CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

January 19, 2010

Ms. Amy L. Rothstein
Assistant General Counsel
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
CoordinationShays3@fec.gov

VIA ELECTRONIC MAIL

Re: Comments of Center for Competitive Politics on *Notice of Proposed Rulemaking on Coordinated Communications,* 74 *FR* 53893 (Oct. 21, 2009).

Dear Ms. Rothstein:

The undersigned submits the following comments on behalf of the Center for Competitive Politics ("CCP") a not-for-profit, educational organization whose mission is to educate the public on the actual effects of money in politics, and the results of a more free and competitive political process.

I. Overview and Summary of Recommendations

The Commission's 2002 effort to craft a content standard largely tracked the *Buckley* Court's interpretation of FECA and congressional intent in BCRA with success. The fourth content standard of 2002, however, which allowed the investigation of ads mentioning candidates within 120 days of the election, was viewed (correctly) by the court as beyond the statute and little more than an exercise in know-it-when-we-sense-it.

Rather than preserve the option of rejecting the 120-day standard and returning to *Buckley's* gloss for the term expenditure (express advocacy)—and to the congressional record for the definitions of electioneering communication and the republication of campaign materials—the Commission's attempted defense of the 120-day standard succeeded only in convincing the court that, while 120-days out won't do, the agency

must determine the one, true point at which an ad is no longer "for the purpose of influencing an election."

After losing its case, the Commission sought social science data, advertising histories, and other testimony to second guess both Congress and jurisprudence to determine the pragmatic scope of the "expenditure" definition: When is an ad truly not "for the purpose of influencing an election?" That these questions were answered by Congress (*see* BCRA's Buying Time studies) and the Court (*see Buckley's* express advocacy standard) got lost in the shuffle.

While the Commission's subsequent pragmatic determinations, 90 days and the like, were rejected by the D.C. Circuit, the approach—administrative attempts to determine the temporal limits of election "influencing" by means of social science data—was adopted by the court wholeheartedly. The court just wants the Commission to regulate more.

At this point, then, the Commission finds itself in the position of defining victory as adopting a standard that will meet the requirements of the DC Circuit in *Shays III,* while doing the least amount of damage possible to campaign finance law and jurisprudence.

- A PASO standard should be rejected, as it is worse than no standard at all. First, no one knows what PASO means. Those that attempt to define it find themselves using its very terms in the definitions that would illuminate them. Second, there is no reason to believe that the statutory term "PASO" can constitutionally illuminate the statutory term "expenditure." Furthermore, the *McConnell* Court upheld the PASO standard only as-applied to sophisticated political actors (state political party committees). The Court had no opportunity to review the terms as-applied to unsophisticated citizens: the *McConnell* Court did not review the PASO provisions in the back-up definition of electioneering communication (which would have applied to speakers at all levels of political sophistication).

- After *WRTL II*, this Commission can do nothing that breathes life into the illegitimate express advocacy definition of 11 CFR 100.22(b). Indeed, even the D.C. Circuit in *Shays III* understands that the definition of express advocacy now stops at "magic words." A standard that would show the Court and regulated community that express advocacy goes beyond magic words would be unconstitutional.

The best possible answer for the Commission, then, is to adopt the "functional equivalent of express advocacy" standard year round, and specifically, the no-other-reasonable-interpretation test (NORI test), as illuminated by the Court in *Wisconsin Rt. To Life, Inc., v. FEC* (*"WRTL II"*), 551 U.S. 449 (2007). It is true that without the 30- and 60-day qualifiers, the standard is vague. *See WRTL II,* 551 U.S. _ at fn. 7.

Nonetheless, the Commission can at least point would-be speakers to its existing rulemaking on electioneering communications and provide some idea of what communications will be subjected to coordination investigations.

While the NORI content standard will bring about results far from ideal, perhaps it will establish the proper dynamic for what may become the next case. Speakers suing the Commission for unduly chilling issue discussion may likely produce a different result than that produced in the litigation dynamic here: that of reformers suing agency attorneys unaccustomed to formulating arguments for free speech, with no chilled speaker anywhere in the proceedings.

II. Importance of the Content Standard

The coordination provisions of the Federal Election Campaign Act are among the least understood and most far reaching.

We begin with the understanding that, "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). In the case of coordinated communications, they affect not only independent speech rights but also important rights of association.

