AGENDA DOCUMENT NO. 02-90-A

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 4, 2002

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner

SUBJECT: Proposed amendment regarding the 'catch all' part of the 'content' standard

As I indicated earlier, I am opposed to an approach in the coordination rulemaking whereby communications outside certain timeframes can fully escape any coordination analysis. In my view, the Commission would thereby be making coordinated communications legal that heretofore have been clearly illegal. This approach would sanction hard hitting 'issue ads' paid for by a person without any limit whatsoever, even if the benefiting candidate produced the ad, selected the media to be used, and picked the precise time and place for the ad to run! Imagine the storied Yellowtail ad (accusing a candidate of wife-beating, stealing, etc.) run nonstop at the behest of an opponent from the date of the primary in an early primary state through early July, or run nonstop from January through early May in a late primary state. This goes even beyond the misguided *Christian Coalition* analysis, and certainly runs counter to the intent behind the BCRA provisions that voided the Commission's regulations because they were too porous. It would allow the worst of the present 'issue ad' problems, and compound it by allowing full-scale coordination with the benefiting candidates.

I appreciate that OGC is trying to provide some guidance regarding what constitutes an "expenditure" that coordination can convert to an in-kind contribution. I further appreciate that OGC is hopeful of applying some sort of objective test that will not require an evaluation of the purpose of the expenditure. Nonetheless, given the clearly inappropriate result noted above, we should strive to better define what 'content' we are trying to identify for purposes of the "expenditure" test.

In my view, Congress has shown us the way with its "promote, support, attack or oppose" standard. When identifying ads that will have to be deemed "Federal election activity," Congress indicated only those that promote, support, attack or oppose a named

candidate need be included. 2 U.S.C. §§ 431(20)(A)(iii); 441i(b)(1), (d)(1), (e)(1)(A), (f)(1). When specifying what exceptions to the definition of "electioneering communication" the Commission might create, Congress clarified that the agency could not exempt ads that promote, support, attack or oppose any referenced Federal candidate. 2 U.S.C. § 434(f)(3)(B)(iv). Finally, when creating a back-up definition for "electioneering communication" Congress again used the 'promote, support, attack or oppose' test. 2 U.S.C. § 434f(3)(A)(ii).

While the Commission has not been able to flesh out the nuances of this standard, it nonetheless has adopted it at several places in its regulations. At 11 C.F.R. § 100.24(b)(3), the Commission uses the phrase in its definition of Federal election activity. Similarly, the concept appears at 11 C.F.R. §§ 300.71 and 300.72 regarding state or local candidate communications. Finally, the test is used at 11 C.F.R. § 100.29(c)(5) to characterize certain activity by State and local candidates that is exempt from the electioneering communication rules.

The 'promote, support, attack or oppose' standard is more precise, in my view, than the 120 day test proposed by OGC. The latter leaves unregulated blatantly election-related ads that fall outside the 120 day periods (such as the Yellowtail ad), and at the same time causes ads that have no connection to an election (such as an ad urging passage of the Wild Horses and Burros Act and asking listeners to "Call Senator Hansen and tell him to vote 'Yes'") to be regulated as in-kind contributions. The 'promote, support, attack or oppose' standard, on the other hand, does a much better job of focusing on the types of communications that have as their purpose influencing elections. By treating the Yellowtail ad as an in-kind contribution if coordinated with the opponent, and by not treating the Wild Horses ad as an in-kind contribution even if coordinated with a candidate, the Commission would be creating a much better result. Only the 'promote, support, attack or oppose' standard allows this reasoned approach.

Though the Commission struggled mightily with giving further clarification to this phrase in the soft money and electioneering communication rulemakings—without success—there is no reason to simply give up on this Congressionally sanctioned test. We should be willing to defend it here if we are willing to defend it in the contexts noted above. Further, we should accept that there are some areas of the law that cannot properly be made purely objective. Just as we will have continuing disputes regarding the meaning of terms like 'express advocacy,' 'clearly identified candidate,' and 'substantial discussion,' we can expect continuing disputes regarding the meaning of 'promote, support, attack or oppose.' On balance, if the latter test does a far better job of drawing the appropriate lines than the 120 day rule, we should embrace it.

