"Brown, Megan"
<MBrown@wrf.com>

03/22/2006 09:56 AM

To <coordination@fec.gov>
cc
bcc
Subject Supplemental Comments on Coordination Rulemaking

Attached please find supplemental comments on behalf of the Chamber of Commerce of the United States.

Megan L. Brown
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, DC 20006
direct dial: (202) 719-7413
email: mbrown@wrf.com

WRFMAIN-12458086-v1-Comments_as_Filed.PDF

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

March 22, 2006

Jan Witold Baran
202.719.7330
jbaran@wrf.com

VIA EMAIL (coordination@fec.gov) and HAND DELIVERY

Mr. Brad Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Supplemental Comments of the Chamber of Commerce of the United States on FEC Rulemaking on Coordination

Dear Mr. Deutsch:

The Chamber of Commerce of the United States appreciates the opportunity afforded in the March 13, 2006 Supplemental Notice of Proposed Rulemaking (SNPRM), published at 71 Fed. Reg. 13306 (Mar. 15, 2006) to submit additional comments on data on House and Senate advertising between November 6, 2002 and November 2, 2004. Pursuant to the FEC's invitation, the Chamber submits these brief comments to explain how that data reinforces the position taken in comments previously filed by the Chamber on January 13, 2006 and in testimony by Jan Baran in January 2006.[1]

In its comments, the Chamber reminded the Commission that it faces two basic imperatives in addressing the D.C. Circuit's[2] mandate: *first*, it must exercise the utmost caution in regulating core political speech and *second*, it must respect the need of regulated entities for clarity and predictability in planning their communicative activities. With respect to the specific proposals contained in the draft rules, the Chamber urged that the FEC hew as closely as possible to the Court's direction, fixing only those problems identified by the D.C. Circuit as necessitating review.

Specifically, the Chamber noted that the FEC can retain the 120 day period contained in the current regulations by relying on evidence produced as part of this proceeding. The evidence from TNS Media Intelligence/CMAG conclusively answers the D.C. Circuit's concerns about the 120 day period's underinclusiveness. In *Shays*, the Court was concerned that the FEC had not justified its distinction

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[1] The Chamber has focused on the Senate and House data, and does not address the Presidential data in its submission, because the Chamber does not take positions on Presidential contests.

[2] *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

between communication occurring within and beyond the 120 day period. The Court worried that substantial communication outside the 120 day period was really intended to or had the effect of improperly influencing a federal election, but was left unregulated by the FEC's time limit.

This data confirms the reasonableness of the FEC's determination that spots aired more than 120 days prior to an election do not need to be treated as coordinated. It supports what the Chamber asserted was "the logical conclusion that as communication is temporally more distant from a federal election, its ability to effect that election, and hence its value to a campaign, diminishes."[3] Specifically, the data shows conclusively that the 120 day period would cover over 97% of media spots airing before House elections.[4] With respect to Senate elections, the 120 day period would appear to be *overinclusive*, as 99.47% of media spots are aired just 90 or fewer days before Senate elections.[5] Therefore, the 120 day period in the existing regulation is, if anything, overinclusive, but is certainly not underinclusive as the D.C. Circuit worried.

In fact, because the 120 day period may be flawed by being *overinclusive*, it would be prudent for the FEC to adopt a narrower time limit, as the Chamber proposed in its comments. For example, the data would easily support a 90, 60, or 30 day time limit. Specifically, Tables S-1 and H-1 reveal that:

- A rule under which coordination could occur 90 days or fewer from an electoral event would encompass 99.13% of media spots for the Senate, and 91.44 % for the House.
- A rule drawing the line at 60 days or fewer from an election would include 91.60% of media spots concerning Senate electoral events, and 88.16% in House races.
- A bright line drawn at 30 days would cover 69.01% of Senate media spots and 80.21% of House media spots.

Thus, when drawing the line, the FEC should ask itself whether the incremental gains in coverage are offset by any chilling effect or overinclusiveness. Because the differences between the 120 and 90 and 60 day periods are negligible, the FEC should give serious consideration to adopting the least restrictive means to achieve its end: the 60 day time period. This time period would be consistent with Congressional line-drawing in the context of electoral and political speech

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3 Chamber Comments at 20.
4 *See* Table H-1.
5 *See* Table S-1.

contained in the BCRA itself.[6] Setting the time period at 60 days is also supported by the FEC's regulatory time periods for the depreciation of polling data in 11 C.F.R. § 106.4(g), under which the FEC has determined that on the 61st day after the polling event, the data is worth only 5% of its original value.[7]

By better justifying the existing limitations, or taking the most prudent approach and choosing a more accurate and narrower time period, the FEC can address unlawful coordination or the appearance of evasion without being over or underinclusive. Such tailoring is needed to provide clarity to the regulated community and survive judicial review:

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).[8]

Because of the critical political, expressive, and associational rights at stake, the FEC should proceed in the most cautious and incremental fashion to address the D.C. Circuit's concerns. The data released on March 13 confirm the wisdom of a modest approach. As such, the Chamber respectfully urges the FEC to adopt a 60 day period in its regulation of coordination. Such a rule would cover greater than 91 and 88 percent of all spots prior to Senate and House electoral events, respectively.

In the alternative, should the FEC conclude that its rule needs to encompass at least 90% of media spots prior to an election event, the 90 day period is appropriate. Finally, it can reaffirm its original judgment that a 120 day period is appropriate, because the data reveal that such a time period ensures coverage of over 97% of

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6 *See* 147 Cong. Rec. S3035 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe) (The definition of "electioneering communications "is carefully crafted to make sure we have a narrow provision identifying the time period of 60 days and 30 days"). Though the D.C. Circuit seemed skeptical of reliance on this 30/60 day timeframe from what it considered a distinct statutory provision, the Court was actually troubled by the fact that the FEC had not relied on the "electioneering communication" provision in its rulemaking, but was simply providing a "post hoc rationalization" *Shays*, 414 F.3d. at 101. Here, the FEC can take the opportunity to explain its reasoning, and has the additional support of voluminous data that demonstrate the reasonableness of a 60 day period.

7 *See* Chamber Comments at 23-25.

8 *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005) (citation omitted); *see also* Comments of the Chamber at 15-16 (collecting cases).

House media spots and 99% of Senate media spots. In any event, the data proves that under no circumstances should the Commission extend the current 120 day period in its coordination regulations. To do so would necessarily capture public communications that do not influence elections. Based on the data, each of these alternatives – the 60, 90, and 120 day periods – is progressively more likely to be overinclusive and therefore overcorrect in trying to resolve the problem identified by the D.C. Circuit.

The Chamber respectfully renews its request for clarity and predictability. In no event should the FEC abandon its commitment to these values by eliminating a bright line rule, as was proposed in several of the alternatives in the NPRM released in December.

Sincerely,

Jan Witold Baran
Megan L. Brown
Counsel to the Chamber of Commerce of the United States