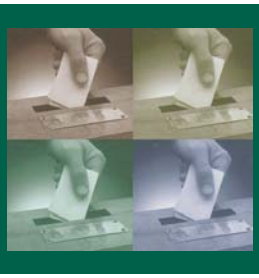
Wiley Rein & Fielding

September 2002

Election Law News

A Publication of the WRF Election Law Practice Group



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

On September 12, 2002, the Federal Election Commission ("FEC" or "Commission") approved a *Notice of Proposed Rulemaking on Coordinated and Independent Expenditures* ("NPRM").[1] 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 Congress, in the Bipartisan Campaign Reform Act of 2002 ("BCRA") § 214(b), repealed the Commission's previous definition, which emanated from the U.S. District Court for the District of Columbia's ruling in *Federal Election Commission v.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.[2] 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.

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[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.*

WRF Successfully Defends RNC in False Advertising Case

WRF's Election Law Practice successfully defended the Republican National Committee against claims that its 1995 newspaper ad challenging anyone to disprove that Republicans "are actually increasing Medicare spending by more than half" was false.

The U.S. Court of Appeals for the District of Columbia ruled on August 20, 2002, that "the statement is not ambiguous…and as a matter of law, the statement is not false."

The ad featured former RNC Chairman Haley Barbour promising to pay $1 million to anyone who could disprove his claim. Although numerous people challenged Barbour's statement in court, this court decision was regarding claims made by Rep. Gene Taylor (D-MS) and Charles Resor.

The Republican National Committee and Mr. Barbour were represented by Jan Baran (202.719.7330 or jbaran@wrf.com), head of WRF's Election Law group, and partner Tom Kirby (202.719.7062 or tkirby@wrf.com). ✦

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FEC NPRM on Coordinated and Independent Expenditures

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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;[3] (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;[4]
- 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.[5]

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. ✦

If you have any questions or concerns about the NPRM or wish to make comments, please contact Jan Baran (202.719.7330 or jbaran@wrf.com) or Mark Renaud (202.719.7405 or mrenaud@wrf.com).

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[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.*

State Law Changes: Illinois Amends Gift Ban & Campaign Finance Laws

In the wake of an Illinois Supreme Court ruling reviving the once unconstitutional Illinois gift laws, the Illinois legislature recently enacted amendments to its State Gift Ban Act as well as to its campaign finance laws.

In Public Act No. 92-0853, signed by the governor on August 28, 2002, the legislature amended the exceptions to its gift ban. The legislature excepted "[a]ny item or items from any one prohibited source during any calendar year having a cumulative total value of less than $100." 5 Ill. Comp. Stat. Ann. 425/15(23). This exception replaced a previous exception applying to "[a]n item of nominal value such as a greeting card, baseball cap, or T-shirt."

In the same Public Act the legislature also amended the state's campaign finance laws. Succinctly, the new law prohibits state executive branch and certain local employees from soliciting or receiving contributions from individuals and companies engaged in a business or activity over which the employee has regulatory authority such as licensing, inspection, or inspection authority. *See* 10 Ill. Comp. Stat. Ann. 5/9-25.2; 720 Ill. Comp. Stat. Ann. 5/33-3.1 and 5/33-3/2.

All of the above changes were effective on August 28, 2002. ✦

For more information on this statutory change or other state gift provisions or campaign finance rules, please contact Carol Laham (202.719.7301 or claham@wrf.com).

IRS Proposes Changes to Form 990

The IRS has issued a call for comments on proposed changes to the reporting requirements for many types of non-profits, including Section 527 political organizations. The IRS announced its plans on September 4, 2002.

Currently under Section 527 of the Internal Revenue Code, political organizations, including PACs and candidate committees that do not report to the Federal Election Commission, must register and report with the IRS. All political organizations, including federal PACs, with gross receipts in excess of $25,000 per year must file an annual tax return, Form 1120-POL, and an annual informational return, Form 990.

The IRS proposes to make a change to Form 990 in order to obtain more information on political organizations. The proposed changes cover fundraising expenses and transfers with other political organizations and 501(c) organizations. Other managed changes generally apply to all non-profit organizations, and are also of interest to political organizations.

