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cc "Michael Bayes - Legal" <MBayes@rnchq.org>, "Tom Josefiak - Legal" <tjosefiak@georgewbush.com>
bcc
Subject

Mr. Deutsch:

Attached please find comments on the Commission's Notice of Proposed Rulemaking on Coordinated Communications, submitted on behalf of the Republican National Committee.

Sincerely,
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Comments - coordination.pdf

Republican National Committee

January 13, 2006

Mr. Brad C. Deutsch
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VIA ELECTRONIC MAIL: coordination@fec.gov

Dear Mr. Deutsch:

These comments on the Federal Election Commission's Notice of Proposed Rulemaking on Coordinated Communications, 70 Fed. Reg. 73,946 (Dec. 14, 2005), are submitted by the undersigned counsel on behalf of the Republican National Committee. We thank the Commission for the opportunity to comment in writing on these proposed rules, and request the opportunity to testify at the Commission's planned hearing.

We urge the Commission to take this opportunity to revise the fourth content prong so that it is more carefully tailored to the statutory requirement that the regulation reach only communications made for the purpose of influencing an election for Federal office. We propose modifying the fourth content prong by (i) adjusting its time frame to that which Congress previously indicated was the relevant electioneering period; and (ii) better defining the scope of the regulation by incorporating a PASO test. Additionally, we urge the Commission to provide explicit safe harbors for (i) endorsement messages that are not made for the purpose of influencing the endorser's election; and (ii) communications developed through the use of publicly available materials. We also recommend that the Commission not eliminate the requirement that a content standard be satisfied in those instances where the "request or suggestion" conduct standard is met.

I. THE FOURTH CONTENT STANDARD

In the Explanation and Justification of the current coordination rule, the Commission stated that "the satisfaction of all three prongs of the test set out in new 11 CFR 109.21 justifies the conclusion that payments for the coordinated communication are made for the

purpose of influencing a Federal election, and therefore constitute in-kind contributions."[1] We respectfully disagree that this conclusion is justified. The fourth content standard is overbroad and has the clear potential to extend to communications that are not made for the purpose of influencing a Federal election.

We agree with the Commission that "a content standard provides a clear and useful component of a coordination definition in that it helps ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election."[2] However, in our view the current content standard should be revised to better focus the various tests on the communication's actual purpose of influencing a federal election, and away from simple proximity to an election.

A. Time Frame

In the 2002 rulemaking on this subject, the Commission noted that its adopted "content standard is largely based on, but is somewhat broader than, Congress's definition of an electioneering communication."[3] The electioneering communication provisions apply 30 days prior to a primary election and 60 days prior to a general election.[4] However, for coordinated communications, the Commission adopted a 120-day time frame, which is derived from the period during which voter registration activity constitutes "federal election activity."[5] In our view, the Commission erred in not selecting a time frame for the current section 109.21(c)(4) that paralleled the electioneering communications time frame.

While fully cognizant of the tremendous time constraints the Commission faced in 2002 to complete the BCRA rulemakings, we agree with the Court of Appeals that the Commission's brief explanation of its choice of the 120-day time frame is less than compelling. First, the Commission asserted that 120 days was a reasonable time frame, stating that it "focuses the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times."[6] Beyond this broad and unsubstantiated assertion, there is no indication in the Explanation and Justification that 120 days prior to an election is a date of any particular significance other than that Congress utilized it for one aspect of the definition of "federal election activity." Next, the Commission noted that the "content standard is only one part of a three-part test . . ., whereas the definition of 'electioneering communication' is complete in itself."[7] This is relevant, the Commission

[1] Final Rule: Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 426 (Jan. 3, 2003).

[2] 68 Fed. Reg. at 426.

[3] 68 Fed. Reg. at 429.

[4] See 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29.

[5] See 2 U.S.C. § 434(20)(A)(i).

[6] See 68 Fed. Reg. at 430.

[7] See 68 Fed. Reg. at 430.

explained, because as but one part of a three-part test, the content standard serves as a threshold filter which cannot be too narrow because it would then be underinclusive.[8] The Explanation and Justification leaves the distinct impression that the Commission simply chose to err on the side of overinclusiveness in opting to treat the content standard as a broad, threshold filter. This approach, however, is no less contrary to the statute than one that is underinclusive.

