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To CoordinationShays3@fec.gov

cc

bcc

Subject Comment on Coordinated Communications

Dear Ms. Rothstein:

Attached please find a comment submitted in response to the Federal Election Commission's Supplemental Notice of Proposed Rulemaking regarding the impact of *Citizens United* on the FEC's proposed rules on coordinated communications.

Best Regards,

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February 11, 2010

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RE: FR Doc # 2010-2973, Proposed Rules on Coordinated Communications

Dear Madam:

This comment is submitted in response to the Federal Election Commission's Supplemental Notice of Proposed Rulemaking regarding the impact of the Supreme Court's decision in *Citizens United v. Fed. Election Comm'n*, No. 08-205, 2010 WL 183856 (U.S. Jan. 21, 2010), on the FEC's proposed rules on coordinated communications. In the paragraphs below, I address a specific question posed in the Supplemental Notice: whether the a more robust coordinated communications rule is needed because the presence of prearrangement and coordination in those communications may result in, or provide the opportunity for, quid pro quo corruption. In response to your question, I respectfully submit that stricter regulation of coordinated communications would serve the Court-sanctioned governmental interests in preventing corruption and increasing transparency, as long it is applied uniformly to all speakers and does not pose an undue burden on speech.

I. The Prevention of Corruption is a Compelling Governmental Interest

A law that burdens speech is subject to strict scrutiny, and to survive a constitutional challenge, the government must prove that the law in question furthers a compelling interest and is narrowly tailored to achieve that interest. While the Court in *Citizens United* recognized that the prevention of corruption is a compelling government interest, it held that the chilling effect of restrictions on corporate political speech was greater than the government's interest in preventing corruption. *Id.* at *29. In reaching this conclusion, the Court distinguished independent expenditures, which are made by the donor "in the absence of prearrangement and coordination" with the recipient of the funds, from other expenditures that entail some degree of involvement by the recipient. *Id.* at *30. The Court reasoned that the lack of involvement between the donor and the recipient in the former category of political speech "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate," thus suggesting that expenditures that fall in the latter category would probably not weigh as heavily against the government's interest in preventing corruption. *Id.*

II. Coordinated Communications Provide an Opportunity for Quid Pro Quo Corruption

Since coordinated communications involve, by definition, some degree of prearrangement and coordination between donor and recipient, the danger of corruption is not absent from this form of political speech. It is for this very reason that any activity that falls

within the definition of coordinated communication under 11 C.F.R. § 109.21 is already subject to disclosure and other requirements in order to reduce the likelihood or at least the appearance of corruption. The Court's reasoning in *Citizens United* supports the regulation of this type of political speech. In upholding the application of disclosure requirements on the electioneering communication at issue in *Citizens United*, the Court emphasized the importance of transparency to a well-working democracy, as it "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at *39. Because coordinated communications involve a larger degree of cooperation between the sponsor of the electioneering communication and its beneficiary than the type of political speech directly addressed by the Court in *Citizens United*, the argument for transparency applies with even greater force to the former as it gives the parties a more ample opportunity to reach improper quid pro quo agreements.

III. More Robust Regulation of Coordinated Communications is Needed After *Citizens United*

Although coordinated communications are currently subject to regulation by the FEC, which treats them as in-kind contributions to political candidates under 11 C.F.R. 109.21(b), there is evidence suggesting that the current regulations on this type of political speech are unclear and insufficiently strict. For example, in *Shays v. Fed. Election Comm'n*, 528 F.3d 914 (D.C. Cir. 2008), the U.S. Court of Appeals for the D.C. Circuit mandated that the FEC expand the scope of its regulation of coordinated communications to include relevant conduct that takes place more than four months prior to a federal election because the current standard is vague and underinclusive. *Id.* at 924. Because the Court's holding in *Citizens United* will increase the amount of conduct to be regulated as coordinated communications, since corporations and labor unions can no longer be banned from engaging in this type of political speech, it follows that the concerns of underinclusiveness held by the Court of Appeals of the D.C. Circuit are even more salient at this point, since more participants will be taking part in the underincluded activity.

IV. More Robust Regulation of Coordinated Communications Is Likely to Survive Judicial Review if Two Conditions Are Met

Stricter regulation of coordinated communications will likely survive strict scrutiny review if the new regulations are applied uniformly to all speakers and are not overly complex so as to impose an undue burden on speech. These two factors were mentioned specifically by the Court in *Citizens United* when considering the boundaries of constitutional restrictions on political speech. The Court recognized a compelling governmental interest in regulating political speech through contribution limits and disclosure requirements if doing so increases transparency and prevents corruption, but only when the regulations treat all speakers equally and provide sufficient notice to the public as to what constitutes illegal conduct. *Id.* at *69, *16.

Respectfully submitted,

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