Comments are due by January 28, 2003. More information can be found in Announcement 2002-97, which will be included in Internal Revenue Bulletin 2002-39 on September 30, 2002. ✦

If you have any questions about 527 political organization taxation or reporting requirements, or wish to file comments with the IRS, please contact Carol Laham (202.719.7301 or claham@wrf.com) or Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Second Circuit Upholds Vermont's Candidate Expenditure Limits

On August 7, 2002, the Second Circuit Court of Appeals upheld, among other aspects of the law, Vermont's candidate expenditure limitation provisions in *Landell v. Vermont Public Interest Research Group*, 300 F.3d 129 (2d Cir. 2002).

A three-judge panel of the Second Circuit held that the state's expenditure and contribution limits are constitutional but ruled that Vermont's attempt to limit contributions from out-of-state sources is unconstitutional. Particularly noteworthy was the court's determination that the candidate expenditure limits satisfied the state's interest in limiting preferential treatment provided by politicians to large contributors. The court found that "the evidence considered by the District Court and the Vermont legislature demonstrates that, absent expenditure limitations, the fundraising practices in Vermont will continue to impair the accessibility which is essential to any democratic political system. The race for campaign funds has compelled public officials to give preferred access to contributors, selling their time in order to raise campaign funds."

The decision is currently on appeal to the full Second Circuit. ✦

For more information please contact Caleb P. Burns (202.719.7451 or cburns@wrf.com).

WRF Election Law Attorneys Secure Voting Rights for Virginia Voters

WRF Lawsuit Prompts Special Election in Northern Virginia

Five Northern Virginia voters, represented by WRF, declared a major victory in July as they dismissed their lawsuit against election officials of the Commonwealth of Virginia having won the right to hold a special election to elect a senator of their own to the General Assembly.

In June, WRF election law attorneys Lee E. Goodman and Thomas W. Kirby filed a federal lawsuit, *Haddow, et al. v. Warner, et al.*, on behalf of their clients against the Governor of Virginia and Virginia election officials claiming Virginia election laws violated the equal protection and due process rights of over 48,000 disenfranchised voters in Fairfax and Prince William Counties.

"We were pleased to help the citizens of Northern Virginia secure their civil rights to vote and representation in the General Assembly," said WRF attorney Lee E. Goodman. "Our clients had the courage to challenge an unfair election system, and the people of Fairfax and Prince William won a right to vote for a senator from their community as a result."

"There's no doubt that Wiley Rein & Fielding's legal action forced the politicians in Richmond to respect my constituents' constitutional rights"

– Virginia Delegate Jay O'Brien

The lawsuit was triggered when Senator Warren Barry resigned in June. Virginia called a special election in a newly created 37th Senatorial District instead of the original district Senator Barry had represented under Virginia's prior apportionment plan. That left over 48,000 citizens who had been moved from Senator Barry's old 37th to a new 39th Senatorial District wholly unrepresented by any incumbent senator who resided in the district. A central issue in the lawsuit was whether the incumbent state senator from the old 39th Senatorial District in Shawsville, Virginia, a rural town in the Southwest region of the State, had been assigned—or constitutionally could be assigned—to represent the people of Fairfax County and Prince William County in the northern region of the state.

Five days after the lawsuit was filed, faced with a choice of either moving to Fairfax County to satisfy Virginia Constitutional requirements or stepping down, the incumbent senator from Southwest Virginia announced that he would retire by the end of summer, and he formalized his retirement in a letter to the governor on July 22, four days before the case was to go to a hearing in federal court. The Governor's Office then promptly issued a writ of special election which granted WRF's clients a special election of their own in their new 39th Senatorial District of Fairfax County and Prince William County, precisely the result requested in WRF's lawsuit.

"There's no doubt that Wiley Rein & Fielding's legal action forced the politicians in Richmond to respect my constituents' constitutional rights," said Virginia Delegate Jay O'Brien who represents sections of the new 39th Senatorial District in the Virginia House of Delegates and will run for State Senate in the upcoming special election. "The citizens in my district went without effective representation for many months, and faced the prospect of an unfair special election until Wiley Rein & Fielding stepped in. Now, the people I represent will have their own special election to vote for a senator who lives in their community and shares their interests on many important issues like transportation, taxes and education."

WRF represented John Haddow, Bruno Maestri, James Arritt, William Jasien and David Pace in the lawsuit. ✦

For more information about this case or other questions relating to voting rights, contact Lee Goodman (202.719.7378 or lgoodman@wrf.com) or Tom Kirby (202.719.7062 or tkirby@wrf.com).

Important Filing Dates

Monthly FEC Reports

Monthly FEC reports are due September 20, October 20, October 24, and December 5. The October 20 report, given that October 20 falls on a Sunday this year, must be postmarked by October 19 or be received by the FEC on October 18 (if hand delivered). Electronic filers may still file on October 20. The October 24 report must be mailed by October 21 if the committee is filing by certified or registered mail.

