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Subject NRA Comments on Notice of Proposed Rulemaking 2005-28 ("NPRM"): Coordinated Public Communications

Attached 1-13-06 Letter to B. Deutsch.pdf

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
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NRA

January 13, 2006

By Electronic Mail: coordination@fec.gov

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

Re: Comments on Notice of Proposed Rulemaking 2005-28 ("NPRM"): Coordinated Public Communications

Dear Mr. Deutsch:

These comments are submitted on behalf of the National Rifle Association ("NRA"), the nation's largest non-profit organization dedicated to the defense of the Second Amendment. With millions of members nationwide, NRA defends the Second Amendment right to keep and bear arms.

NRA has a large, well-developed grassroots lobbying and communications division, the Institute for Legislative Action ("NRA-ILA") which is responsible for monitoring developments in public policy, legislation, administrative regulations, litigation, official actions and decisions by government officials and other actions that impact the legal exercise of Second Amendment rights. NRA-ILA is actively involved in such activities in and before the Congress of the United States, as well as state and local governments. NRA-ILA not only speaks for its dues-paying members, but also for the additional 65 million gun owners in the United States who may not meet the definition of "member" for purposes of the Federal Election Commission ("FEC") regulations.

It is absolutely vital that the FEC define "coordinated public communications" as narrowly as possible so as not to jeopardize NRA's First Amendment right to communicate with those whose constitutional rights are implicated by particular proposals or actions by the federal government. In order to protect NRA's rights of free speech and association and the freedom to petition the federal government guaranteed by the First Amendment, the regulations promulgated by the FEC must be narrowly tailored and must not infringe unconstitutionally on NRA's ability to communicate to the general public.

With that in mind, NRA responds as follows to the questions posed by the Commission in NPRM 2005-28:

1. NRA opposes Alternative 1. A presumption that all communications made within 120 days prior to an election are for an "electioneering" purpose is not supported by the empirical evidence. As Judge Henderson found, many communications even within a 60 day window are genuine issue advocacy. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 317 (D.D.C.) (finding that 34 percent of ads (measured by duration) within 60 days of 2000 election were genuine issue ads). Thus, the 120 day timeframe is far too expansive.

NRA and other citizen groups in America have a constitutionally protected right to communicate to fellow citizens about issues and actions pending before or being taken by Congress. Those communications necessarily involve interaction with members of Congress in their capacities as legislators. The fact that members of Congress also wear their federal candidate hats in even-numbered years does not create a cocoon that protects incumbent officeholders from public communications that praise or criticize their actions as legislators.

The 120-day time frame preceding an election as part of the definition of a "coordinated public communication" is excessively long and impermissibly infringes upon the NRA's rights to engage in vigorous public discussion about congressional action.

NRA opposes the re-adoption of the 120-day time frame in the definition of "coordinated public communications."

2. NRA proposes that the FEC adopt a time frame of no more than thirty (30) days before a general election for purposes of the definition of coordinated public communications and only for communications that do not reference specific legislative proposals. NRA submits that the FEC should proceed cautiously in establishing restrictions on the citizen groups' rights to engage in public communications about legislative actions and proposals. Two factors in tandem should be established: if a communication made within the thirty (30) days prior to an election does not reference a specific legislative issue, then the thirty (30) days plus the remaining content standard should be applied. An additional content standard should be included which specifically exempts communications made within any so-called "blackout" period for all communications which reference specific legislative proposals pending before Congress.

A time frame for coordinated public communications that presumes an election-related purpose while ignoring the legislative realities is constitutionally infirm. The FEC should adopt a time frame that does not exceed thirty days before any election and which incorporates a content standard that recognizes the protected right to petition the government on legislation, issues and policies.

3. NRA opposes the elimination of the time frame. It is wholly unacceptable for the FEC to apply the coordinated communication standards to all communications regardless of the timing of such communications. NRA vigorously opposes such an approach. NRA should not

be restricted in its ability to communicate with members of Congress on legislation and issues for fear of having its public communications on such matters subjected to government investigation. It is universally acknowledged that not every communication is for an election-related purpose just because it references a federal officeholder. The NRA references political candidates for many reasons that have nothing to do with influencing an election. Election-related communications should be defined as those just prior to an election which is, in fact, when such communications are made. Election-related communications to the general public made at a time distant from an election have no effect on the electorate, which is why political campaigns buy advertising time *backwards* from election day. The further from the election a communication is made, the less impact it has for election-related purposes. Indeed, even the sponsors of BCRA acknowledged as much by limiting the definition of electioneering communications to 60 days before a general election. If in doubt about this rule of thumb, the FEC should seek input specifically from campaign media consultants and buyers who will verify the factors governing timing of political advertising.

