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cc
bcc
Subject Supplemental Comment on the Coordinated Communications Rulemaking (Utrecht & Phillips, PLLC)

Hello Ms. Rothstein:

Please accept the attached supplemental comment from Utrecht & Phillips, PLLC regarding the coordinated communications NPRM.

Thank you,
Jessica McBroom

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Utrecht & Phillips - Supplemental Comment on Coordination NPRM 2-24-10.pdf

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February 24, 2010

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

Dear Ms. Rothstein:

These comments in response to the Commission's Supplemental Notice of Proposed Rulemaking ("NPRM") on Coordinated Communications (Notice 2010-01) are submitted by our law firm as election law practitioners and not on behalf of any of our firm's clients and are intended to supplement our earlier submitted comments of January 19, 2010. While these supplemental comments are intended to address the Commission's Supplemental NPRM, and, in particular, the Supreme Court's decision in *Citizens United v. FEC*,[1] we continue to offer these comments from the practical standpoint of the clients we represent, including federal and state candidates, third party independent spenders, membership organizations, corporations, labor organizations, vendors of political services, donors, and political committees.

We believe that the obvious central issue of the Supplemental NPRM is that which is left virtually unspoken in *Citizens United*, but which weighs heavily upon its decision, namely, the effect of coordinated activity on the now new participatory speakers that the Court has introduced into the political process, i.e., corporations and labor unions. We further believe that the impact of the decision highlights the importance of the Commission coming to grips with the key question posed in our earlier comments: in short, are the rules clear to the regulated community? If the rules are clear, then the Commission will have succeeded in drawing a bright line between those communications that are covered as reasonably related to an election and those that are not.

The Commission asks in the supplemental NPRM whether (1) *Citizens United* argues for a more robust coordination rule, and (2) how the proposed content standards are affected. As set forth below, we offer the following comments. To the first query, we believe that the decision argues neither for a more robust or less robust rule, but, rather, for a more precise rule. To the

[1] *Citizens United v. Fed. Election Comm'n*, No. 08-205, slip op. (U.S. Jan. 21, 2010).

second, we conclude that the decision clearly reinforces our earlier comment in which we stated that (1) the promote, support, attack or oppose ("PASO") standard is confusing and unworkable and should not be used, even as modified by any of the proposals contained in the NPRM; and (2) the content standard for communications in 11 CFR § 109.21(c)(3) should be express advocacy or its functional equivalent with the functional equivalent being defined as those that are election-related advocacy as determined by reference within the communication to a candidacy, election or voting.

1. **A brighter more precise line test is necessary after *Citizens United*.**

It is indisputable that the Court in *Citizens United* has re-introduced corporations and labor unions as speakers and participants in the political process, in ways heretofore long impermissible, even as post-decision debate has raged as to the practical effects of the decision. Both old and new speakers in the regulated community deserve a rule from the Commission that is clear and understandable, and the Court itself extols that as one of the goals of its decision.[2] More importantly, for these purposes, however, is the Court's implicit recognition of the divide between independent and coordinated activities. Given the constitutional protections that attach to independent speech, it becomes more important for the community to know where that speech begins and coordinated activity ends. While the decision may not compel a more robust rule, the decision does compel a more precise rule by virtue of the stark divide that has been created between the nearly unfettered constitutional rights of independent speakers and those who may be regulated, investigated and potentially punished due to their coordinated activity.

The most important element to a clear and precise rule is the content of the speech. We urge the Commission to be clear as to what standard is applicable.

2. **The PASO standard is inherently deficient and incapable of being part of any brighter more precise test, and nothing in *Citizens United* alters this deficiency.**

Nothing in the *Citizens United* case clarified the PASO standard or, by any stretch of the imagination, improved its potential standing as clear bright line test.

