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01/13/2006 02:12 PM

To <coordination@fec.gov>
cc
bcc
Subject NRCC Comments on Coordinated Communications

Dear Mr. Deutch:

I have attached comments re: Coordinated Communications from Don McGahn, General Counsel at the National Republican Congressional Committee. The formal mailing address for the National Republican Congressional Committee is:

Donald F. McGahn II

National Republican Congressional Committee

General Counsel

320 First Street, S.E.

Washington, D.C. 20003

Please do not hesitate to call me with any questions or concerns at (202) 646-6405.

Best regards,

Jim Tyrrell

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National Republican Congressional Committee

Donald F. McGahn II
General Counsel

January 13, 2006

Brad C. Deutsch, Esquire
Assistant General Counsel
Federal Election Commission
Washington, DC 20463

via email: coordination@fec.gov

Re: Comments on proposed coordination rules

Dear Mr. Deutsch:

The National Republican Congressional Committee, by and through the undersigned counsel, hereby submits these comments regarding the Commission's proposed revisions to its regulations regarding communications that have been coordinated with Federal candidates and political party committees. We respectfully request that we be permitted to testify at any hearing the Commission has in conjunction with this rulemaking. The National Republican Congressional Committee is located at 320 First Street, SE, Washington, DC 20003.

We urge the Commission to remain cognizant of the primary reason for this rulemaking: the Court of Appeals in Shays v. FEC took issue with the explanation and justification for the current rules, and not the rule itself. Thus, the Commission is under no obligation to radically rewrite the rule, broaden its reach or otherwise bow to editorial critique. On the other hand, because its rules have been in effect for an election cycle, the Commission is no longer operating in the hypothetical. Instead, the Commission can use this opportunity to evaluate the practical application of its rules (and relevant advisory opinions), and clarify certain issues that have proven to be confusing.

The National Republican Congressional Committee has particular interest in these comments, as evidenced by its spending last election cycle. Virtually all of its campaign spending on public communications was done in the form of independent expenditures.

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Thus the Commission's rules on coordination impact the Committee's operations. The NRCC is dedicated to electing Republicans to the House of Representatives, and is composed of and governed by Republican Members of the House. As such, we erected various burdensome firewalls, effectively walling off decisions on virtually all of the Committee's spending from those who are elected and appointed to run the Committee. Such safeguards exponentially increased the proverbial cost of doing business – in many instances, we had redundant staff and infrastructure, so as to avoid any perceived link from information provided by a campaign, and information obtained by the Committee on its own. As a practical matter, there are no secrets in politics—any sort of "insider information" we could obtain from a campaign (media buys, messaging, etc.) was easily obtained through public means. Nonetheless, due to the Commission's past fondness for fact-intensive, costly and intrusive investigations, the NRCC operated defensively, incurring significant cost simply to avoid after-the-fact investigative entanglements.

Although we think it is obvious, this fact tends to get lost in much of the media hype surrounding BCRA and the Commission's implementation of it: the NRCC is one of the few entities that raises and spends only so-called hard dollars. Likewise, its fundraising and spending is fully disclosed. Thus, unlike many of the outside groups, and even the state and local political parties, the national party committees are unique in the post-BCRA political world. After all, the sponsors of BCRA – at least according to their public statements – were excised about soft money "sham issues ads." Today, this debate has migrated to so-called 527 committees, commonly characterized as shadowy soft money groups. Concerns surrounding such groups and coordination of soft money advertising simply do not exist with respect to the national political parties.

Moreover, the Commission's interpretation of its regulations with respect to candidate-to-candidate coordination has proven unworkable for the Republican Members of Congress. The practical result of Advisory Opinion 2004-01 and other Commission opinions on the subject has been to effectively prevent federal candidates from endorsing other federal and non-federal candidates. This is completely contradictory to the actual statutory language of BCRA, which explicitly allows for such endorsements. But the Commission's coordination rules have swallowed the statute, and left it without meaning.

1. Content Prong: 30/60 day time period

We agree with the Court Appeals when it said it could "hardly fault the [Commission's] effort to develop an objective, bright-line test [that] does not unduly compromise the Act's purpose." Thus, we urge the Commission to maintain a bright-line test in the area of coordination.

That being said, the real question is what the bright-line test ought to be. A more justifiable rule, and one more consistent with the language of the Act, is to focus on the time period that Congress itself has deemed the critical period with respect to public communications: thirty days before the primary election and sixty days before the general election.

In addition to the actual language of the statute, BCRA's sponsors agreed that the 30/60-day timeframe was the appropriate timeframe when deciding whether or not a public communication related to a federal election (or, to use the statutory language, made for the purpose of influencing a federal election). In past comments to the Commission, they stated: "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." Comments of Senator McCain, Senator Feingold, Representative Shays, and Representative Meehan on Notice of Proposed Rulemaking on Coordinated and Independent Expenditures (Notice 2002-16), October 11, 2002, at p. 4.

The position of Senator McCain and the other sponsors is consistent with evidence presented during floor debate on BCRA. The chief advocates of what would become the electioneering communications provision, Senator Jeffords and Senator Snowe, cited studies showing that virtually all so-called "sham issue ads" aired in the final two months prior to the general 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." 147 Cong. Rec. S2812-01, 2813 (statement of Sen. Jeffords).

