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cc
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Subject Comments on Coordinated Communications

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January 13, 2006

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington DC 20463

RE: Comments to Notice of Proposed Rulemaking on Coordinated Communications

Dear Mr. Deutsch:

The Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (the "DSCC" and "DCCC") submit these comments on the Notice of Proposed Rulemaking on Coordinated Communications, published at 70 Fed. Reg. 73,946 (Dec. 14, 2005).

I. Introduction: The Commission Should Limit the Rulemaking to the Commission's Obligations under FECA and the APA

The Commission has initiated this rulemaking in response to *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), which found that the Commission's justification for the 120-day "content" standards was inadequate. As explained below, in the absence of any compelling evidence from the 2004 election cycle to the contrary, the Commission should reconsider the 120-day time frame and adopt the time frame established in BCRA for coordinated electioneering communications. The Court of Appeals objected that the 120-day standard was inadequately explained, perhaps because its selection was ill-considered. The Commission has available an alternative suitable for the purpose, since the electioneering communication time frames were carefully considered and the basis for them extensively documented in the course of Congressional and judicial consideration. The choice of these time frames would preserve a time-based standard while providing it with a clear, firm foundation.

The Commission has raised other questions and issues for comments in this, the third coordination rulemaking in as many election cycles. The Commission should

also take the opportunity to conform other parts of its coordination regulations to the requirements of FECA and the APA. Suggestions for specific amendments are provided below.

In proceeding, the Commission would do well to consider several general principles. The coordinated communication rules are structured to capture only those communications with a demonstrable purpose and effect of influencing an election to federal office. This is the only lawful basis for regulation, consistent with implementing the statutory scheme without reaching beyond Congress' authority to control corruption or its appearance. As the Court of Appeals observed, "Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly – say, paying for a TV ad or printing and distributing posters." *Id.* at 97. And "[T]o qualify as 'expenditure' in the first place, spending must be undertaken 'for the purpose of influencing' a federal election (or else involve 'financing' for redistribution of campaign materials). *See* 2 §§ U.S.C. 431(9)(A), 441a(a)(7)(B)(iii)." *Id.* at 99.

Consistent with APA standards, the Commission must provide an adequate explanation of how regulation of a particular coordinated activity relates to constitutionally affirmed statutory objectives. Special care is required by the very nature of this effort, which is the regulation of *communications*, in part on the basis of their *conten*t, as the current rules aim explicitly to do. FECA does not authorize indiscriminate control over any communications with candidates or campaigns. Its objective is to impose controls, through application of contribution limits and source restrictions, on those communications properly treated as contributions to the campaigns with the reasonably delimited purpose and effect of influencing an election.

These considerations also suggest that with one cycle of experience, the Commission may adjust its coordination rule in other respects, to the same effect of shaping them more clearly and precisely to statutory objectives. We suggest, for example, that the Commission incorporate in the rules explicit protection for certain speech—such as one candidate's endorsement of another—that is not reasonably, appropriately or lawfully restricted in furtherance of regulatory purposes. As party committees, we are concerned also with the role that candidates play in supporting their own parties' fundraising efforts: application of the contribution limits, under a coordination theory, discourages activity between parties and candidates without advancing meaningful enforcement of contribution limits.

II. The 120-Day Rule Lacks Adequate Justification and Should be Replaced with the Time Frame for Coordinated Electioneering Communications

The Court of Appeals has compelled the Commission to either provide more adequate justification for the 120-day rule, or adopt a different rule. The Commission should abandon the 120-day time frame in favor of one that correlates more closely to when campaign-related communications most often occur, in periods immediately preceding the election. An extensive empirical record, on which Congress and the courts have acted, supports the adoption of the periods of 60 days before a general, special, or runoff election, and 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate.

The Commission would therefore have adequate justification for adopting these time frames in sections 109.21(c)(4)(ii) and 109.37(a)(2)(iii). Indeed the only communication that BCRA specifically requires to be treated as a contribution when coordinated with a candidate or party committee is an electioneering communication. See 2 § U.S.C. 441(a)(7)(C). In this way, Congress left no doubt about its judgment that these periods require special attention in the enforcement of the contribution limits and source prohibitions of the Act.

