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Subject Comments of Democratic National Committee in response to NPRM: Coordinated Communications

Attached are comments on behalf of the Democratic National Committee in response to the Commission's Notice of Proposed Rulemaking: Coordinated Communications, 70 Fed. Reg. 73946 (Dec. 14, 2005). The attachment is a PDF file. If you have any trouble opening the attachment or need anything further, please let us know.

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FEC nprm Coordination Post Shays 2006 DNC Comment.pdf

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January 13, 2006

Via E-Mail

Brad C. Deutsch, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking—Coordinated Communications

Dear Mr. Deutsch:

These comments are submitted on behalf of our client, the Democratic National Committee ("DNC"), in response to the Commission's Notice of Proposed Rulemaking: Coordinated Communications, 70 *Fed. Reg*. 73946 (Dec. 14, 2005)("2005 NPRM").

The DNC's principal concern in this rulemaking is the clarification of the standard for determining when a political party committee's expenditure for a communication is deemed to be "coordinated" with the party's own federal candidate, such that the expenditure counts against the dollar limits imposed on coordinated party expenditures under the Federal Election Campaign Act of 1971, as amended (the "Act"). 2 U.S.C. §441a(d). In summary, the DNC believes that, for purposes of this determination, the Commission should adopt a "content" standard that is limited to public communications in reasonable proximity to an election that confer a specific benefit on the candidate with whom the party has coordinated, rather than on the party itself or on its other candidates.

Specifically, the DNC proposes that the "content" standard for party coordinated communications, in addition to including express advocacy communications and republication of campaign materials, should be limited to public communications that promote, support, attack or oppose a federal candidate within 120 days of a primary election or convention, or of a general election, in which that candidate appears on the ballot. In addition, the "content" standard should exclude fundraising appeals for the

party committee, through direct mail or telemarketing, which do not expressly advocate the election or defeat of a federal candidate.

The DNC does not believe the Commission should revisit the "conduct" standard for party communications. Nothing in the court decisions prompting this rulemaking requires any such reconsideration; no organization or interest has proposed such reconsideration; and the party committees are familiar with the current standards and find them workable and understandable.

The DNC takes no specific position in this rulemaking on the appropriate "content" standard for communications paid for by entities other than federal candidates and party committees. However, the DNC does not believe the Commission should revisit the "conduct" standard for such communications, for similar reasons: the party committees are familiar with the current standard and have found it workable; no court has questioned it; and no organization or interest has challenged it.

The undersigned request an opportunity to testify on behalf of the DNC at the hearings to be held by the Commission on this NPRM on January 25 and/or 26, 2006.

I. BACKGROUND

Under the Act, an expenditure made by an entity "in cooperation, consultation, or concert with, or at the request or suggestion of" a federal candidate or political party committee is an in-kind contribution to that candidate or party committee. 2 U.S.C. §§441a(a)(7)(B)(i) & (ii).

The issue of coordinated communications arises in two distinct albeit related contexts:

(1) Communications that are paid for by an outside, unregulated entity—a nonprofit organization, labor union, corporation, association, etc.—that are alleged to be coordinated with a federal candidate or party committee. Because the outside, unregulated entity's funds generally do not constitute permissible sources under the Act and/or the amount expended exceeds what can be contributed to a federal candidate or party committee, such a coordinated communication often results in an unlawful in-kind contribution to that federal candidate or party committee.

(2) Communications that are paid for by a federal party committee, with regulated, federal "hard" money, which are nevertheless limited in *amount* by the Act if they are deemed to be "coordinated" with a federal candidate. There are five such limits: (i) the regular limit on what any federal PAC (multicandidate committee) can contribute to a federal candidate, $5,000 per election, 2 U.S.C. §441a(a)(2); (ii) the special limit on what a national party committee can expend on behalf

of its nominee for President, §441a(d)(2)($16.25 million in 2004); (iii) the limits on what national and state party committees can spend on behalf of their candidates for U.S. Senate, §441a(d)(3)(A), which vary state by state; (iv) the limits on what national and state party committees can spend on behalf of their candidates for U.S. House, §441a(d)(3)(B); and (v) the special limit on what the national party committee and Senate Campaign Committee of the national party can contribute, in money or in-kind, to a Senate candidate, §441a(h)($37,300).

