Jacob Heller
<jmheller@stanford.edu>
Sent by:
jacob.heller@gmail.com

02/12/2010 02:04 AM

To CoordinationShays3@fec.gov
cc
bcc
Subject Comment on Coordinated Communications

Dear Ms. Rothstein,

Please find attached my comments on Notice 2010-01: Coordinated Spending. You can reach me any time at:

Jacob Heller
102 Hoskins Ct., # 101
Stanford, CA 94305
(408)-505-1614
jmheller@stanford.edu

Best regards,

Jacob Heller

Comment on Coordinated Communications.pdf

Ms. Amy L. Rothstein,
Assistant General Counsel
Federal Election Commission,
999 E Street, NW., Washington, DC 20463
(submitted electronically to CoordinationShays3@fec.gov)

Re: Comment on Notice 2010-01: Coordinated Communications

This comment is in response to this Commission's Notice of Proposed Rulemaking on Coordinated Communications, 74 Fed. Reg. 53893 (Oct. 21, 2009), as well as its Supplemental Notice of Proposed Rulemaking, 75 Fed. Reg. 6590 (Feb. 10, 2010). In short, this comment advocates that the Commission adopt stringent conduct regulations, while loosening its content requirements, to prevent coordinated election advertising between corporations and candidates for federal office in the wake of *Citizens United v. F.E.C.*, 558 U.S. ___ (2010).

1. Background

The D.C. Circuit rejected this Commission's regulations on election advertisements financed by third parties in coordination with candidates for federal office in *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"). The regulations considered in *Shays III* strictly regulated coordinated expenditures 90 days before a House or Senate election, and 120 days before a Presidential election. Outside of this window of regulation, however, the Commission's regulations were limited only to advertisements that used the eight electioneering "magic words" identified in *Buckley v. Valeo*, 424 U.S. 1, 43-44 & n.52 (1976), a standard the Court later described as "functionally meaningless" because so few advertisements actually contain these words. *McConnell v. FE.C.*, 540 U.S. 93, 193 (2003). The D.C. Circuit held in part that these toothless regulations did not faithfully implement Congress' desire to curtail the use of soft money under the Bipartisan Campaign Reform Act, and so failed under the second step of *Chveron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and were arbitrary and capricious under the Administrative Procedure Act. *See Shays III*, 528 F.3d at 925 (explaining that the regulations allowed "candidates [to] ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words" and aired outside the 90/120 window).

This Commission began the rulemaking process to comply with *Shays III*, 74 Fed. Reg. 53893, and reopened the period for commenting to determine if the Court's decision in *Citizens United* "raise[s] issues relevant to the coordinated communications rulemaking," 75 Fed. Reg. 6590. Because I believe *Citizens United* does raise such issues, I am filing this comment.

2. Without New Regulations, *Citizens United* Creates the Possibility for Corporations to Directly Sponsor Candidates for Federal Office

Citizens United held that provisions of BCRA that prohibited corporations and labor unions from financing independent electioneering communications directly from their treasuries are unconstitutional. While coordinated campaign communications can still be regulated, *see Citizens United*, slip op. at 41, corporations are now free to make unlimited "independent" expenditures to sway elections.

Without stringent enforcement of clear regulations, the door is opened "to corporations working with candidates." Eliza Newlin Carney, *The* Citizens United *Ruling in the Real World*, Nat'l J., Jan. 25, 2010, http://www.nationaljournal.com/njonline/rg_20100122_7487.php (quoting Lawrence Noble, counsel at Skadden Arps). This is because it is impossible to tell whether corporate advertising is truly "independent" or coordinated with a candidate. This, of

course, is a problem: if corporations can coordinate with candidates, there exists a "'danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'" *Citizens United*, slip op. at 41 (quoting *Buckley*, 424 U.S. at 47). This is contrary to the policy goals animating BCRA that this Commission must enforce. Moreover, preventing *quid pro quo* corruption is a compelling state interest that can justify abridging corporate First Amendment rights. *Id.*

3. The Current Regulation's Content Restrictions Hinder the Commission's Ability to Enforce BCRA and Prevent *Quid Pro Quo*, and Are Likely Unconstitutional

The Commission's current proposed content regulations suffer two flaws. First, they do not sufficiently protect against the possibility of *quid pro quo* corruption. The current proposals all contain extending certain "content" requirements for a communication before it can be considered coordinated. This is a misguided effort. Every time the law has defined certain content as prohibited, scrupulous advertisers have responded with gimmicks to circumvent the regulations. (This is why we now have ads that attack candidates, but then ask voters to "call" the subject of the attack.) It also misperceives the problem: it is *not* BCRA's purpose to only eliminate coordination on some electioneering communications, but instead the unregulated flow of soft money from private entities to candidates. The problem that Congress wanted to regulate is the actuality of corrupt conduct—that is, specific conduct—not the content of specific types of speech.

Content restrictions are also likely unconstitutional. As the Court flatly put it in *Citizens United*, "The First Amendment does not permit Congress to make these categorical distinctions based on . . . the content of the political speech." Slip op. at 49. Moreover, the more complex and onerous the regulations, the more like prior restraints on speech they may become. *Id.* at 18.

4. Proposal

To achieve BCRA's goals and to prevent *quid pro quo* corruption, this Commission should promulgate regulations that contain:

1. Loose content standards that only ensure that the speech regulated concerns a federal election, and
2. Stringent conduct regulations that contains the rebuttable presumption that any electioneering communication that follows any interaction between a corporation or labor union and a candidate, her staff, or her consultants (within a reasonable period of time) is coordinated. (While BCRA notes that regulations "shall not require agreement or formal collaboration to establish coordination," BCRA § 214(c), this *presumption* of agreement or collaboration is probably more in line with what Congress had intended.)

Such regulations would focus on the *conduct* sought to be prohibited: the possibility of *quid pro quo* corruption through soft money. It would also remove the need to judge the content of most electioneering communications, as well as replace complex regulations that chill speech, with a clear and easily enforceable standard. It may raise its own constitutional concerns—for example, the associational rights of organizations and candidates—but the possibility of ending *quid pro quo* corruption arguably outweighs the minimal intrusion on associational rights.

Sincerely,

Jacob M. Heller
102 Hoskins Ct., # 101
Stanford, CA 94305