

# Post-BCRA Regulations: FEC NPRM on Coordinated and Independent Expenditures

September 2002

On September 12, 2002, the Federal Election Commission ("FEC" or "Commission") approved a *Notice of Proposed Rulemaking on Coordinated and Independent Expenditures* ("NPRM").<sup>(1)</sup> Comments on this NPRM are due on October 11, 2002, and the Commission will hold hearings on its proposed rules on October 23 and 24, 2002. The proposed regulations have the potential to significantly expand the definition of coordination. A summary of the proposed rules pertinent to corporations, PACs, and trade associations follows below.

## Background on Coordination

The core of the NPRM is the definition of coordination. Congress, in the Bipartisan Campaign Reform Act of 2002 ("BCRA") § 214(b), repealed the Commission's previous definition, which emanated from the U.S. District Court for the District of Columbia's ruling in *Federal Election Commission v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). In the BCRA, Congress did not provide a definition of coordination, but, in addition to adding coordination with a political party, presented the Commission with several issues it must consider when writing the new rules. The BCRA is effective on November 6, 2002, and the Commission must promulgate its new rules by December.

## Definition of Coordination

In the proposed rules, coordinated communications are considered to be "expenditures," as well as, for the most part, in-kind contributions to the candidate or party assisted.<sup>(2)</sup> For the actual definition, the Commission instituted a three-pronged approach. All three elements must be fulfilled in order for a communication to be deemed coordinated.

## Payment Requirement

First, the communication must be paid for by someone other than a candidate, his or her authorized committee, or a political party.

## Content Requirement

Second, under the proposed regulations, the content of the communication must be either (a) an electioneering communication;<sup>(3)</sup> (b) a republication of campaign materials; or (c) a communication that expressly advocates the election or defeat of a clearly identified candidate for federal office. In addition to

these considerations, the Commission also asks for comments on three alternative content provisions, any one of which would fulfill the content prong of the three-part test for coordination. The alternatives are as follows: (A) a public communication that clearly identifies a federal candidate; (B) a public communication that promotes or supports or attacks or opposes a federal candidate; and (C) a communication made within 120 days of an election, that is directed at the relevant jurisdiction of a clearly identified candidate, and that makes express statements about the record or position or views on an issue, or the character, or the qualifications or fitness for office or party affiliation of a clearly identified candidate. Finally, at the September 12 meeting, Commissioner Thomas called for comments on communications that do not mention a clearly identified candidate.

### **Conduct Requirement**

For the final test for coordination, the Commission proposes many examples of conduct, any one of which would make a communication coordinated if the content of the communication meets the aforementioned test. The following types of conduct are included in the proposed rules:

- Communications made at the request or suggestion of a candidate, his or her authorized committee, a political party, or the agents of any of the foregoing;
- Communications made according to the assent of a candidate, his or her authorized committee, a political party, or the agents of any of the foregoing;
- Communications made where a candidate, his or her authorized committee, a political party, or the agents of any of the foregoing are materially involved in decisions about the communication's content, intended audience, means and mode of the communications, media outlet used, timing and frequency, and size and prominence or duration;<sup>(4)</sup>
- Communications created, produced, or distributed after one or more substantial discussions between the person paying for the communication and a candidate in the communication or his or her committee or opponent, a political party, or the agents of any of the foregoing;
- Communications made by a common commercial vendor if the vendor has acquired and makes use of material information about a candidate or party from a previous or current relationship in the election cycle; and
- Communications made during the election cycle by a former employee (or the current employer of a former employee) of a candidate, his or her authorized committee, or a political party where the former employee actually uses material information about the plans, projects, activities, or needs of the candidate or party.<sup>(5)</sup>

Finally, it is important to note that the proposed regulations on coordination do not require, per the BCRA, any formal collaboration or agreement. As the Commission states in the NPRM, no mutual understanding or meeting of the minds is required.

### Other Considerations in the NPRM

In other parts of the NPRM, the Commission touches on the definition of "agent," which is pertinent to coordination, and uses the same definition it approved in the soft money rulemaking. The Commission also makes changes to the definition of "independent expenditure," which is the opposite of a coordinated communication. Further, the FEC discusses the new 48-hour reports required when a person spends \$10,000 or more in the aggregate per election for independent expenditures. Finally, the NPRM briefly discusses voter guides published by corporations, and the proposed rules eliminate the limitation that contacts be only in writing between corporations and candidates when corporations inquire about a candidate's position on issues for its voting guide.

1. *67 Fed. Reg. 60,042 (Sept. 24, 2002).*
2. The Commission excepts some coordinated communications made by the use of a common vendor or a former employee from the in-kind contribution requirement.
3. The definition of "electioneering communication" is being developed by the FEC in a different rule making. See Notice of Proposed Rulemaking on Electioneering Communications, *67 Fed. Reg. 51,131 (Aug 7, 2002).*
4. *A person is materially involved if he or she shares material information or conveys approval or disapproval of the other person's plans. Material means important.*
5. *The Commission also seeks comment on whether to extend this provision to include volunteers.*

*If you have any questions or concerns about the NPRM or wish to make comments, please contact Jan Baran (202.719.7330 or [jbaran@wiley.law](mailto:jbaran@wiley.law)) or Mark Renaud (202.719.7405 or [mrenaud@wiley.law](mailto:mrenaud@wiley.law)).*