The Act and Commission regulations exempt certain categories of state party expenditures from these limits even if those expenditures are coordinated with a federal candidate. These categories include certain kinds of materials distributed by volunteers; volunteer-staffed phone banks in the presidential general election; and certain slate cards. 2 U.S.C. §§431(9)(B)(iv),(viii) & (ix); 11 C.F.R. §§ 100.140; 100.148; 100.149.

The question arises, then, outside of these exempt categories, when does a party expenditure count as a "coordinated expenditure" on behalf of its own federal candidate? The Commission is not writing on a blank slate in attempting to answer this question . The history of the Commission's efforts to address this question shows that there is a need for clear guidance; and that both the Commission and the Supreme Court have always contemplated that there would be a "content" standard appropriate to the particular situation of party committees, for determining when a communication counts as a "coordinated expenditure."

A. Pre-Colorado Rule and Impact of Colorado I

Prior to 1996, there was no "conduct" standard. Under the Commission's regulations then in effect, all party expenditures were considered to be automatically coordinated with their candidates in that parties were presumed to be incapable of making independent expenditures. 11 C.F.R. §110.7(b)(4)(1995). At that time, the "content" standard recognized by the Commission, in its rulings, was that a party communication was deemed "coordinated" with a candidate if it "clearly identified" that candidate and contained an "electioneering message." FEC Advisory Opinions 1984-15, 1985-14.

The question of the appropriate content standard was raised before the U.S. Supreme Court in the case of *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996)("*Colorado I*"). There, the district court found that the content standard should be limited to communications expressly advocating the election or defeat of an identified candidate. The Court of Appeals had disagreed, ruling that the FEC's broader "electioneering" standard was constitutional. The Supreme Court adopted neither position, finding instead that the expenditure in question had been made independently and ruling that the FEC's presumption that parties could not make independent expenditures was unconstitutional: "A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join

those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is 'core' First Amendment activity…." 518 U.S. at 615-16.

The Court in *Colorado I* did not need to reach, and did not address, the issue of the constitutionality of the party coordinated expenditure limits. The Court noted that "party coordinated expenditures do share some of the constitutionally relevant features of independent expenditures. But many such expenditures are also virtually indistinguishable from simple contributions….." *Id*. at 624.

B. Post *Colorado I* Rulemaking & *Colorado II*

Subsequent to *Colorado I*, the Commission first repealed the rule that prohibited party committees from making independent expenditures, 61 *Fed. Reg*. 40961 (Aug. 7, 1996). The Commission then initiated a rulemaking to revise the Commission's regulation governing party committee coordinated expenditures. 62 *Fed. Reg*. 24367 (May 5, 1997). That rulemaking was held in abeyance, however, while the issue of the constitutionality of the party coordinated expenditure limits made its way through the lower courts.

In 1998, the Commission initiated another rulemaking addressing, among other things, issues relating to coordination between party committees and their Presidential candidates, 63 *Fed. Reg*. 69524 (Dec. 16, 1998). Apart from adopting one minor change clarifying that the limits apply to pre-nomination expenditures for such candidates, 64 *Fed. Reg*. 42579 (Aug. 5, 1999), the Commission never finalized any of those proposals.

Then, in the case of *Federal Election Comm'n v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999), the court ruled that "coordination" between an outside, unregulated entity (such a corporation, union, nonprofit organization) could not be found in the absence of "substantial discussion or negotiation between the campaign and the spender" about the key elements of the communication. 52 F. Supp.2d at 92. The Commission did not appeal the decision, and proceeded to adopt new regulations adopting the *Christian Coalition* "conduct" standard. Final Rule, 65 *Fed. Reg*. 76138 (Dec. 6, 2000). These new regulations addressed only coordination between candidates and outside groups, *not* between party committees and their own candidates. The Commission also indicated it was deferring adopting any "content" standard pending resolution of the issue of the constitutionality of party coordinated expenditure limits.