As we stated in our earlier comment, the PASO standard is entirely subjective. It offers the opposite of a bright line test. In many cases whether a particular communication "supports" or "praises" or "opposes" or "criticizes" depends on the perception of the viewer or listener. For example, supposing a non-profit organization pays for a broadcast communication that simply says: "As Congressman, Robert Henry has voted three times to support legislation permitting late-term abortions." Does the communication "praise" or "support" the Congressman's candidacy, "oppose" or "criticize" that candidacy, or is it simply a factual statement about the Congressman's record? Certainly, a listener or viewer could conclude that the statement exuded either positive or negative views of the Congressman, depending on the listener's own predisposition.

In fact, very few communications are truly neutral, or not in some manner susceptible of being viewed as being either in support or opposition to a candidate. In this respect, PASO itself

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[2] *Id.* at 18-20.

is potentially a "functionally meaningless" standard, namely because it is so vague and ill-defined that virtually any communication could be interpreted to be subject to the standard. Thus, in response to the Commission's questions as to whether the "proposed PASO definitions [are] sufficiently clear and unambiguous as not to require 'intricate case-by-case determinations, as concerned the *Citizens United* Court, our answer is a clear and resounding no. Moreover, should the Commission, as it posed in a question, adopt a PASO standard without a definition, it would be presenting the regulated community with the worst of all possible worlds.

Thus, we again urge the Commission to reject the PASO standard and not to extend its use any further than Congress determined was appropriate in BCRA.

3. **In the wake of *Citizens United*, the Commission should adopt a standard in 11 C.F.R. § 109.21(c)(3) that covers only those communications that contain express advocacy or its functional equivalent.**

Nothing in the *Citizens United* case clarified the actual definition of express advocacy or its functional equivalent or, apart from its application to *Hillary: The Movie*, enhanced the regulated community's understanding of the terms of that definition.[3]

We believe that the *Citizens United* Court strengthened our earlier argument that the correct standard outside the 120/90 day window is that of express advocacy or its functional equivalent. However, we differ from the Court that this standard is currently in any way clear or obvious, and we again urge the Commission to develop a bright line standard.[4] In order to do that we return to our earlier comment, where we suggested that the Commission must lay out what additional words in communications will be considered election-related in order to draw a bright line between those communications that are covered because they are election-related and those that are not. This is critical the further away from an election that a communication occurs.

Thus, we suggest that the Commission should redefine § 109.21(c)(3) as applying only to those communications that contain express advocacy or are unambiguously related to an election because they make reference to a candidacy, voting or an election. Where express advocacy is left open to interpretation, even if labeled a "reasonable" interpretation, and without a bright line definition including specific words or references, the revised regulations will accomplish nothing other than the continuation of the current muddied system where the regulated community is left in the dark. With specific words or references, we contend that this standard would be clear, provide certainty to the regulated community, and comply with the applicable constitutional guidelines for covered political speech.

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[3] The Opinion is replete with references that the functional equivalent standard is "objective," but without a definition, the regulated community is left in the dark to the same degree as if the standard were a subjective one. *See, e.g., Citizens United* at 7, 18.

[4] In response to the Commission's query, we do not feel that the Court's decision that the application of the functional equivalent test is sufficiently workable without further amplification, because their application itself was conclusory. *See, Id.* at 8.

Thus, for public communications made prior to the 120/90 day window, we urge the Commission to adopt a well-defined express advocacy standard of 11 CFR § 100.22(a). In promulgating this standard, for the reasons stated above, we urge the Commission to give the regulated community the specific words or references in a clear and concise definition.[5]

We again appreciate the Commission's thoughtful consideration of this matter and for the opportunity to provide the foregoing comments.

Respectfully submitted,

Lyn Utrecht
Eric Kleinfeld
Patricia Fiori
Margaret McCormick
Karen Zeglis

[5] Arguably, and in response to the Commission's query, 11 CFR § 114.15 on electioneering communications is no longer relevant. However, the standards of § 114.15 could potentially be relevant to a clear definition of express advocacy.