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February 24, 2010

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
Notice of Proposed Rulemaking
Supplementary Notice 2010-01

RE: Comments on Supplemental Notice 2010-01: Coordinated Communications

Dear Ms. Rothstein:

These comments are submitted on behalf of Public Citizen in response to the Commission's supplemental Notice of Proposed Rulemaking (NPRM) 2010-01: Coordinated Communications. The Commission has asked whether the U.S. Supreme Court's decision of January 21, 2010, *Citizens United v. Federal Election Commission*, should affect the promulgation of new "coordinated communications" rules governing federal elections. Public Citizen requests that Craig Holman, Public Citizen's Government Affairs lobbyist, be allowed to testify regarding these comments before the Commission.

The answer is "yes." In light of *Citizens United*, it is imperative that the FEC prohibit coordinated communications to (1) preserve the integrity of existing contribution limits and (2) reduce apparent and actual corruption.

Citizens United opens the door to unlimited corporate funding, even creating the potential that outside groups will vastly outspend candidates and parties in some elections. This new state of affairs will give candidates and putatively independent groups an overwhelming incentive to coordinate expenditures, with potentially devastating effects on the laws that the Federal Election Commission (FEC) administers. Massive coordinated corporate election spending would undermine campaign contribution limits and fuel a public belief that the political process is corrupt. Indeed, it will create conditions ripe for actual corruption.

FEC regulation of coordination has been ineffective to date. To be effective, a coordination regulation must apply in the pre-election period to communications that promote, attack, support, or oppose (PASO) candidates—Alternative 1 in the NPRM.

A. *Citizens United* will result in massive new independent expenditures.

It is impossible to predict how much corporate money will flood into our elections in a virtually unregulated system; the country has never faced a similar situation. Nevertheless, it is

reasonable to assume that the amount will be substantial—and possibly overwhelming in races of particular interest to business interests.

By conservative estimates, special interest groups funded primarily by corporate money spent about $50 million on television advertisements promoting or attacking federal candidates in the last two months of the 2000 election. This was an increase from $11 million just two years earlier.[1] Corporations and unions contributed another $500 million in "soft money" contributions in each of the 2000 and 2002 election cycles, exploiting a loophole in the election law.

The 2002 passage of BCRA was intended to end both practices. The Supreme Court upheld BCRA almost in its entirety in 2003,[2] before sharply scaling back the scope of the definition of electioneering communications under the law in 2007.[3] This decision narrowed the electioneering communications restrictions so much as to make them nearly useless, though it upheld their constitutionality. The decision immediately resulted in another $100 million in corporate spending on television electioneering advertisements in the last two months of the 2008 election.[4]

Corporations long have shown a willingness to spend and contribute hundreds of millions of dollars each election through loopholes in the law. Now that the Court has invalidated restrictions on corporate independent expenditures, expect a flood of new money into the 2010 congressional campaigns, state candidate campaigns, state judicial elections, and the 2012 presidential election.

B. FEC has struggled to develop effective coordination rules for independent expenditures.

Given the likelihood of massive new independent expenditures, it is imperative that the Federal Election Commission (FEC) develop strong coordination rules. But the agency has failed to develop effective rules ever since 1976. That year, the Court, in *Buckley v. Valeo*, upheld the constitutionality of contribution limits to candidates and party committees. In upholding limits on contributions, the Court also reasoned that independent expenditures may not so be limited. However, *Buckley* distinguished "independent expenditures" from expenditures made in coordination with candidates. Such coordinated expenditures are in effect "contributions" to a candidate, complete with the dangers of corruption posed by large contributions, and thus subject to regulation. After *Buckley*, the Federal Election Campaign Act (FECA) was amended to provide that any campaign expenditure coordinated with a candidate shall be considered a contribution to the candidate.[5] The FEC promulgated a fairly modest regulation to implement this provision.

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1 Craig Holman and Luke McLoughlin, BUYING TIME 2000 at 31.
2 McConnell v. FEC, 540 U.S. 93 (2003).
3 FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007).
4 Supplemental Brief for Appellee, Citizens United v. Federal Election Commission (Aug. 2009) at 12.
5 2 U.S.C. § 441a(a)(7)(B).

In 2002, the Bipartisan Campaign Reform Act (BCRA) repealed the FEC rule and expanded the scope of coordinated expenditures to include those coordinated with party committees as well as candidates, and it directed the FEC to redraft new rules on coordinated expenditures. In a history that need not be repeated in detail here, the FEC then promulgated a series of different coordination rules, each of which has been invalidated by federal courts.

