



"Paul Ryan"  
<PRyan@campaignlegalcenter.org>

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To <arothstein@fec.gov>, <CoordinationShays3@fec.gov>, <tduncan@fec.gov>  
cc  
bcc  
Subject CLC & D21 Post-Coordination Hearing Supplemental Comments

Dear Ms. Rothstein,

Attached you will find supplemental comments for filing by the Campaign Legal Center and Democracy 21, addressing issues raised during my March 3 testimony at the Commission's "coordination" rulemaking hearing, at which time it was announced that the record in the rulemaking would be kept open for 10 additional days. I was uncertain as to which email address to send these comments to and was unable to reach you by telephone this afternoon. As per your recommendation for our post-*Citizens United* supplemental "coordination" comments, I'm sending them both to the "CoordinationShays3" email address included in the original NPRM, as well as to your FEC email address.

Best regards,

Paul S. Ryan

Cc: Commission General Counsel Thomasenia Duncan

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Paul Seamus Ryan  
FEC Program Director  
& Associate Legal Counsel  
The Campaign Legal Center  
215 E Street NE  
Washington, DC 20002  
Office Ph. (202) 736-2200  
Mobile Ph. (202) 262-7315  
Fax (202) 736-2222  
CLC Blog: <http://www.clcblog.org>  
CLC Web Site: <http://www.campaignlegalcenter.org>

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CLC & D21 Post-Hearing Supp. Comments on Coordination Rulemaking 3.15.10.pdf

March 15, 2010

**By Electronic Mail** ([CoordinationShays3@fec.gov](mailto:CoordinationShays3@fec.gov))

Ms. Amy L. Rothstein  
Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Supplemental Comments Following Coordinated Communications  
Rulemaking Hearing**

Dear Ms. Rothstein:

These supplemental comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to questions posed by Commissioner McGahn to Paul S. Ryan of the Campaign Legal Center at the Commission's March 3 rulemaking hearing regarding coordinated communications under 11 C.F.R. § 109.21.

**1. Commissioner McGahn's "Book" and *Rothenberg Political Report* Hypotheticals**

Commissioner McGahn posed two hypothetical scenarios regarding the publication of (1) a book and (2) an issue of the *Rothenberg Political Report*—both of which are hypothetically based on interviews and collaboration with an officeholder and, therefore, meet the "conduct" prong of the 11 C.F.R. § 109.21(d), and both of which promote, attack, support or oppose (PASO) a candidate for federal office. Commissioner McGahn asked whether such a book or an issue of the *Rothenberg Political Report* would be covered by the PASO coordination content standard proposed in the Commission's Notice of Proposed Rulemaking (NPRM) 2009-23, published at 74 Fed. Reg. 53893, 53912 (October 21, 2009) (proposed 11 C.F.R. § 109.21(c)(3)).

The proposed PASO content standard would apply only to a "public communication," defined in Commission regulations to mean "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 C.F.R. § 100.26.

"Books" are clearly not "public communications" under the Commission's rules. Therefore, the book in Commissioner McGahn's hypothetical would not be covered by the proposed coordination rule regardless of its content or the conduct occurring between its author and a federal officeholder.

The *Rothenberg Political Report* describes itself as “a non-partisan newsletter covering U.S. House, Senate, and gubernatorial campaigns, Presidential politics, and political developments” that “neither endorses candidates, nor advocates positions on matters of public policy.” See <http://rothenbergpoliticalreport.blogspot.com> (emphasis added). The Commission’s definition of “public communication” does not include “newsletters.” And the *Rothenberg Political Report*, which “neither endorses candidates, nor advocates positions on matters of public policy,” does not appear to constitute a form of “general public political advertising.” Therefore, the *Rothenberg Political Report* in Commissioner McGahn’s hypothetical would not be covered by the proposed coordination rule regardless of its content or the conduct occurring between its author and a federal officeholder.

Furthermore, even if the Commission were to determine that the *Rothenberg Political Report* newsletter is a “public communication” under 11 C.F.R. § 100.26, the answer to Commissioner McGahn’s hypothetical would still be that it is not a “coordinated communication” under the proposed regulation because it would be covered by the media exemption from the definition of “expenditure” at 2 U.S.C. § 431(9)(B)(i). The Commission’s “coordinated communication” rule at 11 C.F.R. § 109.21 implements the statutory “coordination” provision at 2 U.S.C. § 441a(a)(7)(B)(i), which states that “expenditures made by any person in cooperation, consultation, or concert with, or at the request of suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidates.” Under federal law, the term “expenditure” does not include “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 431(9)(B)(i). The *Rothenberg Political Report* newsletter constitutes “news” distributed through the facilities of a biweekly “periodical publication” and is therefore exempt under the media exemption. As such, it is not subject to the coordination rules.

## **2. Commission McGahn’s Officeholder Hypotheticals**

Commissioner McGahn posed several hypothetical scenarios regarding public communications that meet the proposed PASO content standard and that occur after conduct between the person who pays for the communications and either (1) a Senator who has announced she is not running for reelection and has terminated her campaign committee or (2) a second-term President who is ineligible to run for reelection. Commissioner McGahn asked whether such communications would be covered by the Commission’s coordination rules if the Commission were to adopt the PASO content standard at proposed 11 C.F.R. § 109.21(c)(3).

