidate's advertising firm to produce "independent" ads using largely the same footage and conveying the same themes as the candidate's ads. In addition, a candidate campaign committee could easily prompt supportive organizations to undertake expenditures by providing confidential information about upcoming events or the schedule of the campaign's advertising buys without making any request or having any discussion with such organizations about specific communications.

The requirement of explicit requests, explicit agreements, or substantial discussions or negotiations in the proposed rule is a roadmap for abuse and an invitation to the sort of coordination with a "wink and a nod" that the Commission's rules should try to prevent. Given the history of soft money and phony "issue advocacy," we have no doubt that loopholes such as these would be fully exploited by groups and candidates on both sides of the political spectrum.

It is even unclear how the proposed rule would affect the Commission's existing regulations found in 11 C.F.R. § 109.1(b) and (d) concerning independent expenditures. If these regulations are completely superceded by the proposed rule, wealthy contributors or advocacy groups could send volunteers into a campaign, collect all of its campaign literature, and then spend millions of dollars copying and "independently" distributing those copies.

We are particularly troubled that the rules would apparently permit high level fundraisers or even paid campaign staff for political candidates to conduct "independent" advertising campaigns in support of those candidates, notwithstanding the Commission's current regulations. *See* 11 C.F.R. § 109.1(b)(4)(i)(B). To require the Commission to carry out a massive fact-finding effort to attempt to discover some sort of explicit agreement between the candidate and such individuals in these cases will further erode the confidence of the electorate in the fair administration of the election laws. The rules should make it clear that the top advisers or fundraisers to a campaign are disqualified from making "independent" expenditures on behalf of their candidate.

Current law expressly provides that "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidates, his authorized political committee, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). We believe these words require a scope for "coordinated communications" much broader than that contemplated by the proposed rule.

In sum, we believe that the proposed rule on coordination is fundamentally inconsistent with the FECA. It is also inconsistent with prior Commission policy on coordination, which has been upheld by the courts going back to at least 1986. *See FEC v. NCPAC*, 647 F. Supp. 987 (S.D.N.Y. 1986). The more recent Christian Coalition case addressed coordination in narrow factual circumstances and should not be broadly applied to all political communication. To effectuate the purpose of the FECA and maintain the fairness of the electoral process and the public's confidence in the law, the proposed rule must be rejected.

Thank you for your consideration.

Sincerely,

Russell D. Feingold
United States Senator

John McCain
United States Senator

Carl Levin
United States Senator

Richard J. Durbin
United States Senator