The issue of the constitutionality of the party coordinated expenditure limits was then decided by the Supreme Court in *Federal Election Comm'n v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001)("*Colorado II*"). The Court ruled that the party coordinated expenditure limits were limits on contributions, not expenditures; that under the *Buckle*y analysis such party spending should therefore be subjected to a lower level of constitutional scrutiny; and that no different analysis was required merely because the donor was a party rather than an individual or other kind of committee. The

Court held that the party coordinated expenditure limits were justified by the government's interest in avoiding circumvention of the limits on contributions by individuals and PACs to specific federal candidates: "There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate….Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." 533 U.S. at 464.

The Court in *Colorado II* was careful to note, however, that it was not, in that facial challenge to the party coordinated expenditure limits, ruling out a future as-applied constitutional challenge to party coordinated expenditure limits. The Court seemed to imply that such a challenge might be successful if application of the limits were not appropriately confined by a "content" standard that adequately takes into account the special features of party spending:

> Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that…we need not reach in this facial challenge. The Party appears to argue that even if the Party Expenditure Provision is justified with regard to coordinated expenditures that amount to no more than payment of the candidate's bills, the limitation is facially invalid because of its potential application to expenditures that involve more of the party's own speech….But the Party does not tell us what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial overbreadth claim.

533 U.S. at 456 n.17.

C. Impact of BCRA and Post-BCRA Rulemaking

In the Bipartisan Campaign Act of 2002, P.L. 107-155 ("BCRA"), section 214, Congress directed the Commission to repeal its then-current regulations on coordinated communications by entities *other* than candidates and parties, and to adopt new regulations. Those new regulations, 11 C.F.R. §109.21, were adopted in December 2002. *Final Rules and Explanation and Justification on Coordinated and Independent Expenditures,* 68 *Fed. Reg*. 421 (Jan 3, 2003) ("2002 Coordination Final Rule").

BCRA also included a new provision restricting the ability of party committees to make independent expenditures if they also made coordinated expenditures in the same election cycle, and vice-versa. BCRA, §213, adding new 2 U.S.C. §441a(d)(4).

In the 2002 Coordination Final Rule, the Commission recognized that "Congress did not specifically direct the Commission to address coordinated communications paid for by political party committees," but stated that the Commission wished to do so anyway "to give clear guidance to those affected by BCRA. Congress determined to regulate political party committees' independent expenditures and coordinated expenditures, and thus it is appropriate and useful for the Commission to promulgate

rules at this time detailing standards for party coordinated communications." 68 *Fed. Reg*. at 448. That "regulat[ion of] political party committees' independent and coordinated expenditures" by BCRA, however, referred to in the 2002 Coordination Final Rule, was struck down by the Supreme Court in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 213-20 (2003).

The 2002 Coordination Final Rule applied essentially the same "content" and "conduct" standards in determining whether a party communication is a "coordinated communication" for a candidate as the standards used in determining when a communication by an outside entity has been "coordinated" with a candidate or party committee. 11 C.F.R. §109.37.

The current rulemaking was prompted by the challenge brought to the 2002 Coordination Final Rule in the case of *Shays v. Federal Election Comm'n*, 337 F. Supp. 28 (D.D.C. 2004)("*Shays District*"), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005)("*Shays Appeal*"). The plaintiffs in that litigation challenged one element of the "content" standard for defining "coordinated communications" paid for by outside groups, namely, the 120-day prong, 11 C.F.R. §109.21(c)(4). The *Shays* plaintiffs did not, however, challenge *any* element of the regulation defining party coordinated communications, 11 C.F.R. §109.37. Indeed, neither the district court nor the Court of Appeals had occasion to address the latter regulation.

