

The Coordinated Contributions Rule
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Our firm is blessed with a talented political law lawyer, Larry Norton, and we share many conversations about the interplay of FCC and election law on candidates and broadcasters. Recently we observed that, hard to believe as it is, the next political campaign season is starting up. Here's an issue we discussed recently that can interest broadcasters because of its impact on funding for additional full rate advertising revenue.

Federal law and regulations have long prevented campaigns and parties from evading contribution limits by having others who support the candidate's or party's cause pay for campaign activity directly - for instance, paying for a television ad crafted by the campaign. FEC investigations focusing on this "coordination" prohibition are typically lengthy and intrusive. As intermediary service providers, radio and television stations, as well as media producers and buyers, do not face liability when coordination occurs, but they should understand the rules in this area or risk being drawn into these investigations through subpoenas and depositions.

Despite several attempts to develop workable rules, the FEC has been tied in knots for years trying to implement this "coordination" prohibition. In June 2008, a federal appellate court in the District of Columbia tossed out parts of the latest FEC coordination rules, while upholding a new rule that allows media buyers and producers, as well as other consultants, to establish "firewalls," permitting them to work simultaneously for candidates and outside spenders.

Why has it been so difficult to write rules in this area? For one thing, it's in the very nature of campaigns that campaign or party officials interact with donors all the time. How do you craft clear rules that allow for this natural exchange of information, while preventing discussions about advertising content, selection of target audiences, developing voter lists, and other matters of campaign strategy?

Second, in many markets there are only a limited number of consulting firms, media buyers, and polling groups that specialize in political activity. How do you prevent these consultants from serving as conduits of valuable information between campaigns and third-party spenders without stifling their business or severely limiting their availability?

Third, in politics as in many areas of today's economy, mobility of employees is common. A person may work for a campaign for awhile, then work for a party committee, then work for a private consultant. Should a person who is privy to the plans, projects, or needs of a candidate or party committee be forever barred from working for an advocacy group that supports the same candidate or party? If not, how do you draw lines in this area?

In 2002, as part of the Bipartisan Campaign Reform Act (known as "BCRA" or the McCain-Feingold law) Congress directed the FEC to scrap its existing coordination rules and adopt new ones. Under the pre-BCRA regulations, the FEC considered whether the candidate

engaged in “substantial discussion or negotiation” about radio or TV ads with an outsider resulting in “collaboration or agreement.” Anything short of this was permitted. BCRA required the FEC to adopt rules that do not require agreement or formal collaboration to establish coordination.

In response, the FEC adopted a test that expanded the manner in which coordination can occur. Under this test, coordination could be found based on (1) the request or suggestion of the candidate or party; (2) substantial discussions between the person paying for the communication and the candidate or party; or (3) situations where the person paying for the communication hires the candidate’s vendor or former employee, allowing for the sharing of information material to the candidate’s plan, projects or needs.

But the new rule also created safe harbors designed to allow the FEC to toss certain complaints before even commencing an investigation. One safe harbor provided that ads run more than 90 or 120 days before an election (depending on whether it identifies a House, Senate, or Presidential candidate) will not be subject to coordination restrictions so long as the ad does not expressly advocate the election or defeat of a clearly identified candidate. The FEC also allowed for media firms and other consultants to establish a “firewall” to prevent the sharing of information. The firewall must be described in a written policy that is distributed to affected employees, consultants, and clients.

In the latest chapter of this saga, the District of Columbia Court of Appeals struck down the time restrictions, but upheld the firewall provision. The court expressed “hope that, as the nation enters the thick of the fourth election cycle since BCRA’s passage, the [FEC] will issue regulations consistent with the Act’s text and purpose.” Over a year and one Presidential election later, there is still no new coordination rule, though the FEC recently promised that proposed rules will be issued in the next month or so.

So the FEC goes back to the drawing board, yet again. In the meantime, complaints will be filed and investigations launched. With the 2010 election season gearing up, there remains little clarity in this area. Still, with legal guidance and proper planning, there is opportunity for third party groups to advertise based on information obtained from candidates or parties.