Jessica McBroom
<jmcbroom@up-law.com>
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To "coordinationshays3@fec.gov" <coordinationshays3@fec.gov>
cc
bcc
Subject Comment from Utrecht & Phillips on Coordinated Communications Rulemaking

Hello:

Please see the attached comment from Utrecht & Phillips on the coordinated comments rulemaking.

Thank you,
Jessica McBroom

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JESSICA MCBROOM
LEGAL ASSISTANT
UTRECHT & PHILLIPS, PLLC
1900 M STREET, NW
SUITE 500
WASHINGTON, DC 20036
TEL (202) 778-4007
FAX (202) 842-5825

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UTRECHT & PHILLIPS, PLLC
ATTORNEYS AT LAW

1900 M STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036

(202) 778-4000
FACSIMILE (202) 842-5825
www.up-law.com

January 19, 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 Notice of Proposed Rulemaking ("NPRM") on Coordinated Communications (Notice 2009-23) are submitted by our law firm as election law practitioners and not on behalf of any of our firm's clients. Our thoughts regarding the issues posed in the NPRM are based on our collective experience advising members of the regulated community for many years. Rather than looking at the issues through the prism of the applicable constitutional case law about which the Commission will undoubtedly receive much briefing, we are offering 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.

Based on our attempts to educate clients and to assist them in their efforts to comply with the law, as well as our observations about the practical difficulties facing the regulated community, we are focusing these suggestions on what we think works in the real world and what does not. At the outset, we suggest that the vast majority of people and organizations subject to the Federal Election Campaign Act ("FECA" or the "Act") make bona fide attempts to comply with laws and regulations of ever-increasing complexity. We would urge the Commission to take into account the degree of difficulty required for future compliance with any rule change.

The central issue in the NPRM is which political communications will be subject to the Commission's coordination rules, and, in particular, which public communications made prior to the time periods specified in 11 CFR 109.21(c)(4) will be covered. In its 2002 Bipartisan Campaign Reform Act rulemaking and in response to various court cases, the Commission sought to revise its coordination regulations with the goal of covering only those communications "whose 'subject matter is reasonably related to an election.'"[1] As a result of

[1] NPRM, 74 Fed. Reg. at 53,895.

Court decisions (*Shays I* and *III*)[2] regarding the FEC regulations, and in light of Supreme Court decisions in *McConnell*[3] and *WRTL*,[4] the Commission is once again reconsidering its rules. We urge the Commission to consider the following question as it revises the rules: Will any two members of the regulated community agree as to whether a particular communication is subject to the coordination rules? If the rules are that 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 raises questions about whether changes should be made both to the content section and to the conduct section of the coordination regulations. As set forth below, we offering the following comments: (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; (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; (3) the time periods in 109.21(c)(4) should be maintained; (4) the 120-day period for common vendors and former employees should be maintained; and (5) the coordination regulations should mirror the same safe harbors as those contained in 11 CFR 114.15.

1. The PASO standard is confusing and unworkable, and no amount of elaboration or explanation will make it precise enough to clearly distinguish between those communications that are election related and those that are not.

The history of the Commission's discussions about the meaning of PASO itself illustrates that it is an unworkable standard for determining whether a communication is election related.

The Commission's own struggle to apply the PASO concept in enforcement actions is an example of the unworkability of the phrase. Most recently, in MUR 6113, the significant divide among Commissioners regarding PASO was evident. Three Commissioners found that the sentence "[t]hat's why he proudly endorses the McCain-Palin team" was not an expression of support of a federal candidate, while three Commissioners found that it was.[5] While the three Commissioners voting against a finding of reason to believe acknowledged that the Commission could define PASO more precisely in the coordination rulemaking proceeding, we suggest that the inability of the Commission to reach a consensus on its meaning in the enforcement process is likely to carry over to this rulemaking proceeding. This inability to reach a consensus is because the standard itself is faulty and is not easily defined in a way that members of the regulated community will readily understand what language is PASO of a federal candidate.

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[2] *Shays v. FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd, Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I*"), *petition for reh'g en banc denied,* No. 04–5352 (D.C. Cir. Oct. 21, 2005); *Shays v. Fed. Election Comm'n*, No. 07-5360 slip op. (D.C. Cir. 2008) ("*Shays III*").

[3] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

[4] *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449 (2007) ("*WRTL*").

[5] Fed. Election Comm'n, Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Matter Under Review 6113, at 9 (December 18, 2009).

Two of the Commissioners in their Statement of Reasons rely on the *McConnell* Court's decision upholding the PASO standard,[6] but we believe that this reliance is misplaced. It is significant that the Court specifically noted that its conclusion that PASO was a valid standard was based on the Court's conclusion that "actions taken by political parties are presumed to be in connection with election campaigns."[7] However, the expansion of PASO beyond the application to political parties is not supported by the Court's decision.

