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Subject Comments In Response to Supplemental NPRM

Comments of Alliance for Justice and AFL-CIO in response to the Supplemental NPRM are attached.

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February 24, 2010

By Electronic Mail to CoordinationShays3@fec.gov

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

Re: Supplemental Notice of Proposed Rulemaking, "Coordinated Communications," 75 Fed. Reg. 6590 (Feb. 10, 2010): Comments and Request to Testify

Dear Ms. Rothstein:

Alliance for Justice and AFL-CIO submit these comments in response to the Supplemental Notice of Proposed Rulemaking on Coordinated Communications published by the Federal Election Commission ("FEC" or "Commission") on February 10, 2010 ("SNPRM") in response to the decision of the Supreme Court of the United States in *Citizens United v. Federal Election Commission,* No. 08-205, 558 U.S. ____ (U.S. Jan. 21, 2010). *See* 75 Fed. Reg. 6590. The Alliance for Justice and AFL-CIO also request an opportunity to testify at the hearing on March 2-3, 2010.

The Commission has re-opened the comment period for its coordinated communications rulemaking to consider the effect of *Citizens United* on the rules previously proposed in response to the decision of the Court of Appeals for the District of Columbia Circuit in *Shays v. FEC,* 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*"). *See* Notice of Proposed Rulemaking, "Coordinated Communications," 74 Fed. Reg. 53893 (Oct. 21, 2009) ("NPRM"). The Commission poses a number of questions of both a general and specific nature regarding the impact of *Citizens United* on the NPRM..

General Considerations

The SNPRM asks whether *Citizens United* suggests the need for "a more robust" coordination rule because the Supreme Court ruled that the presence of coordination may result in, or provide the opportunity for, *quid pro quo* corruption. *See* 75 Fed. Reg. at 6590. As the portion of the opinion quoted in the SNPRM makes clear, this statement by the Supreme Court

broke no new ground; it has been recognized since *Buckley v. Valeo*, 424 U.S. 1 (1976), that coordinated communications pose the risk of *quid pro quo* corruption. The significance of the Supreme Court's decision with respect to the issue of coordination does not lie in its articulation of a new basis for governmental action in this area, it lies with the fact that the decision opens up the opportunity for a much larger universe of speakers to engage in independent communications, thereby increasing the need for vigilant regulation in this area.

There is similarly no basis for the suggestion in the SNPRM, *see* 75 Fed. Reg. at 6591, that *Citizens United* approved a governmental interest other than avoiding *quid pro quo* corruption as a justification for regulating non-party coordinated speech. In stating that *Buckley*'s rational for permissible government limits on speech was "limited to *quid pro quo* corruption," slip op. at 43, and further finding that "[i]ngratiation and access, in any event, are not corruption," slip op. at 45, Justice Kennedy's majority opinion gave no hint that some lesser form of corruption (or another government interest) could be used to justify a prohibition on coordinated communications. Since independence and coordination are opposite sides of the same coin, it would turn the Court's logic on its head to conclude that the allowance of corporate independent communications because they do *not* present the risk of *quid pro quo* corruption means that government may regulate non-party coordinated communications because they present the risk of some other form of corruption. To put it another way, the Commission's regulation of coordinated communications should reach only as far as is necessary to prevent *quid pro quo* corruption; it should not attempt to regulate communications that could merely lead to "[i]ngratiation and access, [which] are not corruption."

Finally, the SNPRM asks, *see* 75 Fed. Reg. at 6591, whether the rule proposed in the NPRM adequately addresses the fact that corporations and unions may now make independent expenditures. The risk of coordination by corporations and unions is not different *in kind* from the risk of coordination presented by other political actors such as individuals or political committees, and the SNPRM does not provide any basis for defining coordination by corporations and unions differently from coordination by these other speakers. For more than twenty years, some nonprofit corporations have been permitted to make independent expenditures under the Supreme Court's decision in *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S.238 (1986) ("*WRTL*"); in 2003, the Supreme Court extended this exception to include independent electioneering communications. *See McConnell v. FEC*, 540 U.S. 93, 209-11 (2003). Nearly three years ago, the Court further expanded the right of corporations and labor organizations to make expenditures for independent electioneering communications in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). None of the Commission's many rulemakings on coordination has previously suggested that these decisions made it necessary to define coordination differently for corporations and unions, and *Citizens United* does not require or suggest a different conclusion.