FEC promulgated a coordination regulation under BCRA in 2007.[6] The agency is currently reconsidering its regulation under court order.[7] The rule established that an advertisement is a coordinated expenditure if it is funded by a person other than the candidate, party, or their agents and it meets specific content criteria and conduct standards.

Content Criteria. Four criteria were used to determine whether a public communication met the "content" prong of the rule. A communication met the content prong if any of the following applied:

- The communication is an electioneering communication.
- The communication republishes campaign materials prepared by a candidate (at any time).
- The communication is express advocacy (at any time).
- The communication refers to a party or candidate, targets voters in the district, and is distributed within 90 days of an election for congressional candidates and congressional party committees or 120 days before a primary election through the general election for presidential candidates and national party committees.

Conduct Standards. If the content criteria were met, four disjunctive factors were used to assess whether the communication met the conduct prong of the rule. Like the content criteria, the conduct prong was satisfied if any of the factors applied:

- The communication is suggested or requested by a candidate or party committee.
- The candidate or party is materially involved in production of the communication.
- The candidate or party has substantial discussions with the person producing or distributing the communication.
- The candidate, party and person responsible for the communication employ the same vendor, the vendor shares campaign plans with the outside group, and that knowledge is used in the communication within 120 days of an election.
- The person responsible for the communication employs a former campaign employee of the relevant candidate or party committee, the employee shares campaign plans with the outside group, and that knowledge is used in the communication within 120 days of an election.

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[6] 11 C.F.R. Part 104, 114.

[7] *See* Shays v. FEC, 508 F.Supp. 2d 10 (D.D.C. 2007); Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008).

C. The 2007 coordination rule was extremely weak, and a similar rule would be even less effective under *Citizens United*.

As recognized by the federal courts, there are crippling weaknesses inherent in the 2007 coordination rule. The principal problem is that, until shortly before an election, the rule would not have deemed a communication "coordinated" unless it engaged in blatant express advocacy—essentially, saying "vote for" or "vote against" a candidate—regardless of the level of actual coordination with a candidate or party. So long as a public communication did not engage in express advocacy (and materials identical to those prepared by the candidate were not used)—the rule would not have captured any joint strategizing between candidates and outside persons, any sharing of material information by common vendors or former campaign employees, or any other overt coordination outside the brief 90- or 120-day windows preceding congressional and presidential elections, respectively. A candidate or party could coordinate extensively with funders of purportedly "independent" expenditures until 90 or 120 days before an election, at which point further coordination was scarcely necessary.

Planning and strategizing for candidate campaigns begins a year or two before an election, or even during a full election cycle, for both presidential and congressional candidates. Print and broadcast advertisements run most frequently near election day in today's campaign environment, but significant advertising expenditures are common as early as five or six months before an election.[8] The mere fact that candidates, parties, and outside groups engage in significant advertising outside the pre-election window attests to the problem of a coordination rule that essentially allows unrestricted coordination more than 90 days before a congressional election and 120 days before a presidential election.

This becomes even more troubling under *Citizens United*. There is now virtually unlimited funding from corporations for express advocacy. Under the FEC's most recent rule, this advocacy may be fully coordinated with the candidate so long as the coordinated communications occur during the technical pre-election cycle and avoid overt express advocacy. The temptation of this new major source of campaign funds will inevitably spur early coordinated activities between corporations and candidates and generate a substantial increase in mid-election season campaign ads arranged by candidates but financed by corporate interests.

Moreover, many organizations and interest groups that make significant campaign expenditures have a strong incentive to coordinate with lawmakers. Coordinating provides them additional access to lawmakers and gives them greater opportunity to demonstrate their power to mete out rewards and punishments.

Additionally, often overlooked in the debate over independent expenditures in elections is the likelihood that lawmakers will "shake down" corporate entities, making them feel compelled to finance coordinated communications. The record in *McConnell v. FEC* is rife with testimony from corporate CEOs claiming that they felt unable to say "no" to requests from party officials

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[8] *See* Craig Holman and Luke McLoughlin, op.cit. at 52-53. It is worth noting that prior to BCRA, corporate and union "soft money" contributions to the party committees flowed throughout entire election cycles, not just 90 days or 120 days before an election.

for soft money campaign contributions. As Gerald Greenwald, chairman emeritus of United Airlines, said:

> *Business and labor leaders believe, based on their experience, that disappointed members and their party colleagues may shun or disfavor them because they have not contributed. Equally, these leaders fear that if they refuse to contribute (enough), competing interests that contribute generously will have an advantage in gaining access to and influencing key congressional leaders on matters of importance to the company or union.*[9]

With major new sources of campaign funds now available to support lawmakers and oppose their challengers, there is every reason to believe that some lawmakers will exert their power and enlist these entities to finance mid-election coordinated communications if permitted to do so.