II. THE DEFINITION OF "PARTY COORDINATED COMMUNICATION" SHOULD INCLUDE A CONTENT STANDARD FOCUSED ON SPECIFIC BENEFIT TO A CANDIDATE WITHIN REASONABLE PROXIMITY TO AN ELECTION

In the NPRM, the Commission asks whether, if the Commission decides to revise the current regulation governing communications by outside groups, "it should make conforming changes to the party coordinated communication regulations in 11 C.F.R. §109.37." 70 *Fed. Reg*. at 73956. The answer is, not necessarily. The DNC suggests that, rather than blindly "conforming" the party coordinated communication definition to whatever definition is adopted relating to non-party entities, the Commission should adopt a carefully considered definition for party coordinated communications that takes into account the special circumstances of the relationship of party committees to their own federal candidates.

A. The Commission Should Address Party Coordinated Communications

As noted above, nothing in BCRA required the Commission to adopt new rules addressing party coordinated communications in the first place. Section 214(b) of BCRA directed the repeal only of "the regulations on coordinated communications paid for by persons *other than* candidates, authorized committees of candidates and *political party committees*" (emphasis added). Nevertheless, the Commission made the right decision in 2002 in adopting regulations to provide clear guidance to party committees on

what expenditures for communications would count as "coordinated communications." The Commission should continue to provide such guidance, so that party committees will be able to understand what payments for communications must be counted against the dollar limits imposed under 2 U.S.C. §441a(d).

B. The Commission Should Not Revise the "Conduct" Standard for Party Coordinated Communications

In the NPRM, the Commission quotes language from *McConnell* suggesting that nothing in BCRA prohibits party committees from working together with their candidates. The NPRM also quotes language from the Brief for Intervenor-Defendants Sen. John McCain *et al*, in *McConnell*, stating that, "BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages and fund raising goals with one another." 70 *Fed. Reg.* at 73957, *quoting* Brief for Intervenor-Defendants at 22. The NPRM then raises the question of whether "the relationship between national party candidates and their parties justify adopting more permissive conduct standards for 'party coordinated communications' in 11 C.F.R. 109.37 than for coordinated communications in 11 C.F.R. 109.21?" *Id.*

The answer is that the relationship between parties and their candidates should indeed be taken into account, but not in establishing the "conduct" standard. In *Colorado II*, the Court made clear that to the extent that a party expenditure is simply the functional equivalent of a monetary contribution to the candidate—*i.e.*, paying the candidate's bills—there is no difference between a party committee and other donors to the candidate, in terms of constitutional analysis. It makes sense, then, that the conduct standard should be the *same* for party committees as for other types of entities.

The current definition of party coordinated communications, 11 C.F.R. §109.37(a)(3), adopts the conduct standard of 11 C.F.R. §109.21(d), *i.e.*, the same conduct standard as that applicable to the definition of coordinated communications for outside groups. That should continue to be the standard.

There is no reason whatsoever for the Commission to modify the "conduct" standard either in section 109.21 or section 109.37. As the Court noted in *Shays Appeal*, the "content" standard was "the only component at issue here." 414 F.3d at 98. No one has ever challenged the "conduct" standard of the Commission's current rules. The party committees lived with the "conduct" standard in the 2004 election cycle and generally understand what it means (as it has been further interpreted by the Commission in its Advisory Opinions) and what conduct must be avoided, in the relationship of parties with outside groups as well as their own candidates, in order to prevent impermissible coordination. The Commission should simply leave this standard alone.

C. The Definition of Party Coordinated Communication Should Include a Content Standard

The definition of "party coordinated communication" should include a content standard. First, the Commission has long recognized that not every party expenditure for a communication or activity that is coordinated with a candidate should count against the coordinated expenditure limits. Even when the Commission's rules deemed parties as being incapable of making independent expenditures—*i.e.*, created a presumption that all party expenditures were coordinated with candidates—party expenditures were never considered "coordinated" unless they met a *content* standard: the communication had to reference a clearly identified candidate and contain an "electioneering" message.