The Supreme Court closely considered and upheld this judgment in rejecting the challenge to the electioneering communication provision in McConnell v. FEC, 540 U.S. 93 (2003). In upholding the 30- and 60-day periods "The precise percentage of issue ads that clearly identified a candidate and were aired during [the 30- and 60-day] periods but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. [Citation omitted.] Nevertheless, the vast majority of ads clearly had such a purpose." *Id.* at 206 (citation omitted). Rejecting the argument that the electioneering communications requirements were underinclusive because they did not apply to print media or the Internet, the Supreme Court concluded that Congress had adequately explained the reasons for its legislative choice: "Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to staunch that flow of money." *Id.* at 207 (citation omitted). The Court found that the significance of these time periods was well documented: "The record amply justifies Congress' line drawing." *Id.* at 208.

These time periods are consistent with the campaign activity that the DSCC and DCCC have observed, and on the basis of which they have made crucial budgetary,

strategic and other choices, in numerous races for federal office. The committees strongly urge the Commission to adopt these time frames in place of the 120-day rule.

III. The Commission Should Amend the Coordination Regulations to Correct Inconsistencies with FECA and the APA

A. Endorsements of Other Candidates and Candidate Solicitations for Party Funds Should Not be Treated as Coordinated Expenditures

The current coordination rules apply, broadly and unwisely, to two types of communications with little significance for the enforcement of the contribution limits but much importance for ordinary and healthy political relationships: candidate endorsements, and solicitations for party funds that are signed by candidates.

As the FEC has interpreted them, the rules now treat an endorsement as a potential in-kind contribution to the candidate making the endorsement. This may be consistent with the Commission's current coordination regulations, *see* AO 2004-1: their plain language may have left the agency with little choice.

But the outcome is not sound, and it is not compelled by law. A coordinated expenditure, treated as a contribution subject to the limits and source restrictions, must meet the test of benefiting a candidate. This is not true of an endorsement, which is a speech act performed for the benefit of another. The candidate providing the endorsement may benefit in some way—by earning the gratitude (or avoiding the resentment) of another candidate, but any such "value" does not accrue to her campaign or in any way share the characteristics of a bona fide contribution. The approach urged here is consistent with common sense and practice. When a candidate for the House or Senate makes a guest appearance at another candidate's campaign event and endorses the hosting candidate, there is no requirement that the endorsing candidate try to quantify the value he or she derived from appearing at the other candidate's event. The costs of the event are campaign expenses of the candidate hosting the event, because the purpose of the event is to influence that candidate's election, not the election of the candidate who makes the guest appearance.

The Commission is urged to take this opportunity to exempt candidate endorsements from the coordination rules. It is a step that could be taken with ample precedent, since the FEC, in Part 114, has provided corporations and unions with the opportunity to endorse candidates, under an exemption from the overall prohibition on the use of general treasury funds "in connection with" a federal election. The path to the exemption for candidates is still clearer: this is not corporate speech, but instead

the speech of candidates, and nothing is more firmly established and more appropriately protected than the common practice among candidates of seeking and providing mutual support through endorsements.

The present rulemaking also presents the occasion for empowering candidates to assist parties with their fundraising. A direct mail solicitation signed by a candidate, for the benefit of a party, yields funds for the party, not the candidate. This distinction is enforced through 11 C.F.R. § 110.1(h), which only allows a contributor to donate to both a party committee and a candidate if "[t]he contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election." 11 C.F.R. § 110.1(h)(2). Often the solicitation is directed to an audience whose members include, few, if any, of the candidate's own electorate. It is not obvious, and it has certainly not been demonstrated, that a candidate enhances his popularity with any segment of the public by appealing for money—much less money for the party. The benefit gained in these circumstances is the party's: any benefit to the candidate is conjectural, and if it is realized at all, only incidentally, not in a way threatening to the enforcement of contribution limits. Application of those limits, however, does have the effect of limiting and discouraging cooperation of parties and their candidates in the raising of party funds.