BCRA's sponsors agreed that the 30/60-day time frame was an appropriate measure of the communicative period that is related to a campaign. In comments to the Commission, they wrote, "Title II of BCRA reflects congressional judgment that communications concerning federal elected officials during the 60 day period prior to a general election and the 30 day period prior to a primary is usually campaign related."[9]

The sponsors' position is supported by evidence presented during floor debate on BCRA. The chief proponents of what would become the electioneering communications provision, Senator Jeffords and Senator Snowe, cited studies showing that virtually all "sham issue ads" aired in the final two months prior to an election. As Senator Jeffords noted, "[s]tudies have shown that in the final two months of an election, 95 percent of television issue ads mentioned a candidate, 94 percent made a case for or against a candidate, and finally 84 percent of these ads had an attack component."[10]

Additionally, at the request of Senator Snowe, a study authored by Jonathan Krasno and Kenneth Goldstein titled *The Facts About Television Advertising and the McCain-Feingold Bill* was reprinted in the Congressional Record.[11] This study found that in 1998 and 2000 "the greatest deluge of issue ads began appearing after Labor Day."[12] The report also explained:

> Despite the overwhelming evidence that the vast majority of issue ads are a form of electioneering, there were commercials in each year that our coders took to be genuine discussion of policy matters (22 percent of issue ads in 1998, 16 percent in 2000). Would the definition of electioneering created by McCain-Feingold – any ad mentioning a federal candidate by name in his or her district within 30 days of the primary or 60 days of the general election – inadvertently capture many of these commercials? We addressed this question by comparing the issue ads that would have been classified as electioneering under McCain-Feingold to the coders' subjective assessment of the purpose of each ad. In 1998 just 7

[8] See 68 Fed. Reg. at 430.

[9] Comments of Senator McCain, Senator Feingold, Representative Shay, and Representative Meehan on Notice of Proposed Rulemaking on Coordinated and Independent Expenditures (Notice 2002-16), October 11, 2002, at p. 4.

[10] 147 Cong. Rec. S2812-01, 2813 (statement of Sen. Jeffords).

[11] See 147 Cong. Rec. S3070-01, S3074.

[12] Id. at S3075.

> percent of issue ads that we rated as presentations of policy matters appeared after Labor Day and mentioned a federal candidate; in that figure was lower still, 1 percent [sic]. In 2000 that number was less than one percent. Critics may argue that chance of inadvertently classifying 7 percent, or even 1 percent, of genuine issue ads as electioneering makes this bill overly broad. In contrast, these percentages strike us as fairly modest, evidence that McCain-Feingold is reasonably calibrated.[13]

These findings demonstrate that, at least with respect to a general election, the key election-related period occurs after Labor Day (*i.e.*, in the months of September and October). This is clearly the legislative rationale behind the 60-day figure.[14]

In the course of defending the 120-day window in Shays v. FEC, the Commission noted that "Congress itself was justified in drawing a temporal line at 30 and 60 days before the election to separate advertisements to be regulated because they are likely to have the purpose of influencing an election and advertisements not regulated because they more likely lack that purpose . . . ."[15] The Supreme Court agreed (as the Commission noted while litigating Shays v. FEC) that "[t]he record amply justifies Congress' line drawing."[16]

Adopting the 30/60-day time frame would allow the Commission to draw on the extensive, and court-approved, Congressional record justifying those periods as the key communicative periods leading up to elections. No such similar record exists to support use of the 120-day time frame, nor was the Commission successful in creating one in 2002.

B. PASO Standard

Adopting a shorter time frame during which the content standard is presumed satisfied, without any reference to content beyond the mere mention of a federal candidate, goes a long way toward creating a regulatory standard that is both easily applied and only reaches those communications that Congress intended. However, precisely because the current fourth content standard does not require any consideration of the actual content of the communication, it risks being an imprecise, mechanical test that can only approximate the range of communications that Congress intended to be covered.

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[13] Id. at S3075.