Content Standards

In our initial comments in this rulemaking, we urged the Commission to adopt an additional content standard based on the "appeal to vote" test articulated by the Supreme Court in *WRTL*. We further urged that in defining this content standard, the Commission incorporate its regulation at 11 C.F.R. § 114.15, including the safe harbors in that regulation, in part because that standard was familiar to the regulated community. After *Citizens United,* however, the "appeal to vote" standard is no longer relevant in defining the types of electioneering communications which may be financed by corporations and unions, because corporations and unions may now finance both express advocacy and electioneering communications.[1] Furthermore, Justice Kennedy's opinion suggested that the "two-part, 11-factor balancing test" in the Commission's regulations was more complex and uncertain than the "objective 'appeal to vote' test" articulated by Chief Justice Roberts in *WRTL*. Slip op. at 18. This criticism of the Commission's regulation would be just as salient if it were to be used to define coordinated communications, since the "complexity" of the regulation would still "function as the equivalent of prior restraint by giving the FEC power ... of the sort that the First Amendment was drawn to prohibit." *Id.* On the other hand, the court of appeals in *Shays III Appeal* clearly directed the Commission to expand the content standard for the period outside of the 90/120 day windows to include speech beyond express advocacy. We believe, therefore, that the proper approach is to include the "appeal to vote" test from *WRTL* without further regulatory elaboration. This approach will eliminate the complexity of the 11-factor balancing test in the regulation, while still expanding the content standard to include some speech that is not express advocacy.

The SNPRM also asks a number of questions relating to the Supreme Court's conclusion that *Hillary: The Movie* (the "Movie") is the "functional equivalent of express advocacy." *See* 75 Fed. Reg. at 6591. The Court's analysis and conclusion regarding the Movie has, in our view, no direct bearing on the application of the "express advocacy" content standard outside the 90/120-day windows because the FEC never attempted to argue that the Movie did not constitute express advocacy, and the Court therefore had no reason to reach this issue. On the other hand, the Court made clear that the "functional equivalent test is objective," slip op. at 7, and that it is violated "only if [the communication] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id., quoting WRTL,* 551 U.S. at 469-70. As so understood, the Court had no difficulty in applying the "appeal to vote" test, and we believe the same would be true for the Commission. There is also no suggestion in Justice Kennedy's opinion that the Court's conclusion regarding the "appeal to vote" test is only applicable in the context of BCRA § 203 which *prohibits* corporate expenditures for electioneering commuications, rather than in the context of other provisions which merely

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[1] The "appeal to vote" test also now has no relevance in defining the reach of the statute's disclaimer and reporting requirements for electioneering communications, because *Citizens United* upheld the application of those requirements to any communication which meets the broader statutory definition of electioneering communication without regard to the "appeal to vote test". Slip op. at 53-54.

restrict speech, as the SMPRM suggests.[2] The Commission should similarly be able to apply the objective test in the context of the coordinated communications regulation, as we propose above.

In our initial comments in this rulemaking, we argued that the proposed PASO content standard, even if defined in the regulation, is not sufficiently clear to avoid unduly restricting protected speech. The SNPRM asks whether *Citizens United* or *WRTL* provide a constitutional limit on the reach of the proposed PASO standard, and also whether any content standard broader than express advocacy or its functional equivalent is permissible after *Citizens United. See* 75 Fed. Reg. at 6591. In our view, *Citizens United* and *WRTL* do impose a constitutional limit on the content standards used to define prohibited coordinated communications insofar as both cases stressed the need for objective rules which will avoid "intricate case-by-case determinations" or, alternatively, force prospective speakers to seek advance guidance from the Commission as to whether their proposed speech would be permissible. As we noted in our initial comments, the Commission itself has twice found that the PASO test does not meet these conditions.[3]

Evidentiary Standard

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[2] It is true that in upholding BCRA's disclosure and disclaimer requirements for electioneering communications, the Court refused to apply the "appeal to vote" test, slip op. at 53-54, because such rules "may burden the ability to speak, but they 'impose no ceiling on campaign-related activities'... and 'do not prevent anyone from speaking.'" Slip op. at 51, *quoting Buckley v. Valeo,* 424 U.S. at 64, and *McConnell v. FEC,* 540 U.S. at 201. Since the result of a finding of coordination is to treat a communication as an unlawful union or corporate contribution to the candidate or political party, the Court's analysis of BCRA's disclosure and disclaimer rules is not applicable to the issues raised in the NPRM and SNPRM.

