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01/13/2006 06:08 PM

To <coordination@fec.gov>
cc <davies@dlcc.org>
bcc
Subject Democratic Legislative Campaign Committee

Attached please find comments on behalf of the Democratic Legislative Campaign Committee in connection with the Commission's rulemaking on coordinated communications. As the comments indicate, I would appreciate the opportunity to testify on the DLCC's behalf at the Commission's public hearings on this matter.

Very truly yours,

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January 13, 2006

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

Re: Coordinated Communications

Dear Mr. Deutsch:

My firm is general counsel to the Democratic Legislative Campaign Committee ("the DLCC"). The DLCC consists of Democratic state legislators from across the country. Like the DLCC itself, the DLCC's member state legislators typically do not make contributions or expenditures for the purpose of influencing federal elections. Their paramount concern is to elect candidates to nonfederal office.

The DLCC appreciates the opportunity to comment on the above-referenced Notice of Proposed Rulemaking. Specifically, it wishes to accept the Commission's invitation to "comment regarding the application of the coordinated communication test to situations in which Federal candidates endorse, or solicit funds for, other ... non-Federal candidates ..." 70 Fed. Reg. at 73,953.

In two advisory opinions, Advisory Opinion 2004-1 and Advisory Opinion 2003-25, the Commission held that the appearance and material involvement of a federal candidate in a public communication endorsing another candidate, and distributed to the federal candidate's own voters within 120 days of a federal election, would result in a contribution to the federal candidate by the sponsor.

Advisory Opinion 2004-1 provided a way for an endorsing federal candidate to "buy in" to an advertisement, and thus to avoid receiving a contribution from an endorsed

federal candidate. However, the Commission expressly refused to extend this possibility to the endorsement of nonfederal candidates: "The Commission reiterates that the determination about attribution in this advisory opinion applies only to two Federal authorized committees spending entirely Federal funds." Advisory Opinion 2004-1 n.3. As a practical matter, this has barred federal candidates from endorsing state and local candidates in public communications distributed on the eve of an election to overlapping electorates.

The reasoning of neither Advisory Opinion 2004-1 nor Advisory Opinion 2003-25 was compelled by the plain language of the Bipartisan Campaign Reform Act of 2002. Rather, those opinions were anomalous results of the rules initially written by the Commission to implement BCRA.

Apart from any desire to promote federal candidates, state and local candidates have a keen interest in publicizing the fact that they have been endorsed by federal candidates. Candidates for state legislature often face the significant burden of introducing themselves to the voting public. The approbation of a familiar federal candidate, especially incumbent federal officeholders who are trusted and liked by their constituents, and who are often unlikely to face competitive races of their own, can go a long way toward surmounting this burden.

For years before BCRA's passage, Commission advisory opinions recognized this legitimate interest. They allowed federal candidates to be featured in communications endorsing state and local candidates, without receiving contributions as a result, so long as the circumstances did not reflect an intent to influence the federal candidates' own elections. *See, e.g.,* Advisory Opinion 1982-56, and opinions cited therein.

The Members of Congress who passed BCRA were well aware of this practice. There is no evidence that they intended to disturb it, except insofar as 2 U.S.C. § 441a(a)(7)(C) affects electioneering communications; and except insofar as 2 U.S.C. § 441i(f) prohibits state and local candidates from spending "soft money" to promote, support, attack or oppose federal candidates. As the Commission acknowledged in Advisory Opinion 2003-25, simply to note a federal candidate's endorsement of a state candidate is not to "promote" or "support" the federal candidate.

Thus, BCRA gives the Commission flexibility to keep its earlier approach and broadly permit federal candidates to endorse state and local candidates in public communications, absent evidence of intent to influence the federal candidates' own elections. We respectfully submit that an exemption toward this end would be

consistent with Congress' intent when it passed BCRA, and we strongly urge the Commission to consider it.

Again, we appreciate the opportunity to comment on these matters. I would respectfully request the opportunity to testify before the Commission on the DLCC's behalf at the public hearings to be held in connection with this rulemaking.

Very truly yours,

Brian G. Svoboda
Counsel to the DLCC