[14] See 147 Cong. Rec. at S3076 (statement of Sen. Snowe, commenting on the Krasno-Goldstein report) ("Mr. President, ninety-nine percent of the ads that were run in that 60-day period mention Federal candidates. They tested the Snowe-Jeffords language. Guess what? Ninety-nine percent were ads that mentioned a Federal candidate. Only one percent were genuine issue advocacy ads.").

[15] Defendant Federal Election Commission's Motion for Summary Judgment, Shays v. FEC, U.S. District Court for the District of Columbia, February 27, 2004, at p. 78.

[16] McConnell v. FEC, 540 U.S. 93, 208 (2003); Defendant Federal Election Commission's Motion for Summary Judgment, Shays v. FEC, U.S. District Court for the District of Columbia, February 27, 2004, at p. 78.

As noted above, coordinated communications are "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" or party committee, and an "expenditure" is "made . . . for the purpose of influencing any election for Federal office."[17] Under the current fourth content standard, a public communication that satisfies any conduct standard, and that refers to a clearly identified federal candidate, and is distributed within that candidate's voting jurisdiction within 120 days of a federal election, is a coordinated communication, *even if* it is not actually made for the purpose of influencing a federal election. Satisfaction of the key statutory requirement is simply presumed.

In defining an "expenditure" as "made for the purpose of influencing any election for Federal office," Congress made the content of a communication crucial to the question of whether or not that communication is regulated. Attempting to translate an inherently content-based standard into a series of bright-line tests that lack reference to the actual content of the communication (beyond the mere mention of a federal candidate) necessarily results in imprecise application and either under- or overbreadth. We believe that some consideration of the actual content of a communication is critical to the faithful and accurate implementation of the statute, and that the PASO standard provides a clear, easily understandable method for accomplishing this.

The Supreme Court has already upheld the PASO standard against a challenge of unconstitutional vagueness, stating that "[t]he words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential . . . speakers must act in order to avoid triggering the provision. These words 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"[18]

Incorporation of a PASO test would also solve the dilemma posed by "genuine" legislative advertisements and lobbying communications that appear shortly before an election. Communications that satisfy the three prongs of the fourth content standard would, under our proposal, lastly be subjected to a PASO test. If the communication's purpose is to influence a federal election, it will promote, attack, support, or oppose the candidate or party mentioned in the communication, and will be found to be a coordinated communication. However, if the communication does not promote, attack, support, or oppose the candidate or party, but rather has a genuine lobbying or legislative purpose, then the communication will be "saved" from an incorrect finding that it is a coordinated communication.

In comments to the Commission on the 2002 coordination rulemaking, BCRA's sponsors indicated that the Commission had been tasked by Congress to "make sure that the standard does not discourage legitimate non-campaign related interactions between groups

[17] See §§ 441a(a)(7)(B), 431(9)(A).

[18] McConnell v. FEC, 540 U.S. at 170 fn. 64 citing Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

and candidates or parties."[19] Previously, the Commission *itself* offered the following argument in its Motion for Summary Judgment in Shays v. FEC:

> The further in advance of an election a communication is distributed, the more likely it is to be intended to affect legislation or public views on issues important to the speaker rather than a still distant election, even if the communication is planned in cooperation with a member of Congress who shares the spender's interest in promoting the legislation or issue position. *The Act was not intended to put a stop to cooperation between members of Congress and private groups with respect to the enactment of legislation*.[20]

The Commission, however, rejected a safe harbor for "lobbying and other activities that are not reasonably related to elections" due to concern that such an exception "could be exploited to circumvent the requirements of 11 CFR part 109."[21] These concerns might be justified where "legislative communications" are simply exempted, as a result of difficulties in defining such a term. However, if the applicable test asked whether or not the communication promoted, attacked, supported, or opposed a federal candidate, these definitional difficulties could be avoided.

For example, a communication produced to rally support for a legislative proposal commonly known as the "Smith Bill," which does not PASO the re-election of Representative Smith, should not be deemed a coordinated communication (and thus an in-kind contribution) simply because Representative Smith is a federal candidate who has a bill named after him and that bill is being discussed shortly prior to an election. The hypothetical communication was *not* made to influence Representative Smith's election, but rather to advocate passage of legislation. A regulation that classifies this advertisement as a coordinated communication does not properly implement the statute.