In short, the activity occurring in these hypotheticals would not be covered by the Commission’s coordination rules because the hypotheticals do not involve coordination conduct between the spender and a “candidate,” and the relevant coordination statute and rules apply to expenditures coordinated with “candidates.”

Again, the statute underlying the Commission’s coordination rules provides that “expenditures made by any person in cooperation, consultation, or concert with, or at the request of suggestion of, a candidate, his authorized political committees, or their agents, shall be

considered to be a contribution to such candidates.” 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added).

The conduct standard of the Commission’s current coordination rules at 11 C.F.R. § 109.21(d)(1)-(3) are met when the communication is created (1) at the request or suggestion of a candidate, (2) with the substantial involvement of a candidate, or (3) after substantial discussion with a candidate.

“Candidate” is defined by statute to mean “an individual who seeks nomination for election, or election, to Federal office.” 2 U.S.C. § 431(2). The Commission’s regulations define “candidate” identically. *See* 11 C.F.R. § 100.3(a).

The federal officeholders in Commissioner McGahn’s hypotheticals are not seeking election to any office and, therefore, are not “candidates” under 2 U.S.C. § 441a(a)(7)(B)(i) and 11 C.F.R. § 109.21. PASO communications created at the request or suggestion of such non-candidate officeholders, or with the substantial involvement of such non-candidate officeholders, or after substantial discussion with such non-candidate officeholders do not fall within the scope of 2 U.S.C. § 441a(a)(7)(B)(i) and 11 C.F.R. § 109.21.

### 3. Conclusion

We wish to make two concluding comments about these hypotheticals. First, the purported problems which these hypotheticals superficially appear to pose—even if they were real problems (and as we have shown, they are not)—would not in any event be solved by choosing express advocacy (or its functional equivalent) instead of a PASO test for the content prong of the coordination rule. Indeed, the same issue for the *Rothenberg Political Report* is posed by the even more encompassing content test in the existing coordination rules—whether a public communication “references” a candidate within the pre-election time frames. The pre-election “reference” rule has been in effect for eight years, without jeopardizing the legality of the *Rothenberg Political Report* or similar publications. And the same is true of the book hypothetical.

Nor would the purported problems posed by the hypotheticals be solved even by choosing an express advocacy test instead of a PASO test, for then the hypothetical simply shifts to a book that is published after extensive interviews with a candidate and that contains express advocacy of the candidate. Would the coordination rule “ban” the book? The answer is the same—no, because the book is not a “public communication” and thus does not fall within the scope of the coordination rules. Would the coordination rule “ban” the *Rothenberg Political Report*? No, because it would still be covered by the press exemption.

In other words, focusing on the PASO test as the key element in these hypotheticals is a distraction that does little more than seek to present a false problem.

Second, we readily acknowledge that there may be hard cases at the margins posed by a rule which incorporates a PASO content standard (although the hypotheticals discussed above are not among them). But so too, those who advocate a content standard of express advocacy (or

its functional equivalent) should acknowledge that there are equally hard cases posed by those tests as well.

For instance, in our opening comments, we discussed a real—not hypothetical—ad run by Americans for Job Security (AJS) outside the pre-election time frames in a 2006 Senate race:

**ANNOUNCER** [v/o]: Most Saturdays they get together in the park, 8 a.m. sharp. Pennsylvania families relax a little more these days because Rick Santorum is getting things done everyday. Over \$300 billion in tax relief; eliminating the marriage penalty, increasing the per child tax credit—all done. And now Rick Santorum is fighting to eliminate unfair taxes on family businesses. Call and say thanks because Rick Santorum is the one getting it done.

We assume that some on the Commission would find that this ad does not satisfy the tests of express advocacy or its functional equivalent. So the “hypothetical” we pose is whether the Commission is satisfied with a coordination rule that would permit former Senator Santorum, while a candidate, to have been “materially involved” in decisions about the content, intended audience and timing of this ad—in other words, for him to sit down with AJS, write the text of the ad with an eye to how it could help his campaign, and then collaborate with AJS on where and when it would spend its money to run this ad.

Although such coordination in fact by Senator Santorum on this specific ad is (to our knowledge) a hypothetical, the fact that outside spenders run such overtly PASO ads is not. In the 2006 coordination rulemaking, we submitted dozens of real world examples of such ads to the Commission.

So in addition to crafting clever hypotheticals that seek to probe the outer limits of the proposed PASO test, the Commission should consider those real life ads that fall squarely within the heartland of the PASO test—and ask whether those ads should be excluded from the coordination rule outside the pre-election time frames, and whether by so doing, candidates should be permitted to freely coordinate with outside spenders on the content and airing of such ads that overtly promote a candidate’s campaign.

That is a real question—not a hypothetical—which the Commission cannot ignore.

We appreciate the opportunity to submit these comments.

Sincerely,

*/s/ Fred Wertheimer*

Fred Wertheimer  
Democracy 21

*/s/ J. Gerald Hebert*

J. Gerald Hebert  
Paul S. Ryan  
Campaign Legal Center

Donald J. Simon  
Sonosky, Chambers, Sachse  
Endreson & Perry LLP  
1425 K Street, NW – Suite 600  
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan  
The Campaign Legal Center  
215 E Street, NE  
Washington, DC 20002

Counsel to the Campaign Legal Center