In short, *Citizens United* permits massive amounts of new funding for campaign advertisements from sources that have dire stakes in legislative and regulatory matters and in the fortunes of the public officials who determine those matters. We are likely to see a substantial increase in campaign advertising by outside groups and, with it, a strong incentive for the groups to coordinate their communications with lawmakers.

D. To be effective, a coordination rule must use a "promote, attack, support, or oppose" content criteria during the pre-election window.

Under *Citizens United*, outside groups could become critical players, if not the most important players, in determining certain election outcomes, and they will have strong incentives to coordinate their expenditures with candidates and parties. Public Citizen strongly urges the Federal Election Commission to comply with federal district and circuit court orders by strengthening its coordinated communications regulation.

1. The rule should use a "promote, attack, support, or oppose" (PASO) standard prior to the pre-election window.

Most important, a new coordinated communications regulation must adopt the "promote, attack, support, or oppose" (PASO) content standard for communications made outside the pre-election windows. The current express advocacy content standard is wholly inadequate to prevent coordination between candidates and outside groups in preparing and distributing mid-election season campaign ads. Candidates and party committees must be prevented from suggesting, directing, or materially influencing coordinated communications with corporations that promote, attack, support, or oppose candidates throughout the course of the election cycle. The PASO content standard, Alternative 1 in the NPRM, appropriately addresses this problem.[10]

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[9] Anthony Corrado, Thomas Mann & Trevor Potter, eds., INSIDE THE CAMPAIGN FINANCE BATTLE at 300-301.

[10] *See* 74 Fed. Reg. 53,897.

Without a PASO content standard regulating coordinated communications beyond the pre-election windows, coordination is likely to become increasingly common as corporate interests and candidates and party committees seek to exploit each other. In the wake of *Citizens United*, the sheer amount of new funding available for campaign communications provides an irresistible temptation to coordinate mid-election campaign communications.

2. The rule should require the firewall between third parties and common vendors or former campaign employees for the full election cycle.

Second, the FEC should require that the firewalls against coordination by common vendors and former campaign employees apply throughout the election cycle. Sharing common vendors and campaign employees between candidates, party committees and corporate campaigns is essentially a sharing of the minds. No one understands the intricacies of a campaign better than the campaign consultant, media buyer or a candidate's former campaign manager. This was once fully understood by the FEC, when the 2002 coordinated communications rule required that commercial vendors and former campaign employees be subject to a strict firewall against sharing campaign information used in the creation or distribution of ads throughout the entire election cycle. The time period for that firewall was only recently shortened to a 120 day pre-election window in the 2007 regulations, a change invalidated by the federal courts.

Public Citizen originally encouraged the Commission in the 2003 rulemaking process to adopt a strong "presumption of coordination" standard – assuming that coordination is present between an outside campaign and a candidate or party committee if the outside campaign employs common vendors or former employees of the candidate or party that benefits from the ad campaign, unless it could be otherwise demonstrated. If it is impractical to apply a strong "presumption of coordination" between corporate communications and candidate and party ads by the fact that the campaigns share a common vendor or former employee, then the FEC at least should reinstate that common vendors and former employees must abide by appropriate firewalls and to guard against sharing material information throughout the full election cycle. Alternative 3 regarding common employees and vendors in NPRM 2009-23 would reinstate this standard.

3. The rule should adopt a consistent 120-day pre-election window for congressional and presidential races.

Third, the 2007 rule's content criteria and conduct standards within the pre-election period are largely appropriate, but the time periods should be standardized for all candidates and party committees at 120 days before the primary election through the general election. The FEC in 2007 shortened the pre-election window for congressional candidates from 120 days to 90 days. For consistency as well as compliance with the court orders, the agency should standardize the pre-election window for coordinated communications at 120 days before the primary election.

Conclusion

Citizens United will alter campaigns radically, introducing unprecedented independent expenditures and strong incentives to coordinate them. The Commission should adopt an effective coordinated communications regulation quickly.

A new coordinated communications regulation should clarify that coordination between an outside group and a candidate or party is present prior to the pre-election windows when a public communication promotes, attacks, supports or opposes a candidate or candidates, and that the conduct standards for coordination with the same candidate or candidates are met. A strict firewall should be created for the use of common vendors or former campaign employees throughout the full election cycle, rather than just within the pre-election window. And the pre-election window in which the more extensive content criteria and conduct standards that define coordination should be standardized for all candidates and party committees at 120 days before the primary election through the general election.

Public Citizen appreciates this opportunity to offer its recommendation and looks forward to working with the Commission as we all work through the ramifications of *Citizens United*.

Sincerely,

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