Moreover, BCRA's main purpose was to remove candidates from the business of raising and spending soft money. No soft-money loophole is opened by a candidate solicitation for the DSCC or the DCCC, both now prohibited under BCRA from raising or spending soft money. *See* 2 U.S.C. § 441i(a). In the experience of both the DSCC and the DCCC, candidates play a significant role in party fundraising, which can only be severely and unjustifiably undermined by application of the coordination rules.

The Commission should therefore exempt solicitations by candidates that are made in accordance with 2 U.S.C. § 441i(e) from the coordination regulations.

B. The Commission Should Exclude Time Buyers and Fundraisers from the Common Vendors Content Standard.

In comments submitted to the Commission during the initial BCRA rulemaking, the DSCC, DCCC and DNC raised several concerns regarding the scope of the proposed rules regarding common vendors. Specifically, the party committees objected to the inclusion of fundraisers and media time buyers in the content standard for common vendors. Those earlier comments are excerpted below:

> There is no basis, for example, for including within that class fundraising professionals. These kinds of professionals assist with the development of fundraising appeals, and in some cases with their implementation, and they do so typically for a broad range of political and commercial clients. It is not necessary to the fundamental objectives of the rules to reach this class of professionals, when the result will be serious damage to the practice of their trade and to their availability for party work, without a commensurate gain in controlling strategically sensitive communications . . . .
>
> The limited number of vendors providing particular services raises another problem. Some services provided to candidates, political parties and other organizations are highly technical and specialized in nature, resulting in circumstances where very few provide them . . . . The classic example in the political arena are media timebuyers, who are few in number, high in their degree of specialization, and who normally implement strategic decisions made broadly by others.

Memorandum, dated October 11, 2002, from the DNC, DSCC and DCCC to Mr. John Vergelli, at 5-6.

These concerns were not taken into account in the final rules, which specifically included media timebuyers and fundraisers. *See* 11 C.F.R. § 109.21(d)(4)(ii)(A) and (D). Nor was an adequate justification provided for the inclusion of these professions; the Commission merely provided a conclusory statement that it was applying its rules to vendors "who provide specific services that, in the Commission's judgment, are conducive to coordination between a candidate or political party committee and a third-party spender." *See* Final Rules and Explanation and Justification on Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 2003). In the absence of justification for their inclusion, as required under the APA, the Commission should remove fundraisers and timebuyers from its list of vendors who are singled out for additional regulation in 11 C.F.R. § 109.21(d)(4)(ii).

C. The Common Vendor and Former Employee Conduct Standards Should Cover a 60-Day Time Frame

During the 2004 election cycle, the Commission's temporal limit for common vendors and former employees set forth in sections 109.21(d)(4)(ii) and 109.21(d)(5)(i) caused substantial harm to individuals who lacked any material information that could be used for coordination purposes, and yet who were targeted in

FEC complaints because of these rules. The temporal limit of an entire election cycle bears no relation to the life span of useful, non-public information about a campaign. The 60 days proposed in the Notice is a much better balance between the Commission's need to prevent circumvention of the coordination rules and the rights of individuals to conduct their business in a lawful manner without being unduly targeted.

D. DSCC Coordination with Third Parties in a State Where No Senate Election is Occurring Should Not be Subject to the Coordination Rules

As currently written, the coordination rules that apply to communications between the DSCC and third parties extend, perhaps unintentionally, to activities in states where no Senate race is occurring. *See* 11 C.F.R. § 109.21(c)(4)(iii). By encompassing jurisdictions where "one or more candidates of the political party appear on the ballot," the rule potentially sweeps in the DSCC if an outside group runs an ad referencing Democrats or Republicans within a time frame when the only federal candidates on the ballot in that state are House candidates. There is no basis for concluding that such an ad is for the purpose of influencing an election in which the DSCC is participating, and it is inconsistent with the Commission's overall approach to reach this activity in a seemingly arbitrary and capricious manner. Therefore, the Commission should clarify that for the national senatorial campaign committees, a Senate candidate must appear on the ballot in order for a communication that references either political party to meet the content standard in section 109.21(c)(4). This approach would be consistent with the Court of Appeals' analysis in the context of candidates:

> While election-related intent is obvious, for example, in statements urging voters to 'elect' or 'defeat' a specified candidate or party, the same may not be true of ads identifying a federal politician but focusing on pending legislation – a proposed budget, for example, or government reform initiatives – and appearing three years before an election. Nor is such purpose necessarily evident in statements referring, say, to a Connecticut senator but running only in San Francisco media markets.
>
> Insofar as such statements may relate to political or legislative goals independent from any electoral race – goals like influencing legislators' votes or increasing public awareness – we cannot conclude that Congress unambiguously intended to count them as 'expenditures' (and thus as

> 'contributions' when coordinated). To the contrary, giving appropriate *Chevron* deference, we think the FEC could construe the expenditure definition's purposive language as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign.

414 F.3d at 99.

IV. The Commission Should Adopt Safe Harbors to Facilitate Compliance with the Law

A. Codify MUR 5506 to Provide a Safe Harbor for Entities with Firewalls

In MUR 5506, the Commission found no reason to believe that EMILY's List made, or that the Castor Committee knowingly received, excessive contributions in the form of coordinated television advertisements. EMILY's List maintained internal policies and procedures that, in the Commission's view, "ensured that no coordination occurred." First General Counsel's Report at 6. The employees, volunteers, and consultants who worked on independent expenditures were "barred, as a matter of policy, from interacting with federal candidates, political party committees, or the agents of the foregoing. These employees, volunteers and consultants are also barred from interacting with others within EMILY's List regarding specified candidates or officeholders." *Id.* at 6-7.

Consistent with its conclusion in MUR 5506, and to encourage compliance with the coordination regulations, the Commission should include a safe harbor in the coordination regulations for entities that adhere to the policies and procedures described above.

In addition, the Commission should clarify that such policies and procedures cannot, as a practical matter, completely wall off the overall head of the organization or the compliance personnel who implement the policies and procedures, and therefore mere contact with those individuals would not constitute a breach of the firewall. The restrictions on the use of material information, via the participation of the CEO or compliance personnel, would still apply. Mere contact would not be sufficient to make out a case of illegal coordination. This is a practical adjustment to the rule which leaves its essential protections intact.

B. Create a Safe Harbor to More Clearly Define When Publicly Available Information Falls Outside the Coordination Regulations

The Commission should create a safe harbor to more clearly identify which publicly available information may be shared without triggering the content standard. Specifically, the Commission should make it clear that merely summarizing publicly available information does not cause the information to become subject to the content standard. There is no adequate justification for the Commission to treat information that is publicly available as suspect, simply because it is shared in a different format. Nor is there any reason for the Commission to treat publicly available information as somehow tainted if it is received directly from a candidate or party committee. The statutory restrictions on the republication of campaign materials are sufficient to address these concerns.

V. Other Proposed Alternatives

The Notice raises a host of other questions, too numerous to answer in these comments, involving the potential expansion of the rules. As a general matter, the Commission should avoid exercising its discretion in a way that increases restrictions on political speech where no discernible threat of corruption or the appearance of corruption exists. Several of the proposals to expand the regulations appear to presuppose that there are groups with unlimited resources who, given the opportunity to coordinate at any point during an election cycle, will quickly pour their resources into campaign-related ads even if the timing of the ads severely diminishes the impact that the ads will have on potential voters. This is simply not the case. Campaign issues can be as fluid as current events, and the issues that affect how votes are ultimately cast inevitably shift during an election. This is especially true in a Congressional race, in which issues unique to a district also compete with issues of statewide and national importance.

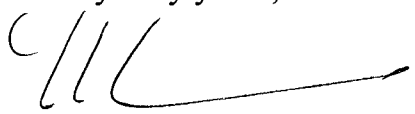
Rather than address each and every issue that was raised in the Notice, counsel to the committees will be happy to answer questions at the public hearing regarding any alternatives that are under consideration with the current Commission.

VI. Conclusion

The DSCC and the DCCC appreciate the opportunity to comment on these proposed rules. Counsel to the committees request the further opportunity to testify at the public hearing on these issues scheduled for January 25, 2006. Robert F. Bauer

will testify on behalf of the DCCC, and Marc E. Elias will testify on behalf of the DSCC.

Very truly yours,



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