For many years the FEC operated under the assumption that any disbursement of money for a public communication that was coordinated with a campaign was a "coordinated expenditure." This approach, however, did violence to the Supreme Court's decision in *Buckley,* which defined "expenditure" much more narrowly than any disbursement of funds, at least when public communications by speakers other than the candidate and his campaign committee, were at stake. Rather, the Court defined "expenditure" as being limited to "express terms [that] advocate the election or defeat," of a candidate, or what became known as "express advocacy." 424 U.S. at 44. Nothing in *Buckley* suggests that the Court did not intend for the same definition of expenditure to apply in the context of "coordinated" expenditures. In other words, before spending can be considered a "coordinated expenditure," and so treated as a contribution, two prongs must be met: the spending must be "coordinated" (conduct), and it must constitute an "expenditure" as the term is used in the Act, as interpreted by *Buckley* (content).

Accordingly, in 2000, after losing several court cases and engaging in other long, ultimately fruitless investigations, the Commission began to limit its findings of "coordinated expenditures" to cases in which there was an actual "expenditure" as defined by the Act. That is to say, absent "express advocacy," the Commission would decline to find coordinated expenditures in matters involving public communications. *See* Statement of Reasons, Chairman David M. Mason and Commissioner Bradley A. Smith, MUR 4538 (Alabama Republican Party).

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress included a provision requiring the FEC to redraft its coordination rules, and added electioneering communications to the content that could be regulated under the Act's coordination provisions at 2 U.S.C. §441a(a)(7).

The reason *Buckley* defined "expenditure" narrowly was to avoid the vagueness concerns inherent in the statutory term, "for the purpose of influencing" an election. The Court of Appeals, citing concerns of overbreadth, had interpreted that phrase to be limited to speech that advocated the election or defeat of a candidate, *Buckley v. Valeo,* 519 F.2d 852-53 ((D.C. Cir. 1975). But the Supreme Court went further. Noting that, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," the Court held that anything less than a bright line standard could chill protected speech about political issues. *Buckley,* 424 U.S. 1 at 41. Hence the creation of the "express advocacy" standard. 424 U.S. 1 at 44, n. 52. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court made clear that other legal standards might also be sufficiently clear to avoid vagueness problems—specifically the 30 and 60 day prior to an election limits on references to a candidate—but never suggested that a standard that did not satisfy vagueness concerns would be permitted.[1] The concerns that motivated the *Buckley* and *McConnell* courts to draft bright line rules—the concerns about the chilling effects of imprecise rules—are nowhere more important than in the consideration of "coordinated" communications.

Section 441a(a)(7) sets forth three, and only three, separate and distinct things that, when coordinated with either a candidate or political party, result in in-kind contributions to that candidate or party: expenditures, §441a(a)(7)(B)(i)-(ii); electioneering communications, §441a(a)(7)(C); and republication of campaign materials, §441a(a)(7)(B)(iii). The absence of any of the three brings an investigation immediately to a close as a matter of statutory law. "Expenditure" is a statutory term of art, which, as we have seen, is limited in scope.

Cash transfers to a candidate's campaign committee are given for the purpose of influencing an election. Although the Court has recognized that political contributions are a form of protected speech under the First Amendment, the Court decided in *Buckley* that they are speech by proxy that can be limited, in part because the contributor retains other independent avenues of communication, which cannot be limited constitutionally. *Buckley v. Valeo*, 424 U.S. 1 (1976). If, at a candidate's urging, an individual buys ten vans and hires ten drivers to get-out-the-vote on election day, that is an expenditure of funds for the purpose of influencing a federal election and will be treated as an in-kind contribution by operation of section 441a(a)(7)(B)(i). The Commission may extensively investigate van purchasers, that is, individuals engaged in this kind of independent economic activity for ties to candidates and officeholders, with little concern of "chilling" any fundamental constitutional right. The same cannot be said of speech, however. There is a fundamental First Amendment right to engage in independent political speech, recognized from *Buckley* through *McConnell,* that is chilled by coordination investigations, especially those in which the respondent can be aware of no bright line that tells him which topics awaken the Commission's jurisdiction. Without a meaningful content standard a respondent cannot adequately conform his conduct and speak freely,

[1] The Constitutional battle over the "electioneering communications" provisions of BCRA had to do with overbreadth, not vagueness.

or if he speaks on a lobbying topic and is wrongfully roped into an investigation, can assert no affirmative defense that will bring the investigation to an early close.

