



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

AGENDA ITEM
For Meeting of: 9-12-02

SUBMITTED LATE

TO: The Commission

FROM: Lawrence H. Norton
General Counsel *LH Norton*

DATE: 09/12/2002

SUBJECT: Amendments to NPRM on Coordinated and Independent Expenditures
(Agenda Document No. 02-64)

- 1 The Office of General Counsel proposes the following amendments:
2
3 1. Page 99, lines 12 and 13: delete and replace with the following –
4 (1) To request or suggest that a communication be created, produced, or
5 distributed.
6 2. Page 100, lines 11 and 12: delete and replace with the following –
7 (1) To request or suggest that a communication be created, produced, or
8 distributed.
9 3. Pg. 8, line 3: change “of” to “or”
10 4. Pg. 8, line 20: delete “the solicitation or receipt of contributions or other transfers of
11 funds,” and replace with “requesting or suggesting that a communication be created,
12 produced, or distributed.”
13 5. Pg. 9, line 8: change “?” to “.” at the end of the sentence.

14 6. Pg. 105, line 20: delete "Except as provided in paragraph (f) of this section,"; capitalize
15 the word "a".

16 7. Pg. 42, line 7: insert the following

17 "The Commission proposes this conduct standard to address what it understands to
18 be Congress' primary concern, which is a situation in which a former employee of a
19 candidate goes to work for a third party that pays for a communication that promotes or
20 supports the former employer/candidate or attacks or opposes the former
21 employer/candidate's opponent. The conduct standard, as proposed, does not require that
22 the former employee act under the continuing direction or control of, at the behest of, or on
23 behalf of, his or her former employer. This is because a former employee who acts under
24 such circumstances is a present agent, and would presumably be regulated as an agent, not
25 as a former employee. To give effect to the statutory language that mandates the
26 Commission's coordination regulations address 'former employees' (see Pub. L. 107-155,
27 sec. 214(c)(3)) the Commission assumes that a "former employee," as that term is used in
28 the statute, must be different from an 'agent.'

29 "The Commission seeks comment on whether a requirement of continuing direction
30 or control by the former employer/candidate should be added to the proposed conduct
31 standard. Consider, for example, an employee of a candidate in a contested primary who
32 leaves the employment of that candidate to work for a third-party organization that makes a
33 communication satisfying one or more of the proposed content standards. Under the
34 proposed conduct standard, that third-party organization could be found to make an in-kind
35 contribution. Assuming that the former employee is not acting under the continuing
36 direction or control of, at the behest of, or on behalf of, his or her former employer, it can be

37 argued that the third-party organization is making an independent expenditure or a non-
38 coordinated disbursement for an electioneering communication, albeit with the windfall of
39 the former employee's knowledge. Should the regulation provide that the third-party
40 organization does not make an in-kind contribution in this specific circumstance?

41 "The Commission also seeks comment on a related situation illustrated by the
42 following example. Consider an employee, disgruntled or otherwise, of a candidate in a
43 contested primary who leaves the employment of that candidate to work for a third-party
44 organization that makes a communication satisfying one or more of the proposed content
45 standards. Under the proposed conduct standard, that third party organization could be
46 found to make an in-kind contribution. But suppose the third party organization uses
47 information gained by the employee to run ads critical of the former employer or that favor
48 the opponent of the former employer? Assume also that the third party organization has no
49 contact with the opponent, his campaign or any agent of the opponent. Should the
50 Commission consider those communications to be in-kind contributions to the candidate
51 who is the intended beneficiary? Or, assuming that the communication would otherwise
52 qualify as an independent expenditure or electioneering communication, should the
53 Commission merely consider this third party communication to be either an independent
54 expenditure or a non-coordinated disbursement for an electioneering communication?"