



To: Election Law Group Clients
From: Bryan Cave Election Law Group
Date: August 30, 2010
Re: New FEC Regulations Governing Coordinated Communications

On August 26, 2010, the Federal Election Commission (“FEC”) voted to amend its regulations that govern coordinated communications between federal candidates and non-party organizations, including all entities that are not political party committees. The new coordination rules, if not overturned by Congress, will take effect for the 2011-2012 election cycle. The new coordination rules will not apply to federal political party committees, which will continue to be subject to the FEC’s existing party coordinated communication rules contained at 11 C.F.R. § 109.37 pending the outcome of a future FEC rulemaking.

FEC regulations provide that “[a] payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 C.F.R. § 100.52(d) to the candidate . . .” 11 C.F.R. § 109.21(b)(1). FEC regulations also state that “coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee” or an agent of any of these entities. 11 C.F.R. § 109.20. The FEC has a three-pronged test for determining whether a communication is coordinated. In order for a communication to be considered coordinated, all of the following three prongs must be met concerning: (1) the source of the payment for the communication; (2) the content and timing of the communication; and (3) the interaction between the person paying for the communication and the candidate, the candidate’s campaign committee, and any agent thereof. *See* 11 C.F.R. § 109.21(a).

The FEC’s new coordination regulations do not alter the foregoing coordination provisions with the exception of the content prong, which has now been modified slightly as is outlined below. The FEC has also created a new safe harbor for certain business and commercial communications.

I. THE PAYMENT PRONG

In order for the payment prong of the FEC’s coordination regulations to be satisfied, an individual or entity apart from the candidate or the candidate’s campaign committee must pay, in whole or in part, for the communication. *See* 11 C.F.R. § 109.21(a)(1). This prong is automatically satisfied when a person other than a candidate decides to make expenditures on behalf of a candidate. The FEC did not alter the payment prong in its new coordination regulations.

II. THE CONTENT PRONG

In order for the content prong of the FEC's coordination regulations to be satisfied, the communication must be considered a public communication¹ and must meet any one of the following standards:

- (1) The public communication is considered to be an electioneering communication under 11 C.F.R. § 100.29;²
- (2) The public communication republishes, disseminates, or distributes candidate campaign materials at any time;
- (3) The public communication expressly advocates the election or defeat of a clearly identified federal candidate at any time;³ or
- (4) The public communication refers to a clearly identified U.S. House or U.S. Senate candidate and is publicly distributed in the candidate's jurisdiction within 90 days of the candidate's primary or general election. *See* 11 C.F.R. § 109.21(c).

The Commission's new coordination regulations add a fifth content standard. In addition to the above, any public communication disseminated at any time that is the functional equivalent of express advocacy will also satisfy the content prong. A communication is considered to be the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate." New 11 C.F.R. § 109.21(c)(5). The FEC considers the functional equivalent of express advocacy to be broader than express advocacy and indicated that it will be guided by the U.S. Supreme Court's application of the test in recent decisions.

In its explanation and justification for the new coordination regulations, the FEC quoted from the U.S. Supreme Court's *FEC v. Wisconsin Right to Life* ("WRTL") decision in describing what types of communications contain the functional equivalent of express advocacy:

WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on this issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks the indicia of express advocacy: The ads do not mention an

¹ "Public communication means 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. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26.

² An electioneering communication is any broadcast, cable, or satellite communication that: (1) refers to a clearly identified federal candidate; (2) is publicly distributed within 60 days before a general election or 30 days before a primary election for the office that candidate is seeking; and (3) is targeted to the relevant electorate of the identified U.S. House or U.S. Senate candidate. *See* 11 C.F.R. § 100.29.

³ The FEC has extensive regulations defining express advocacy. *See* 11 C.F.R. § 100.22(a)-(b).

election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

FEC v. WRTL, 551 U.S. 449, 470 (2007).

III. THE CONDUCT PRONG

A public communication satisfies the conduct standard in the FEC's coordination regulations if the communication is made:

- At the request or suggestion of a candidate, candidate's authorized committee, political party committee, or any of their agents;
- With the material involvement of a candidate, candidate's authorized committee, political party committee, or any of their agents;
- After substantial discussions with a candidate, candidate's authorized committee, political party committee, or any of their agents;
- Using a common vendor; or
- Using a former employee or independent contractor of a candidate, candidate's authorized committee, or political party committee.

See 11 C.F.R. § 109.21(d)(1) – (d)(6). The FEC did not alter the conduct prong in its new coordination regulations.

IV. NEW SAFE HARBOR FOR CERTAIN BUSINESS AND COMMERCIAL COMMUNICATIONS

The FEC created a new safe harbor intended to protect bona fide business and commercial communications from being treated as coordinated communications. Under the new safe harbor, public communications referring to a clearly identified federal candidate in his capacity as the owner or operator of a business that existed prior to the individual becoming a candidate are not considered to be coordinated communications, provided that the public communication does promote, attack, support, or oppose that candidate or an opponent for the same office. In addition, the communication must be consistent with other public communications made by the business prior to the individual becoming a candidate in terms of the medium, timing, content, and geographic distribution of the communication. *See* new 11 C.F.R. § 109.21(i).

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If you have any questions regarding the FEC's new coordination regulations, please do not hesitate to contact the Bryan Cave Election Law Group for assistance.