The Commission has been discussing the need for notice in the area of coordination for years, and has gone from the vague and vexing "electioneering message" standard of the late 1990s—which was nothing more than a *post hoc* evaluation of the respondent's subjective intent to see if four Commissioners could divine from every possibly relevant document or witness what was the speaker's true "purpose"—to the content standard analysis adopted by the Commission, and lauded by the *Shays* Appellate Court as an effort to provide bright lines. The clarity that a content standard provides, and the lack of clarity that will arise without it, no matter how carefully drawn the conduct standard employed by the Commission, was explained by one Commissioner as follows:

> [T]he conduct standard alone does not provide an adequately bright line to prevent the specter of investigation and litigation from chilling constitutionally protected speech. When a person decides to make independent political expenditures, he opens himself up to two potential burdens under the Act. The first is to report those independent expenditures in excess of $250. *See* 2 U.S.C. §434(c). The second is to defend against allegations that the advocacy was somehow authorized by or coordinated with a candidate, which, if true, would lead to still greater limits on the person's political activity. *See* 2 U.S.C. §431(17). Respondents can spend substantial sums defending themselves against such allegations, and this possibility will cause many speakers to avoid engaging in what ought to be constitutionally protected speech. Thus, a bright line is needed. A content test ... provides such a bright line. If a financier of general public communications is not willing to defend against charges that his speech was authorized by a candidate, or prefers not to disclose the sources of his funding, *see e.g. NAACP v. Alabama*, 357 U.S. 449 (1958), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), he can simply delete from his message words [delineated in a well-defined content standard] and speak on any other topic of his choosing. If he is investigated nonetheless, he can be assured that the investigation will be short, non-intrusive, and inexpensive, merely by demonstrating the absence of [elements of the content standard] in his communications. Absent a content standard, however, no such immediate defense is available.

Statement for the Record of Commissioner Bradley A. Smith, MUR 4624, (The Coalition) p.4 (Nov. 6, 2001).

Or, as stated by the D.C. Circuit in *Orloski*, "a subjective test based on a totality of the circumstances ... would inevitably curtail permissible conduct." *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). *Orloski* warned of other practical problems, many of which are on exhibit in several Commission matters.

> [A] subjective test would also unduly burden the FEC with requests for advisory opinions ... and with complaints by disgruntled opponents who could take advantage of a totality of the circumstances test to harass the sponsoring candidate and his supporters. It would further burden the agency by forcing it to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. It would also considerably delay enforcement action. Rarely could the FEC dismiss a complaint without soliciting a response because the FEC would need to know all the facts bearing on motive before making its "reason to believe" determination.

Id. at 165. The Commission forgets this at its peril. The expensive, lengthy investigation and exoneration of The Coalition in MUR 4624, covering four years, 60 individual committees, and thousands of documents; like the similar four-year investigation and exoneration of the AFL-CIO in MUR 4291; and the six-year investigation and exoneration of the Christian Coalition, consisting of eighty-four depositions, 100,000 pages of documents, and Federal appellate litigation – each could have been readily avoided by the simple promulgation and application of a meaningful content standard. "The objectionable quality of vagueness and overbreadth does not depend [just] upon [the] absence of fair notice to a[n] accused ... but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a ... statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 423-433 (1963). A content standard provides advanced notice to actors of what types of speech the FEC will investigate, and reduces the risk of capricious enforcement more effectively than a purely conduct based standard.

Because coordination investigations have the potential to chill independent grassroots lobbying or other issue advocacy, the coordination regulations are all about setting parameters for communications, and not about non-expressive economic activity. This is why the term "independent expenditure" is defined in the Act as a communication, *see* 2 U.S.C. §431(17); why the other triggers under the coordination provisions of section 441a(a)(7)—electioneering communications and republished campaign materials—are communications; and why the Commission has wisely named this rulemaking "Coordinated Communications." 74 *FR* 53893 (Oct. 21, 2009). The statute also makes clear that investigations cannot spring from just any variety of communication. To deem the term "expenditure" a catchall in the coordination provisions and a basis for regulating any communication would be to drain the phrase "for the purpose of influencing" of any meaning. And it would have the effect of making republication, as well as Congress's most recent enactment in this area, coordinated electioneering communications, superfluous and nonsensical. It is the Commission's duty to set out meaningful parameters for that critical phrase in the definition of expenditure, the phrase "for the purpose of influencing a Federal election." This requires a content standard.