Alternatively, suppose Senator Washington is viewed as "on the fence" with respect to a federal court nominee who will shortly face a vote in the Senate. If at the request of a political party or candidate, the Committee for Judicial Excellence pays for an advertisement urging Senator Washington to vote for or against the nominee, and again assuming the advertisement does not PASO the re-election of Senator Washington, why should that advertisement ever be considered a coordinated communication? Its purpose is to influence a Senate vote, not a federal election.

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[19] Comments of Senator McCain, Senator Feingold, Representative Shay, and Representative Meehan on Notice of Proposed Rulemaking on Coordinated and Independent Expenditures (Notice 2002-16), October 11, 2002, at p. 4. *See also* Final Rules: Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 441 (Jan. 3, 2003) (noting "the statements of BCRA's principal sponsors that the Commission's regulations should not interfere with lobbying activities").

[20] Defendant Federal Election Commission's Motion for Summary Judgment, Shays v. FEC, U.S. District Court for the District of Columbia, February 27, 2004, at p. 78-79 (emphasis added).

[21] See 68 Fed. Reg. at 441.

The very real possibility, indeed likelihood, that genuine legislative and lobbying communications are captured by the current fourth content standard does not square well with the Commission's previous statement that "these final rules are not intended to restrict communications or discussions regarding pending legislation or other issues of public policy."[22]

While considering any changes to the fourth content standard, we urge the Commission to keep in mind the Supreme Court's statement in McConnell that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."[23]

II. SAFE HARBOR FOR ENDORSEMENT MESSAGES

Irrespective of any action the Commission takes regarding the fourth content standard, we believe that an explicit safe harbor for communications featuring messages of a federal candidate's endorsement is warranted. This exclusion should include both endorsements of candidates, either Federal or non-Federal, and state ballot measures. The purpose of a Federal candidate's endorsement message is to aid the *endorsed* candidate or ballot measure, not to aid the *endorsing* candidate's own election. Where the endorsed candidate (or ballot measure proponent or opponent) pays for the communication, no in-kind contribution should result to the endorsing candidate.

A. Endorsements of Candidates

The Commission recently issued two Advisory Opinions considering the question of Federal candidate endorsements. We believe that the application of the fourth content standard in those Advisory Opinions yielded unsatisfactory results, and believe that an endorsement exclusion would serve as a better approach that is more consistent with the statute.

In Advisory Opinion 2003-25 (Weinzapfel Committee), the Commission concluded that the advertisement in question was not a coordinated communication only because it was made outside the fourth content standard's 120-day time frame. The implication was that the advertisement would have constituted a coordinated communication if it had been made within the 120-day time frame. In other words, the exact same advertisement literally becomes a coordinated communication overnight. And in fact, this is precisely the bizarre result seen in Advisory Opinion 2004-1 (Kerr Committee; Bush-Cheney Committee).

In Advisory Opinion 2004-1, the Commission determined that advertisements (paid for by Alice Forgy Kerr) featuring President Bush's endorsement of Alice Forgy Kerr in a

[22] 68 Fed. Reg. at 441.

[23] McConnell v. FEC, 540 U.S. 93, 206 fn88 (2003).

special election would constitute coordinated communications when made within 120 days of Kentucky's May 18 presidential primary (unless reimbursed). Thus, an advertisement aired one day would become a coordinated communication overnight, and would constitute an in-kind contribution to the Bush-Cheney campaign.

The advertisements in Advisory Opinion 2004-1 were not made for the purpose of influencing the Kentucky presidential primary and should never have been considered in-kind contributions to the Bush-Cheney campaign.[24] As the Advisory Opinion noted, the advertisements made no mention of President Bush's re-election or the upcoming presidential primary, and contained no materials developed by the Bush-Cheney campaign. Although the Commission did not have occasion to determine whether these advertisements promoted, attacked, supported, or opposed the endorsing federal candidate, we think it clear they did not. Furthermore, it seems even less likely that the advertisements were intended to influence the presidential primary election when one considers that President Bush had no primary opponent. The fact that application of the current fourth content standard yielded a finding that certain of these advertisements were coordinated communications (meaning they were made for the purpose of influencing the endorser's election), is evidence that the fourth content standard is demonstrably overbroad, and therefore flawed.

