

FEC Reconsiders 120-Day Coordination Rule: Comments Due on January 13

January 2006

Bowing to a decision in the U.S. Court of Appeals for the District of Columbia, the Federal Election Commission (FEC) is undertaking an expedited rulemaking on its coordination regulations. See www.fec.gov/law/law_rulemakings.shtml#coordinated. The Notice of Proposed Rulemaking (NPRM) was published on December 14, 2005, and comments are due on January 13, 2006.

The main focus of the rulemaking is the 120-day content factor in the FEC's coordination regulations. Under the regulations as they now stand, certain communications coordinated with a candidate or a political party are considered to be in-kind contributions to the candidate or political party, which are subject to contribution limits for PACs and individuals and prohibited if by corporations. The current list of covered communications is as follows: (1) campaign literature, (2) communications that expressly advocate the election or defeat of a federal candidate, (3) electioneering communications (certain television or radio communications aired within 30 days of a primary and 60 days of a general election that mention or feature a federal candidate) and (4) public communications disseminated within 120 days of a federal election that mention or feature a federal candidate and are directed toward voters in the candidate's congressional district or state. The D.C. Circuit stated that the FEC had failed to substantiate the choice of the 120-day time period.

The FEC considers a wide variety of options in its NPRM, including doing away with a time period altogether, reducing the time period to 30 days before a primary and 60 days before a general election and extending the time period to the entire election year. Another option proposed is the retention of the 120-day period. The NPRM also considers other changes in the rules with respect to

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coordination, such as the inclusion of a "promote, support, attack or oppose" test, and the adoption of a test analyzing whether the "purpose" of a communication is to influence a federal election.

In addition, the FEC also calls for comments as to the effect of the coordination rules related to common vendors and former employees, the "request or suggestion" conduct prong, the use of firewalls by consultants and vendors and the use of publicly available information.