[3] The PASO test is in this regard very similar to the "electioneering message" test unsuccessfully used by the Commission in the past to define the kinds of communications that may not be coordinated with candidates or party committees. Recognizing that the "electioneering message" standard gave no advance notice to the regulated community or the Commission itself, four Commissioners ultimately announced that they would not vote to open any coordination investigation that relied on this standard. *See* Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of "Dole for Presdent Committee, Inc." (Primary), "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, Inc." (General), "Dole/Kemp '96 Compliance Committee, Inc." (General), "Clinton/Gore '96 General Election Legal and Compliance Fund" at 6 (June 24, 1999).

The SNPRM also raises a new question concerning how the Commission should conduct investigations in enforcement actions arising from allegations of coordination. *See* 75 Fed. Reg. at 6591. In this regard, it is important to note that one of the principal reasons for including content standards in the coordination regulation is to allow the Commission to screen out cases at the reason-to-believe ("RTB") stage of an enforcement proceeding without the necessity of an intrusive, expensive and time-consuming investigation into the political activities of respondents and third parties.[4] While a "heightened" pleading requirement for complaints of unlawful coordination, as proposed in the SNPRM, *see* 75 Fed. Reg. at 6591, would also serve this important goal, it is debatable whether the Commission may require more than RTB before opening an investigation into alleged coordination, because FECA makes no distinction with respect to the evidentiary threshold between complaints of impermissible coordination and complaints alleging other violations. *See* 2 U.S.C. § 437g(a)(2)..

The question remains, however, what allegations in a complaint are sufficient to support an RTB finding in coordination cases. This question has vexed the Commission for many years. *See e.g.* Matter Under Review 2766, Supporting Memorandum of Commissioner Thomas J. Josefiak for the Statement of Reasons of Chairman Lee Ann Elliott and Commissioners Joan D. Akers and Thomas J. Josefiak 3-6 (June 13, 1990), upheld in *Democratic Senatorial Campaign Committee v. FEC,* 745 F. Supp 742, 745-46 (D.D.C. 1990); Matter Under Review 2272, upheld in *Stark v. FEC,* 683 F. Supp. 836, 846 (D.D.C. 1988); Matter Under Review 1624 (1984). In our view, the RTB threshold should not be met when a complaint includes a conclusory allegation of coordination without any supporting evidence that coordination actually occurred. *Cf. Bell Atlantic v. Twombley*, 550 U.S. 544, 555 (2007) (civil complaint alleging conspiracy "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") Furthermore, if a complaint merely includes circumstantial evidence such as the presence of an "opportunity for coordination," as where a speaker and candidate attended the same event, this also should not be sufficient to establish RTB. In such cases, it remains speculative whether coordination actually occurred, and an accused party responding to such a complaint is faced with the almost impossible task of proving a negative – ie. while they had the opportunity to coordinate, they did not in fact do so - thus effectively eliminating the RTB threshold in such cases. Rather, RTB should be found to exist only if there are enough credible facts in the complaint that there is a "reasonable expectation that [an investigation] will reveal evidence of illegal [conduct]." *Twombley,* 550 U.S. at 556. *See* FEC Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed.

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[4] The SNPRM is totally off base in suggesting that any content standard is inconsistent with the RTB requirement in FECA § 437g(a)(2) for opening an investigation. *See* 75 Fed. Reg. at 6591. This provision sets forth an evidentiary threshold to protect against frivolous complaints; it does not have any bearing on the substantive elements of the statute's requirements or on the FEC's regulations implementing those requirements.

Reg. 12545 (Mar. 16, 2007) ("The Commission will find 'reason to believe' in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation....")

Safe Harbor

Finally, the SNPRM seeks comment on whether the safeharbors proposed in the NPRM for certain communications sponsored by 501(c)(3) organizations or candidates' businesses are consistent with the statement in *Citizens United* that "restrictions distinguishing among different speakers, allowing speech by some but not others," are prohibited. *See* 75 Fed. Reg.at 6591. The SNPRM reads too much into Justice Kennedy's statement, which was made in the context of a statutory provision *prohibiting* speech by corporations and unions, not with a provision *permitting* speech by certain types of organizations. In addition, the proposed safeharbor does not allow 501(c)(3) organizations to undertake coordinated communications of the kind which other corporations and entities would be prohibited from making. Rather the proposal establishes a different content standard for communications by 501(c)(3)s in recognition of the special limitations imposed on such organizations by the Internal Revenue Code. The safeharbor merely recognizes that, because they may lose their tax exemption if they engage in any partisan political activity, including activity which is coordinated with a candidate or political party, 501(c)(3)s are highly unlikely to engage in prohibited communications.

Respectfully submitted,

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