B. Endorsements of Ballot Initiatives

A communication featuring a federal candidate's endorsement of, or opposition to, a state ballot initiative should also be exempted from the coordinated communication rules, provided the communication does not promote, attack, support, or oppose the endorsing candidate's federal election. Such a communication is not made for the purpose of influencing the endorser's election, but, rather, to influence the outcome of the state ballot initiative. Like the examples above, no in-kind contribution should result here.

III. SAFE HARBOR FOR USE OF PUBLICLY AVAILABLE MATERIALS

We believe strongly that the Commission should make clear that the use of publicly available information does not satisfy any conduct standard.

Information that is material to effectively communicating an electoral message is readily available through newspapers, television and cable news, weekly newsmagazines and other outlets, and even on candidate's own websites. For example, one did not need to be a member of the inner circle of one of the presidential campaigns in 2004 to know which states were considered "battleground states." One did not need to be an insider to know

[24] The Commission seeks comment on its proposal to make clear that the fourth content standard's time frame requirement applies to the non-paying, clearly identified federal candidate. This was the approach taken in Advisory Opinion 2004-1, and then reiterated in the Concurring Opinion to Advisory Opinion 2005-18 (Reyes Committee, Inc.). We agree that this is the correct approach and support the inclusion of clarifying language in the regulations.

where those campaigns were making or canceling media buys, or moving staff. Such information, which indicated where candidates were and were not competitive, was freely available and every news-following member of the general public knew exactly where advertisements could have the most impact on the outcome of the race. Information learned from public sources is obviously not obtained from any collaboration with a candidate or party. Thus, the sort of conduct with which the statute is concerned is simply not present.

Politically astute and knowledgeable members of the general public should not be penalized for using publicly available information in the course of exercising their own First Amendment rights. The fact that the information in question was publicly available at the time it was conveyed or otherwise learned should be conclusive in finding that no conduct standard is met.

IV. CONDUCT STANDARD: "REQUEST OR SUGGEST"

For the reasons set forth above, the Commission should reject any request or suggestion that it eliminate the necessity of satisfying a content standard in those instances where the first conduct standard (section 109.21(d)(1)) is met.

The statute does not require *only* that a communication be made at the "request or suggestion" of a candidate or party committee. It also requires that there be an "expenditure," meaning that the communication must be made for the purpose of "influencing any election for Federal office." If the communication is not made for this purpose, the fact that it was made at the request or suggestion of a candidate or party committee is no matter – the statutory standard is not met. The regulatory test must address both aspects of the statute.

The Commission asks if a communication made at the request or suggestion of a candidate or party committee would "presumptively have value to the political entity" with which it was coordinated. The answer to this question is irrelevant. Even if the communication has "value" to the political entity with which it was coordinated, that is not the relevant, statutorily-mandated inquiry. Furthermore, this does not serve as an appropriate substitute inquiry because it does not answer (or even ask) the question of whether the collaborative communication constitutes an "expenditure."

V. PARTY COORDINATED COMMUNICATIONS

If the Commission determines not to extend any of our suggested changes to the regulations to all committees, we urge it to consider extending them to political party committees alone, based on the unique and vital role that political parties play in our electoral system.

As the Commission noted it its Notice of Proposed Rulemaking, the Supreme Court emphasized in McConnell that "BCRA leaves parties and candidates free to coordinate

campaign plans and activities, political messages, and fund raising goals with one another."[25] The Court also stated that "[n]othing on the face § 323(a) prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money."[26]

If BCRA itself recognizes this close relationship between parties and their candidates, why should they be subject to burdensome coordination rules that undermine, and in some instances even prevent, that close relationship? We urge the Commission to extend our proposals to section 109.37, at a minimum.

We once again thank the Commission for the opportunity to present our views on this matter.

Respectfully submitted,

___/s/_____

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[25] McConnell, 540 U.S. at 160 citing Brief for Intervenor-Defendants Sen. John McCain et al. in No. 02-1674 et al., at p. 22.

[26] McConnell, 540 U.S. at 160.