4. NRA supports the adoption of a safe harbor criteria that will protect its legislative and policy public communications. NRA believes it is important for the FEC to promulgate clearly defined standards that remove the vagueness from the definition of "coordinated public communications" and, in particular, the NRA supports the adoption of safe harbor criteria. Any communication that references specific legislative proposals should be *presumed* to be for legislative advocacy purposes, regardless of when such communications occur. A federal officeholder wears two hats in the public policy arena: legislator *and* candidate. It is inappropriate to presume that the candidate role *always* trumps the legislative role. NRA should be free to communicate about legislators in their legislative roles regarding legislation, whenever such communications are necessary to invoke NRA's constitutionally protected rights to petition the government. NRA was instrumental for more than five years in pushing Congress to enact a federal law protecting gun manufacturers from lawsuit liability. NRA had some influence but no final say in when such legislation was brought to the House or Senate floor for consideration and passage. A mindless rule that ignores the legislative purpose of certain communications completely distorts and subverts the ability of citizens to engage in the important issue decisions Congress makes in the days and weeks preceding an election. Some safe harbor criteria is vital in order to recognize and protect the important constitutional rights of the people to be called upon to weigh in with their congressmen about legislative issues.

5. NRA opposes the elimination of the time frame for political committees. NRA's separate segregated fund, the NRA Political Victory Fund ("NRA PVF") has been forced by BCRA to pay for any communication that references a clearly identified candidate in the 60-day period preceding a federal election, regardless of whether the communication has an actual election-related purpose. To extend that requirement to *all* communications that reference or depict a federal candidate or officeholder, regardless of when they occur, is wholly unwarranted and constitutionally suspect. For the exact same reasons as indicated above, NRA vigorously

opposes the elimination of a specific time period for the application of the coordinated communications scrutiny. Otherwise, all communications by NRA PVF, regardless of when they are made, will be presumed to be for an election-related purpose. Such a presumption is not based on any empirical data or facts and should not be adopted. Indeed, the record in *McConnell v. FEC* demonstrates that the relevant data do not support such an approach.

6. NRA opposes Alternative # 6 because it opens the door to non-stop investigations. NRA strongly advocates that the Commission establish clear, discernible standards and bright lines for the application of the "coordinated communications" regulations. NRA opposes any result that would invite the filing of non-stop FEC complaints that clog the FEC's enforcement capabilities and require the expenditure of countless resources by citizens organizations such as the NRA. **If the FEC can't agree on clear standards, how is the regulated community supposed to know what is and is not permissible**?

7. NRA strongly opposes Alternative #7 because of NRA's extensive relationships and ongoing communications with members of Congress. The proposal that all public communications if made after consultation with members of Congress are automatically "coordinated" for election-related purposes is far too sweeping and overbroad in violation of the First Amendment. Members of Congress serve on the Board of Directors of the NRA and such has been true for many years. If an NRA board member makes a plea at an NRA Board meeting for public advocacy of a particular issue and NRA subsequently makes public communications on that issue, this alternative would deem such communications to be "election-related" and subject to FECA restrictions and prohibitions.

And taking these various alternatives to their worst-case conclusions, if the Commission were to adopt this standard, the scenario above would mean that NRA-PVF would be required to pay for any such public advocacy. If the Commission were also to adopt alternative 5 which presumes *all* communications paid for by a political committee, regardless of when made, are for an election-related purpose and should be treated as in-kind contributions, NRA's speech would be dramatically curtailed. While there are those who would applaud any law or regulation that silences NRA, the Federal Election Commission should be mindful and wary of such a potential result regarding *any* citizens' organization.

With respect to other questions raised by the FEC in the NPRM, NRA reiterates its concern about the conduct standard and urges the Commission to more narrowly define the standard to apply *only* to election-related requests. As indicated above, NRA works closely with members of Congress on issues of concern to its members and to gun owners throughout the world. Members of Congress serve on NRA's Board of Directors and on its legislative committee and are involved in the decision-making process that determines NRA's advocacy programs. Those connections and relationships should not give rise to any presumptions regarding an election-related purpose to subsequent communications by NRA. Likewise, NRA

may share vendors with candidates and officeholders for a variety of NRA activities and communications, but the commonality of vendors, absent more, should not be a factor which converts a legitimate advocacy program into candidate campaign activity.

Yesterday, at the Senate Judiciary Committee hearings on the confirmation of Judge Samuel Alito to the US Supreme Court, the issue arose regarding a court decision by Judge Alito in a case involving the constitutionality of a federal law banning certain types of weapons. The NRA should be able to communicate with members of Congress about that issue and then to engage in public communications that reference a member of the Senate and his/her potential vote on the confirmation of Judge Alito. Period. And such public communications should not subject the NRA to a federal investigation nor should they be deemed to have an election-related purpose simply by virtue of *when* they occur or because NRA has been in contact with members of Congress on the subject prior to making the communications. NRA will strongly resist any efforts to relegate it to an observer role with regard to congressional and legislative actions.

In conclusion, NRA cannot urge the Commission strongly enough to be cognizant of the constitutionally protected rights of NRA and others to engage in grassroots lobbying and communications with and about members of Congress. NRA's speech relating to legislative issues are vitally important to the NRA's defense of the Second Amendment and cannot be curtailed on the false assumption that such speech is intended to influence an election if it references a federal candidate. The Commission must reject any approach that is overbroad.

Please contact me if you have further questions.

Respectfully,

David Lehman
Deputy Executive Director of NRA-ILA
and General Counsel
National Rifle Association