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. *See* 147 Cong. Rec. S3070-01, S3074. This study found that in 1998 and 2000 "the greatest deluge of issue ads began appearing after Labor Day." *Id.* at S3075. 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 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.

Id. at S3075.

These findings demonstrate that, consistent with the statutory 60 day pre-general election window, 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. *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.").

The Commission's own statements in court also justify the use of a 30/60 day time period. 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 . . . ." 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.

Finally, the Supreme Court agreed (as the Commission noted while litigating Shays v. FEC) that "[t]he record amply justifies Congress' line drawing." McConnell v. FEC, 540 U.S. ---, --- (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.

In the event the Commission changes course and declines to use the statutorily significant 30/60 timeframe, we oppose any effort to expand the 120 rule to something more, or impose some sort of tiered content standard, single out political committees, or any of the other burdensome proposed alternatives. Such an expansive approach would be particularly burdensome to the NRCC, as it could effectively cut us off from those elected and appointed to run the Committee. The Act does not mandate such an expansive and intrusive approach. In light of the arbitrary nature and lack of tangible justification for the various alternative proposals, it is hard to imagine that such rules could withstand judicial scrutiny.

2. Other issues

Endorsement: As mentioned in our introduction, the Commission's application of its regulations to candidate-to-candidate coordination has proven unworkable, and has effectively prevented what BCRA itself says is permissible – endorsements. The Commission, so as to be consistent with the actual language of BCRA, ought to make clear that endorsements are permissible. Specifically, so long as the public communication does not promote or support the federal candidate's election or candidacy, or does not solicit funds for the federal candidate, it ought not to trigger the Commission coordination rules.

Republication of campaign materials: There is some confusion within the political community as to what constitutes republication of campaign materials. Obviously, if a third party simply copies a campaign's yard sign, or direct mail piece, or other similar material in full, that constitutes republication. But what if the third party group merely uses a picture of a candidate, or a small portion of a campaign piece? That, we believe, does not constitute republication. And what about film footage, particularly what is commonly called B-roll – the background shots of the candidate walking around, doing various things that candidates do? Prior to the 2004 election cycle, it was common to purchase such footage (generally from media vendors who owned the footage) at its fair market value, and use it in advertisements. But now, there appears to be a difference of opinion as to the parameters for its use – with some committees using it and others (including the NRCC) not using it. Use of such footage does not somehow allow the third party to republish the communicative message of the candidate, and it is not footage that a campaign would use in its own public advertising. We urge the Commission to make clear that the use of B-roll footage is permissible, and would not taint the independence of an expenditure in and of itself.

Common vendors: The Commission's current rule goes too far in that it includes media buyers as vendors that are problematic for coordination purposes. To be clear, we are not talking about media production companies that also place the media – they clearly have at least some say in the content. But instead, we are raising the issue of firms that simply place the media, and have no editorial control whatsoever. Ultimately, it is irrelevant if such firms place media for both a campaign and a party committee placing an independent expenditure beneficial to that candidate, as information regarding the media buys of the candidate are publicly disclosed by the various stations under FCC rules. We urge the Commission to make clear that absent some sort of editorial control, use of such vendors does not give rise to allegations of coordination.

Safe harbor for use of publicly available information: Similarly, we ask that the Commission create a safe harbor for the use of public available information in independent expenditures. As a practical matter, this would help eliminate some of the burdensome redundancy within the NRCC.

Polling: There appears to be a difference of opinion as to the use of polling results, thus we ask the Commission for clarification. Some party committees report polling in its independent expenditure reports, others do not, and others have done it both ways. If a party committee conducts a poll, and then shares that poll with a campaign (reporting its value in accordance with the applicable polling regulations), that ought not affect whether or not the party committee can use that poll to fashion an independent expenditure. It does not constitute something that could be seen as being a suggestion by the campaign, as ultimately it is the party committee's poll. At a minimum, those who work for the party committee, regardless of whether or not they have direct contact with campaigns, ought to be able to view all polls commissioned by the party committee, without fear of tainting the committee's independent expenditures.

Incidental communications: The Commission ought to make clear that incidental and other communications will not trigger the application of the Commission's coordination rules, at least with respect to the national party committees. For example, the NRCC conducts national fundraising, and in some instances, its Members sign fundraising solicitations. Under the current rule (120 days pre-primary), it has proven vexing to ensure that the content of such a letter does not inadvertently contain something that might trigger the content portion of the Commission's rule, particularly when a Member of Congress wishes to solicit within his or her own district on behalf of the party committee. There is no evidence of which we are aware, whether in the statutory language, floor debates, past MURs, or court cases, that indicates that fundraising materials ought to come under the reach of the coordination rules.

3. Conclusion

The NRCC urges the Commission to continue to adopt bright-line rules and explicit safe-harbors. Such an approach is necessary so that the regulated community has clear notice concerning which communications will be subject to the coordination regulations. Similarly, such regulations should be tailored to cover the time period when the overwhelming majority of election-related communications are distributed -- which Congress, the courts and even the Commission itself has already stated is 60 days before the general election -- while leaving other non-election related communications free from burdensome regulation.

The NRCC appreciates the opportunity to present these comments. Please do not hesitate to contact me with any questions.

Respectfully submitted,

Donald F. McGahn II