Monthly IRS Reports

Political organizations required to file Form 8872 with the IRS and which do so on a monthly basis must file such a report on September 20, October 20, October 24, and December 5. The October 20 report, given that October 20 falls on a Sunday this year, must be postmarked by October 19 or be received by the IRS on October 18 (if hand delivered). Electronic filers may still file on October 20. The October 24 report must be mailed by October 21 if the organization is filing by certified or registered mail.

Quarterly FEC Reports

Quarterly FEC reports are due on October 15, October 24, and December 5. The October 24 report must be mailed by October 21 if the committee is filing by certified or registered mail.

Quarterly IRS Reports

For political organizations filing quarterly reports with the IRS, Form 8872 is due on October 15, October 24, and December 5. The October 24 report must be mailed by October 21 if filing by registered or certified mail.

Coordinated and Independent Expenditures NPRM – October 11

Comments in the *Notice of Proposed Rulemaking on Coordinated and Independent Expenditures* are due at the Federal Election Commission on October 11. Please see related article on page 1 of this issue, or any member of the Election Law Practice Group for more information. ✦

Please visit www.wrf.com/publications/ppt/election/checklists.asp for a complete list of filing dates for 2002.

The Election Law Primer for Corporations

Updated Version Now Available

The Election Law Primer for Corporations, Third Edition, by Jan Baran is now available from the American Bar Association. The Primer provides a thorough analysis of the federal statutory and regulatory schemes affecting the political affairs of corporations, their PACs, and trade associations. Campaign finance, lobbying, and soft money are all covered by the Primer, which has been revised to incorporate an analysis of the Bipartisan Campaign Reform Act of 2002. Included in this third edition is a new chapter explaining the tax considerations of political activity—from the deductibility of lobbying expenses to the taxation of political expenditures by 501(c) organizations to the various IRS tax filings for PACs and other political organizations. ✦

The Primer may be ordered at **www.abanet.org/buslaw/catalog/pubs.html** (Source Code: ELECTION; Product Code: 5070414) *or at 312.988.5522.*

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Federal District Court Strikes Down Some Section 527 Reporting

On August 22, 2002, the senior United States District Judge for the U.S. District Court for the Southern District of Alabama struck down parts of the reporting requirements of section 527 political organizations and enjoined the IRS from enforcing the requirements. *Nat'l Fed'n of Republican Assemblies v. United States*, 2002 WL 2008245 (S.D. Ala. Aug. 27, 2002). In his opinion, Judge Richard W. Vollmer, Jr. declared the disclosures required under section 527(j) of the Internal Revenue Code, which refers to periodic reporting such as on Form 8872, to be unconstitutional to the extent that the statute required the disclosure of contributions and expenditures in connection with state and/or local electoral advocacy and disclosure of expenditures in connection with federal electoral advocacy.

The judge, citing *Buckley v. Valeo*, stated that the government failed to prove the existence of actual or perceived corruption in connection with independent expenditures, which are the only two compelling interests open to the government in First Amendment cases involving political speech, and, therefore, the reporting requirements for independent expenditures could not be supported. He also ruled that section 527(j) violated the equal protection component of the Fifth Amendment because it treated political organizations differently from other tax-exempt organizations without any necessary critical differentiating characteristics. Finally, Judge Vollmer held that, with respect to state and local electoral advocacy, Congress did not exercise its taxing power when enacting section 527(j) and, as a result, the section violated the Tenth Amendment.

On September 17, 2002, Judge Vollmer amended his decision to limit the corresponding injunction to the plaintiffs in the case. ✦

For more information contact Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Election Law Practice Group

Jan Witold Baran	202.719.7330	jbaran@wrf.com
Carol A. Laham	202.719.7301	claham@wrf.com
Thomas W. Kirby	202.719.7062	tkirby@wrf.com
Andrew G. McBride	202.719.7135	amcbride@wrf.com
Barbara Van Gelder	202.719.7032	bvangeld@wrf.com
Jason P. Cronic	202.719.7175	jcronic@wrf.com
Lee E. Goodman	202.719.7378	lgoodman@wrf.com
Caleb P. Burns	202.719.7451	cburns@wrf.com
D. Mark Renaud	202.719.7405	mrenaud@wrf.com
Thomas W. Antonucci	202.719.7558	tantonuc@wrf.com