I appreciate the suggestion from Commissioner Sandstrom that 2 U.S.C. § 441i(e)(1) contains language that might be read to accomplish some of the goals I am seeking. Specifically, it provides that "A candidate . . . or an entity . . . acting on behalf of [a] candidate . . . shall not spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act . . . ." Since one

prong of the definition of Federal election activity reaches public communications that promote, support, attack or oppose a Federal candidate, one could argue that a coordinated communication falling outside OGC's 120 day period could not be funded by a group 'acting on behalf of a candidate' unless the funds used are, in essence, hard dollars from a reporting "political committee." Presumably, this would mean that the expending group would have to take contributions only from permissible sources and only in amounts not exceeding $5,000 per year. While this reading of § 441i(e)(1) would assure that no soft money could be used for such coordinated ads, it would not address the fundamental issue before us: whether the overall cost of such a coordinated ad should be treated as an in-kind contribution. In other words, it would not address why a coordinated Yellowtail type ad could be run by such a group from March to early July in an early primary state *without any limit*, and yet would be subject to the $2,000 per election limit if run during the following 120 days. By not addressing the issue in the context of 'coordination' analysis, the Commission would ignore the heart of the statute which prevents coordinated expenditures—even by a "political committee" using hard dollars—above specified limits. The opportunity for a 'quid pro quo' arrangement is at its zenith in such unlimited in-kind contribution situations.

A further complication with the § 441i(e) analysis is that there is no assurance that anyone would appreciate that the Commission intends the 'acting on behalf of a candidate' situation to reach circumstances where the candidate merely satisfies the various 'coordination' tests. In other words, a group wishing to run Yellowtail type ads outside the 120 day timeframe might well argue that coordination with the opponent does not mean the group is 'acting on behalf' such candidate. For the same reason such group argue that it is not an 'agent' of the opponent (because it was acting on its own behalf under the 'Two Hat' agency theory), such group would argue that it is not within the scope of § 441i(e)(1). Indeed, a multitude of defenses come to mind: a mere 'request or suggestion' would not rise to the level of 'acting on behalf of;' nor would 'material involvement' in certain decisions; nor would 'substantial discussion' about a communication.

My suggested approach, on the other hand, would build upon the rationale of § 441i(e)(1). Not only would it assure that hard money be used for coordinated public communications that promote, support, attack or oppose a candidate, it would retain the current legal posture of the Commission whereby the person paying for such communications must treat them as an in-kind contribution. It reflects the straight-forward proposition that if a candidate goes so far as to meet the 'conduct' standards being proposed, and the communication fits the 'promote, support, attack or oppose' description, the FEC is within its rights to apply the contribution limits to the expender.

To implement my proposal, it would be necessary to substitute for the proposed language at 11 C.F.R. § 109.21(c)(4) (*see* pp. 148, 149 of Agenda Document 02-90) the following:

A communication that is a public communication, as defined in 11 CFR 100.26, and that promotes, supports, attacks or opposes a clearly identified candidate or a clearly identified political party.

The E & J would have to be revised as well. I would substitute for the language from line 3 on p. 36 through line 22 on p. 41 the following:

The Commission is including a modified version of Alternative B in the final rules at 11 CFR 109.21(c)(4). At the heart of the provision is the standard used by Congress at several places in BCRA: whether the communication promotes, supports, attacks or opposes the named candidate (or party). The modification involved is the adoption of the "public communication" concept so that the types of communications will be circumscribed in a manner consistent with other parts of BCRA.

The Commission rejected the Alternative A approach because it could too easily reach communications that have nothing to do with elections. With no timeframe whatsoever, and no possibility to exclude communications that make only benign reference to a candidate in a politically neutral setting, it was overbroad. The Commission rejected the Alternative C approach because it too could easily reach communications having nothing to do with elections and, at the same time, it could easily fail to reach communications that had everything to do with elections. For example, it could reach a public service ad about disaster relief that merely urges listeners to "Contact your Congressman or other elected leaders for more information" run four months away from any election. Yet it would not reach a hard hitting attack ad run 121 days from an election saying, "Bill Mackay is a liar, tax cheat, and wife-beater. Is that the kind of leader we need?"

The 'promote, support, attack or oppose' test is more focused on the type of communication that should be deemed an "expenditure" for purposes of coordination analysis. It will allow the Commission and the regulated community a better opportunity to avoid application of the in-kind contribution result where there is no plausible nexus to influencing elections. At the same time, it will assure activity that meets the common sense meaning of the straight-forward terms used and that is coordinated is properly regulated as an in-kind contribution.

The Commission has adopted, and must apply, the 'promote, support, attack or oppose' standard in other places pursuant to BCRA. *See* 11 CFR 100.24(b)(3) (definition of Federal election activity); 11 CFR 300.71 and 300.72 (state or local candidate communications subject to soft money restrictions); 100.29(c)(5) (exempting certain State and local candidate activity from electioneering communication rules). While this will require in each instance some degree of case-by-case analysis, it is not really different from the case-by-case analysis that must be applied in applying terms like 'expressly advocating' (words which "in context can have no other reasonable meaning;" *see* 11 CFR

100.22(a)) and 'clearly identified' ("the identity of the candidate is otherwise apparent through an unambiguous reference;" *see* 11 CFR 100.17)).