

FEC Proposes to Expand Coordination Rules; Outcome Could Curtail Grass-roots Lobbying Year-Round

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Certain spending that is "coordinated" with a federal candidate or political party can become an illegal contribution. On October 21, 2009, the Federal Election Commission (FEC) published proposed changes to its coordination rules (as required by a recent court case). The proposed changes are of many different hues and, like the rules themselves, highly technical. The bottom line, however, is as follows: If the most restrictive rules are adopted, the rules will curtail the ability of corporations, trade associations and others to conduct effective federal grass-roots lobbying at all times, and not just near elections.

For example, one of the proposals would outlaw communications coordinated with, among others, incumbents and their agents if the communications "promote, support, attack or oppose" a political party or candidate, including an incumbent running for re-election. There would be no time limit on this prohibition, so the effect on coordinated grass-roots lobbying would be year-round. An example of a communication covered by this ban (using the subjective words "promote" and "support") would be as follows: "Senator X is working hard to lower your taxes. Senator X is the one getting it done. Call Senator X and tell him 'thanks.'" For "attack" or "oppose," the following would be a covered communication:

Is X looking out for our state? In Washington, he takes \$136,000 from a notorious lobbyist now under federal investigation. Then X fights for and passes legislation to give the lobbyist's client \$3 million, in another state. X doesn't pass the smell test. Call X: Tell him to start

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working for our state.

A separate proposal would extend the coordination ban to cover any coordinated communication at any time (whether it mentions a candidate or not) if the communication has been created, produced or distributed pursuant to a formal or informal agreement with a candidate or party committee to influence any election. Although corporations and trade associations in the end could likely show that no formal or informal agreement existed, outside entities could easily allege impermissible coordination without much more than a notary to file a complaint. The threat of such complaints will chill collaboration between the Hill and grass-roots organizations.

The proposed rules also affect other types of conduct that make a public communication "coordinated" with a federal candidate, including an incumbent, and a political party committee. Nonetheless, the coordinating conduct remains focused on the following areas: (a) making the communication at the request or suggestion of the candidate, a political party or their agents; (b) materially involving the candidate, a political party or their agents in the making and distribution of a communication; (c) engaging in substantial discussions about campaign plans, projects and needs, with the candidate, a political party or their agents; (d) certain uses of a common vendor to a candidate or political party; and (e) certain involvement of former employees and independent contractors of a candidate or political party.

Separately, changes proposed to the conduct factors related to the use of common vendors and former employees/independent contractors could have a large impact on individuals and entities working in the political advocacy field and for those who hire them. Under one proposal, the lasting effect of working on a senatorial campaign could be a ban from working for outside entities interested in and communicating in that senator's state for the rest of the six-year cycle.

The breadth of these and other proposals in the rulemaking will increase the costs and risks associated with grass-roots lobbying in election years and non-election years alike, and the chilling effect on coordinating legislative lobbying with important incumbents and outside sources will reduce the efficacy of such lobbying efforts. The Notice of Proposed Rulemaking can be found [here](#). Comments are due by January 19, 2010. Wiley Rein is available to assist corporations and trade associations that wish to submit comments in this rulemaking.