In retrospect, and certainly since the decision in *McConnell*, it can be reasonably concluded that PASO is fundamentally flawed as a standard, both in its application by the regulated community and the Commission. PASO can be interpreted as covering any communication referring to a clearly identified federal candidate that is positive or negative. Even if defined, it would seem that none of the suggestions for definition would remove ambiguity about a communication that discusses an issue but in the course of that discussion criticizes or praises a federal candidate with respect to his or her position on that issue. Under Alternative A, the Commission suggests that a prominent individual, legislator or public official may be mentioned in a communication and criticized not as a candidate *per se* but in their other capacity. Does this mean that the same ad discussing an individual's position on an issue would be PASO as to one candidate, but not as to his or her opponent?

Even the dictionary definitions quoted in the NPRM at 53,899 illustrate the shortcomings of PASO. "Support" is to "uphold (a person, cause, policy, etc.)." Is praising a candidate's support of a policy or issue upholding the candidate or the policy? "Oppose" includes "to be hostile or adverse to, as in opinion." Is noting disagreement with a candidate's opinion on an issue opposing the candidate, or opposing his or her opinion on the issue? The proposed language in Alternative B based on these definitions would state that a communication only PASOs if it "helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or adverse to, or criticizes." This language would cover many communications that are not election-related.

Even as so defined, 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? How would the Commission decide? Would it be influenced by considerations outside the communication itself such as the sponsor of the communication or the timing? Would it matter if the communication were sponsored by the National Right to Life Committee or by NARAL Pro-Choice America?

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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[6] Fed. Election Comm'n, Statement of Reasons of Commissioner Cynthia L. Bauerly and Commissioner Ellen L. Weintraub, Matter Under Review 6113, at 2 (December 18, 2009).
[7] *McConnell* at 170 n.64.

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, one of the core criticisms of the current express advocacy standard (albeit one with which these commenters disagree) applies equally to the PASO standard. Its adoption would not be an improvement for the regulated community but rather would subject it to further confusion in the community's good faith attempts to comply with arbitrary applications of the standard by the Commission.

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

2. The Commission should adopt a standard in 109.21(c)(3) that covers only those communications that contain express advocacy or its functional equivalent.

While we disagree with the Court that the express advocacy standard is functionally meaningless, we recognize that the Court of Appeals has asked the Commission to prescribe a different standard for 109.21(c)(3) for communications that are made outside the 90/120 day periods.[8] We submit, however, that there need be — and indeed constitutionally should be — a limited extension of express advocacy in order to draw only certain communications under this provision.

We suggest 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.

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) or its functional equivalent, rather than leaving 109.21(c)(3) as it currently is written and adding a new subsection (c)(5). In promulgating this standard, for the reasons stated above, we urge the Commission to reject the reapplication or reintroduction of 11 CFR 100.22(b) as the operating definition of express advocacy, and instead give the regulated community the specific words or references in a clear and concise definition.

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[8] *Shays III* at 18.

3. The time periods in 109.21(c)(4) should be maintained.

The time periods covered in 109.21(c)(4) are rational and cover only communications reasonably related to an election. Especially if the Commission draws into 109.21(c)(3) communications that reference a candidacy, voting or election, there will be no need to expand the time period in this section.

4. The 120-day period in the conduct regulations applicable to common vendors and employees should NOT be extended.

Extending this provision to two years or to an election cycle would inflict undue hardship on vendors and campaign workers seeking to change jobs. In discussing coordination and concerns about the potential for circumvention of the law it is easy to overlook the fact that this provision places limitations on the universe of individuals and mostly small firms that provide services to candidates and committees. While some limitation on their ability to move from one candidate or organization to another is reasonable given concerns about coordination, we urge the Commission to recognize that while the concerns about coordination are theoretical, the people involved are not. Even though the regulation is not styled as such, it is effectively a ban on employment.

There are many reasons why vendors and employees might move from one employer to another during an election cycle that have nothing to do with an attempt to coordinate. Campaigns and strategy change quickly and four months is a long time in the life of a campaign. Financing of campaigns can dictate hiring decisions which have nothing to do with coordination or the sharing of information. While we are not in possession of empirical evidence, it would seem that publicly available polling information showing the changes in public opinion from one month to the next and the tightening of many races in the closing days of the election would support the conclusion that information about strategy loses its currency pretty rapidly. Indeed, the Commission has already recognized this in its allocation regulations dealing with poll results. See 11 CFR 106.4. Moreover, it does not appear that the *Shays* Court considered the very real impact of the common vendor and former employee provisions on the individuals involved.

5. The Commission should include the same safe harbor provisions for corporations and unions provided in 114.15 in the revised coordination regulation.

Section 114.15 of the Commission's regulations provides a safe harbor for certain communications that may be made by corporations and labor organizations despite the electioneering communication ban, provided that those communications meet the safe harbor requirements under subsection (b). A similar safe harbor should be included in the coordination regulations.

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

Respectfully submitted,

Lyn Utrecht
Patricia Fiori
Eric Kleinfeld
Margaret McCormick
Karen Zeglis