Second, the legislative history of BCRA indicates clearly that not every party expenditure coordinated with candidates is to be treated as a coordinated expenditure. S. 27 as originally passed by the Senate, and H.R. 2356, the Shays-Meehan bill introduced in the House on June 28, 2001, included a provision that would have added to the Act's definition of "contribution", "any coordinated expenditure or other disbursement made by any person…regardless of whether the expenditure or disbursement is for a communication that contains express advocacy." H.R. 2356 section 214(a)(1)(June 28, 2001). The DNC and others then pointed out to certain of the sponsors the fact that this provision would treat as a party coordinated expenditure even an expenditure for a generic voter registration or GOTV drive paid for 100% with federal (hard) money—expenses of a type which had never before been treated as coordinated expenditures. This provision was then *removed* from the bill as passed by the House in February 2002.

For these reasons, the definition of party coordinated communication should include an appropriate content standard.

D. The Content Standard Should Be Limited to Communications Made in Reasonable Proximity to an Election

The content standard clearly should include express advocacy communications and republication of campaign materials. The question is what other communications, referencing federal candidates, should be included.

As the Court noted in *Colorado I*, "party coordinated expenditures do share some of the constitutionally relevant features of independent expenditures." *Colorado I*, 518 U.S. at 624. Even in *Colorado II*, the Court acknowledged that it might be constitutionally impermissible to limit party expenditures that "involve more of the party's own speech" as distinct from party expenditures functionally indistinguishable from contributions. *Colorado II*, 533 U.S. at 456 n.17.

In determining on what side of the line a party communication should fall, the Commission should be mindful of the governmental interest recognized, in *Colorado II*, as justifying the imposition of limits on party coordinated expenditures in the first place: avoiding the circumvention of limits on contributions to specific candidates. Therefore, the further removed a party expenditure is from affecting a particular candidate's election, and from conferring specific benefit on that candidate, the less justification there is for limiting the party's expenditure.

Shays Appeal held that the Commission *can* permissibly establish a content standard in defining coordinated communications between candidates and outside groups, and *can* limit that definition to communications occurring within a certain period of time before an election. 414 F.3d at 99-100. The Court found, however, that "the Commission offered no persuasive justification for" the 120-day time frame in section 109.21 of the 2002 Coordination Final Rule.

The Commission has a freer hand, of course, in defining the content standard for party coordinated communications than it does in defining that standard for communications coordinated between candidates/parties and outside groups. The Commission was not obligated by BCRA to promulgate any new definition in the first place. And having promulgated section 109.37 in 2002, the Commission is not obligated by the *Shays District* or *Shays Appeal* decisions to amend that definition at all.

Further, the entire concern of the coordination rules, and of BCRA's sponsors in challenging the Commission's current version of those rules, is with the ability of outside groups to spend unregulated funds—soft money—in coordination with candidates and parties. By contrast, any communication at all by a national party committee, and any public communication by a state party committee promoting, supporting, attacking or opposing a federal candidate, at any time, must be paid for 100% with "hard" money, *i.e.*, funds subject to the limits and prohibitions of the Act. 2 U.S.C. §§431(20)(A)(iii); 441i(a) & (b). Thus, the central concern of the outside group coordination regulations is not even implicated in defining party coordinated communications.

In these circumstances, we would submit that 120 days is a reasonable time frame for distinguishing public communications the funding of which could serve to circumvent contribution limits from public communications that are less likely to pose that threat. With respect to the presidential election, the 120 day time-frame precludes party advertising based on the "content" standard for most of the presidential election year, in most states, even if a presumptive nominee emerges relatively early in the year. Further, in 2004, the DNC in fact made no expenditures for public communications, otherwise meeting the "conduct" standard, referencing the presidential candidates, Senator Kerry and President Bush, outside the 120-day window.