Before the FEC adopted a content standard in its coordination investigations, the specter of a coordination investigation served as a kind of Hobson's choice for publicly spirited individuals and politically interested grassroots lobbying organizations. Organizations had to decide whether to surrender the right to interface with lawmakers to preserve one's right to engage public advocacy, or *vice versa.* If conduct were the sole criteria for determining whether a public communication was a "coordinated expenditure," certain organizations that run advertising would always have enough contact with officeholders to at least trigger a lengthy investigation. Major citizens groups, such as the Sierra Club, regularly petition public officials but also speak to fellow citizens through public advertising on a regular basis. Earth First, the AFL-CIO, the Chamber of Commerce, the NRA, Handgun Control Inc., NARAL, NRTL, and hundreds of other groups all speak to officeholders regularly, while at the same time communicating their stands on issues to the public through grassroots communications. These organizations will naturally communicate with their legislative allies, and so have myriad contacts with candidates for public office. While such a group may not coordinate its activities with such candidates so as to satisfy the "conduct" standards of 109.21(d)—that is, they may never share material information of any kind—its contacts with officeholders and candidates will be extensive enough that the allegation of "coordination" will be available to political rivals virtually any time the group takes to the airwaves or other advertising on issues.

Hence, some type of content standard is critical for the FEC, not only to protect the legitimate speech rights of citizens, but also to manage its own enforcement load and protect itself from endless, politically motivated complaints. *See Orloski,* 759 F.2d. at 165 (D.C. Cir. 1986).

III. Why Two Of The Proposed Standards Should Not Be Adopted.

A. The PASO standard should be rejected

In this rulemaking, it is the task of the Commission to define the term "expenditures" in the context of section 441a(a)(7). The terms "electioneering communication" and "republication" in the coordination context are understood. It is the statutory term "expenditure" that the Commission is clarifying, and specifically, what the *Buckley* court called its critical phrase: "for the purpose of influencing." When Congress introduced PASO in 2002, it created black-letter law; a new term of art, yet nowhere said that PASO is coterminous with the statutory term "expenditure" or its critical phrase "for the purpose of influencing." Congress did not redefine "expenditure" when it adopted BCRA, and has yet to conflate "PASO" and "expenditure" in subsequent legislation.

What's more the term PASO, as found in type-iii federal election activity, for example, was upheld in *McConnell* as applied to sophisticated political actors; candidates, party committees, and, in limited circumstances to the activities of certain tax exempt organizations. The Court did not reach the question of whether PASO can apply to ordinary citizens—the persons most in need of a well-defined content standard—and chose instead to uphold the primary electioneering communication provision, which does not include PASO and is not at all vague. *See McConnell*, 540 U.S. 93, 190 n.73 (2003)

("We uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition.")

Adopting PASO as a definition of "expenditure" is sloppy statutory interpretation unworthy of the Commission. And, as explained below, it is prohibited by operation of 2 U.S.C. §434(f)(3)(B)(ii). If, as proposed, the Commission adopts as a content standard a public communication that promotes, supports, attacks or opposes a candidate to federal office as a meaningful guidance on the term expenditure in 441a(a)(7)(B)(i), it would conflict with Congressional intent elsewhere in the Act. If adopted, the proposal would essentially say that a "PASO public communication" is an "expenditure" for purposes of coordination. But the back-up definition of electioneering communication itself is essentially a "PASO public communication," and the statute says, at section 434(f)(3)(B)(ii), that "[t]he term electioneering communication does not include [] a communication which constitutes an expenditure or independent expenditure under this Act". Indeed, black letter law does not permit the Commission to use PASO to define communicative expenditures, no matter how many days the communication occurs from an election.

B. The Part (b) definition of express advocacy cannot be resuscitated

In passing BCRA, Congress grafted the "electioneering communication" provisions onto FECA; adding to, not altering, FECA's structure and the meaning of core FECA terms. This means, as a matter of jurisprudence, that the *McConnell* Court could not have reached, and therefore, could not have disturbed its earlier judicial interpretations of "expenditure" in deciding the facial validity of BCRA's electioneering communications. "Both the concept of express advocacy and the class of magic words were born of an effort to avoid constitutional problems of vagueness and overbreadth *in the statute before the* Buckley *Court." McConnell*, 540 U.S. 93, 192 (2003) (emphasis added). The statute before the *Buckley* Court, of course, was FECA, including its definition of "expenditure." FECA was not before the Court in *McConnell*. Therefore, nothing said by the *McConnell* Court could have altered the judicial gloss on FECA's core terms.

