



"Amanda Adams"  
<aadams@ombwatch.org>  
01/19/2010 11:07 PM

To CoordinationShays3@fec.gov  
cc  
bcc  
Subject Notice 2009–23 Comments

Hello,

Please find attached comments regarding [Notice 2009—23] Coordinated Communications.

Thank you.

Amanda Adams

Policy Analyst, Nonprofit Speech Rights

OMB Watch

1742 Connecticut Ave, NW  
Washington, DC 20009

202-683-4880

[aadams@ombwatch.org](mailto:aadams@ombwatch.org)

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Combined Federal Campaign #10201



coordcomments\_0110.doc



January 19, 2010

Amy L. Rothstein, Assistant General Counsel  
Federal Election Commission  
999 E Street, NW.  
Washington, DC 20463

RE: [Notice 2009—23], Coordinated Communications

Dear Ms. Amy L. Rothstein,

OMB Watch is a nonprofit, charitable organization that promotes government accountability and citizen participation at the national level. We encourage nonprofits' participation in governmental decision-making, which includes advocacy, lobbying activities, and nonpartisan voter participation. We advocate for governmental policies that reduce barriers for nonprofits to engage in public policy debates and help to make nonprofit sector activities more transparent and accountable. It is for these reasons we appreciate the opportunity to comment.

These comments are written from the perspective of nonprofit organizations that are actively involved in public policy issues, but do not participate in candidate elections or campaigns. 501(c)(3) organizations are different from other nonprofits in that the tax code prohibits any support or opposition to candidates in elections. Campaign finance laws and regulations should be carefully written to not adversely affect nonprofit public policy participation, particularly 501(c)(3) organizations which are candidate neutral by law.

The NPRM asks on page 22, "is it permissible for the Commission to regulate any speech, whether independent or not, that does not fall within the Court's definition of 'express advocacy' or its definition of the 'functional equivalent of express advocacy'?" Our answer to this question is, no, unless it is considered a coordinated communication. However, we continue to find the Commission's definition of "express advocacy" and rules established to implement Wisconsin Right to Life (WRTL) too vague and difficult to enforce.

We are taking this opportunity to once again call for FEC regulations that outline distinctly, what is electoral and non electoral activity. If express advocacy will be used to determine whether messages can be regulated, that definition must first be clarified.

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*Celebrating 25 Years of Promoting Government Accountability and Citizen Participation — 1983 - 2008*

1742 Connecticut Ave. NW  
Washington, DC 20009

tel: 202.234.8494  
fax: 202-234.8584

email: [ombwatch@ombwatch.org](mailto:ombwatch@ombwatch.org)  
web: <http://www.ombwatch.org>

The definition of express advocacy<sup>1</sup> is very similar to the standard set in the Supreme Court's opinion in WRTL; "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This definition is too vague, leaving far too much room for interpretation.

Such ambiguity prevents the Commission from fairly or adequately enforcing the rule defining express advocacy. The definition of express advocacy is even vaguer than the current electioneering communications rule in 11 CFR 114.15. As a practical matter, this makes it impossible for citizens' organizations that want to communicate with the general public to judge whether their broadcast is allowable or not, threatening the risk of sanctions.

In addition, the notice asks whether the WRTL decision has any effect on the definition of PASO (promote, support, attack or oppose). Our answer to this question is no, because PASO can apply outside of the independent expenditure context. Also, McConnell dictates using the plain meaning of PASO words. In the NPRM, the Commission highlights the portion of McConnell that states that the terms of the PASO standard "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (p.24 of NPRM) While we do not agree that the PASO standards are explicit and clear, using the aforementioned rationale, the PASO definition is supposedly clear, so WRTL should have no bearing on the definition since it focuses on the plain meaning of the words.

However, even if WRTL does not affect the scope of the PASO definition, the definition is still extremely vague and overly broad, even when taking the McConnell decision into account. A PASO standard would unnecessarily allow the Commission to regulate more speech and subject a broader range of speech to campaign finance regulations. In addition, even though Congress included PASO as the backup definition of "electioneering communication," it was only intended to be used if the "express advocacy" definition was rejected as unconstitutional. Thus, that should not be taken into account when deciding if WRTL affects the scope of PASO.

The NPRM further asks on page 22, "Is the decision in Wisconsin Right to Life applicable in the coordinated communications context, since the Court's decision was confined to independent electioneering communications?" We would answer no, because the decision was confined to independent electioneering communications. Even though an electioneering communication satisfies the content standard of a coordinated communication, the WRTL decision bars using the standard outside of the independent electioneering communication context. To apply WRTL in the coordinated communications context would go against the Court's intent, as the coordinated communications are outside the scope of the Court's decision.

Separately, OMB Watch supports the proposed safe harbor exemption that addresses communications where Federal candidates endorse or solicit support for 501(c)(3)

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<sup>1</sup> 11 CFR 100.22

nonprofit organizations. The notice references MUR #6020, Alliance/Pelosi, which illustrates that not all joint efforts between public officials and nonprofits are somehow campaign related. None of the ads mention an election, voting, political parties, or any officeholder's character or fitness for office, but address an issue central to the group's mission and are part of an ongoing issue advocacy campaign. This is a clear example of how federal election law has reached beyond partisan campaigning to treat traditional grassroots issue advocacy like electioneering.

### *Conclusion*

Nonprofits often work closely with officials on public communications involving legislative campaigns or other activities connected to their public office. These communications should not be considered campaign activity. For example, groups may work closely with the sponsor of a bill to generate public support for passage of legislation. An action alert from a nonprofit asking the public to contact their representatives calling for their support would be more effective if the timing and content can be coordinated with the lawmaker.

Any final rules should protect First Amendment rights and encourage citizen involvement in public policy debates, while not exempting communications meant to impact federal elections. It is important to note that there are multiple types of broadcasts that can identify federal candidates and yet be completely unrelated to elections. These include grassroots lobbying, issue advocacy and educational messages.

Sincerely,



Amanda Adams, Nonprofit Policy Analyst



Lateefah Williams, Nonprofit Policy Analyst