Finally, BCRA defines voter registration activity as "federal election activity" only if it takes place within 120 days of an election. 2 U.S.C. §431(20)(A)(ii). That is the one definite time frame provided in BCRA for distinguishing *party* activity deemed to affect specific federal elections, from activity sufficiently removed in time so as to be treated as a generic party activity affecting elections across the board. To be sure, the *Shays Appeal* court doubted the relevance of voter registration activity to determining the impact on elections of public communications by outside groups. 414 F.3d at 100. The Court did not, however, have occasion to address the relevance of this definition to party communications and activity.

For these reasons, we submit that the content standard for party communications should, in addition to express advocacy communications and republication of campaign materials, be limited to public communications occurring 120 days before an election in which the candidate appears on the ballot.

E. The Content Standard Should Be Limited to Communications That Specifically Benefit the Candidate

As explained above, the less a party communication benefits a specific candidate, the less likely it becomes that a donor will use a contribution to the party to circumvent contribution limits. In addition, communications benefiting the party itself, or a whole group of its candidates, clearly represent more of the "party's own speech" than a simply functional contribution to a specific candidate.

For this reason, we urge the Commission to limit the content standard to communications that specifically benefit the candidate mentioned. That limit should take two forms. First, the provision that requires mere reference to a federal candidate, section 109.37(a)(2)(iii)(A), should be replaced with the requirement that the communication "promote, attack, support or oppose" a federal candidate. "PASO" is the general standard for party public communications under BCRA that are deemed to constitute federal election activity. 2 U.S.C. §431(20)(A)(iii); *see also NPRM*, 70 *Fed. Reg*. at 73951 n.13 (explaining general use of PASO standard in BCRA).

Second, the content standard should specifically exempt communications that are clearly made primarily for the benefit of the party *itself*, even if they "PASO" a federal candidate. In particular, a party's own fundraising mailings and telemarketing to raise funds for that party committee should be exempted from the content standard, even if they reference, are signed by, or even PASO a federal candidate.

The national and state parties have for many years sent fundraising solicitations signed by and/or referencing their federal candidates and officeholders. BCRA specifically permits federal candidates and officeholders to solicit federally-permissible funds for party committees, 2 U.S.C. §44i(e)(1), thereby recognizing that it is appropriate and necessary for federal candidates and officeholders to support and be associated with these efforts. Unless the "content" standard addresses these situations, the "conduct" standard will subject the costs of party fundraising communications referencing federal candidates to the coordinated expenditure limits, because these communications must necessarily be approved by the officeholders and candidates who sign them or are discussed in them. Such a result would impose on party fundraising efforts limitations that are far removed from the intent of the coordinated expenditure provisions.

Exempting party fundraising from the content standard would not open any avenue for potential abuse if the exemption were limited to mail and telemarketing, and were not extended to other forms of public advertising such as television, radio and

newspaper advertising. (Internet solicitations by the party itself, through its own web site and permission e-mail, are already exempt because they are not public communications and would not be so treated even under the Commission's proposed amended rule on Internet communications, 70 *Fed. Reg*. 16867, 16977 (April 4, 2005)).

CONCLUSION

For the reasons set forth above, the Commission should:

(1) Address party coordinated communications in this rulemaking;
(2) Not modify the conduct standard in its current rules;
(3) Adopt an appropriate content standard for party coordinated communications;
(4) Limit that standard to express advocacy communications, republication of campaign materials, and public communications that PASO a candidate within 120 days of an election in which that candidate appears on the ballot;
(5) Exempt party fundraising mailings and telemarketing.

The DNC appreciates the Commission's consideration of these comments and looks forward to participating in the Commission's hearing in this rulemaking.

Sincerely yours,

/s/

Joseph E. Sandler
Neil P. Reiff

Attorneys for the Democratic National Committee