In a relatively recent rulemaking, however, the Commission says that, "The Commission was able to apply the alternative [express advocacy] test set forth in 11 CFR 100.22(b) free of constitutional doubt based on *McConnell's* statement that a magic words test was not constitutionally required." *See Supplemental Explanation and Justification, Political Committee Status*, 72 *FR* 5595 (Feb. 7, 2007). It is odd indeed that the Commission would invoke the *McConnell* Court's discussion of electioneering communications to resuscitate a failed definition of express advocacy at 11 CFR 100.22(b). BCRA specifically forbade the *McConnell* Court from reaching the constitutionality of 100.22(b) while reviewing the constitutionality of "electioneering communications." *See* 2 U.S.C. § 434f(3)(A)(ii) ("Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.") This means that nothing said in *McConnell* about the constitutionality of electioneering communications can, as a matter of law, affect the

validity of two federal court opinions that hold that the definition at 11 CFR 100.22(b) is unconstitutional.

Moreover, the *McConnell* Court made plain that *Buckley's* judicial gloss still applies to FECA's terms. *Id.*

If the *McConnell* Court had said that electioneering communications now mark the outer bounds of express advocacy, or are a kind of express advocacy, that would be one thing. But it was the *McConnell* Court that denigrated the strictures of express advocacy partly to justify its upholding of Congress's need to regulate electioneering communications. *McConnell*, 540 U.S. 93; 157 L. Ed. 2d 491 (2003). Vague terms such as those found at 11 CFR 100.22(b) would not have survived a review by the Court in *McConnell*; that is, not even the *McConnell* Court would not have called 11 CFR 100.22(b) "express advocacy."

In *WRTL II*, Chief Justice Roberts wrote that, "[r]esolving [*WRTL II*] requires us first to determine whether the speech at issue is the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office, or instead a 'genuine issue a[d].'" 127 S. Ct. at 2659. Invoking the phrase "functional equivalent of express advocacy" necessarily implies, first, that there is a concept "express advocacy", and, second, that its "functional equivalent" is something other than express advocacy. In short, the functional equivalent of express advocacy is not a kind of express advocacy. This means that the no-other-reasonable-interpretation test marks the outer bound of "electioneering communications" as implicated in 2 U.S.C. §441b, and does not now mark the outer bound of "expenditure" at 2 U.S.C. § 431(9) or "independent expenditures" at 2 U.S.C. § 431(17). Indeed, there are statutory concerns in conflating the constitutional test for expenditures or independent expenditures, on the one hand, and the test for electioneering communications, on the other. Expenditures and electioneering communications are mutually exclusive concepts under BCRA and the Act. Indeed, we know from *WRTL II* that the factors listed in 11 CFR 100.22(b)—purportedly designed to define express advocacy—are even less rigorous than the factors required to meet the "functional equivalent of express advocacy" standard, a standard even more broad in its scope than true, *Buckley*-inspired, part (a), express advocacy.

At least two appellate courts have held that the Commission's part (b) definition of express advocacy is not express advocacy as contemplated by *Buckley*, and is unconstitutional. *See FEC v. Christian Action Network, Inc.*, 92 F.3d 1178 (4th Cir. 1996); *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1(1st Cir. 1996). Nothing in the *McConnell* opinion changes the import of those appellate court decisions.

As this history demonstrates, there is no such thing as "post-BCRA express advocacy" that differs from pre-BCRA express advocacy; no such animal as post-*McConnell* express advocacy that carries any meaning; no such thing as PASO expenditures; and no *McConnell* gloss on core FECA terms. As such, the Commission may not resuscitate an unconstitutional definition of express advocacy at 11 CFR 100.22(b) when describing the term "expenditures" at 2 U.S.C. § 441a(a)(7).

IV. Conclusion

CCP respects the efforts of the Commission in this area, and requests the opportunity to testify at a public hearing on these issues.

Respectfully submitted,

/s/ S M Hoersting

Steve Hoersting
(703) 894-6800
SHoersting@campaignfreedom.org