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Sent by: sherman.paul@gmail.com

06/11/2007 06:15 PM

To hybridads@fec.gov
cc
bcc
Subject Comments from Center for Competitive Politics

Ms. Rothstein,

Attached are comments from the Center for Competitive Politics concerning the Commission's "hybrid communications" NPRM. Please let me know if you have any trouble with the attachment.

Sincerely
Paul Sherman

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Center for Competitive Politics

June 08, 2007

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Hybrid Communications NPRM

Dear Ms. Rothstein:

These comments are filed on behalf of the Center for Competitive Politics in regard to the Commission's Notice of Proposed Rulemaking (NPRM) concerning "hybrid communications," issued on May 10, 2007.

The premise of the Commission's allocation provisions is that not all coordinated activity creates an in-kind contribution. If a committee pays its share for an activity, no one has given it anything. The Commission is tasked with enforcing the Act's limitations on in-kind contributions while respecting the speech and associational rights of candidates and party committees participating in the political process.

The way to accomplish both tasks is 1) to provide objective criteria for determining when a candidate or party committee participates in an advertisement, while keeping a political committee's selection of text and advertising content that indicate participation flexible, and 2) to allow participants in an ad to split costs in equal shares, or based on the relative time or space consumed in the shared communication.

Nothing in the two criteria listed above conflicts with the test articulated by the Commission decades ago: costs of a communication are to be allocated based upon "the benefit reasonably to be derived."[1] In regulations promulgated in 1977, the Commission required political committees active in both federal and non-federal elections to allocate their administrative expenses between separate federal and non-federal accounts.[2] Since 1978, the Commission has codified how such committees may allocate the costs of certain activities that affect both federal and non-federal elections.[3] In 1990, the Commission specified "explicit percentages" for each category of allocable expense by each type of communication covered by the rules.[4]

In each of these enactments the Commission issued objective criteria. Publications and communications were to be allocated according to the space or time devoted to each candidate as

[1] 11 CFR Part 106.
[2] Final Rules, Federal Election Commission: Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058 (June 26, 1990).
[3] *Id.*
[4] *Id.*

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compared to the total space or time devoted to all candidates. And the ballot-composition method provided for an allocation of costs for get-out-the-vote activity according to the ratio of federal offices on the ballot to total federal and non-federal offices on the ballot. The Commission did not second-guess whether having half of the page-space *actually* conferred half of the "benefit" in the eyes of the likely voter. Indeed, when the Commission has attempted to divine "true" benefit in the minds of the voting public the result has backfired, as the Commission recognized and corrected in the ballot-composition method it adopted in 1990, which replaced "the poorly defined 'weighting' concept [giving proportionately more allocation 'weight' to the federal portion of get-out-the-vote efforts] with an 'average ballot' approach" that allowed committees to calculate a ballot-composition ratio according to the ballot which an average voter would face in that committee's geographic area.[5]

In short, the Commission's phrase "benefit reasonably to be derived" has been interpreted as an objective test, promulgated by the Commission, to guide committees in splitting their activities without running afoul of the limits on in-kind contributions or subsidizing federal activities with non-federal funds. The "benefit reasonably to derived" formulation has not been and ought not become license for the Commission to look behind the words chosen by a party committee to divine whether that message, in the aggregate mind of millions of voters, "actually benefited," or more precisely, would prospectively benefit the party committee in question (since the party committee must allocate before the ad is issued).

In light of this past practice, CCP wishes to point up three problematic questions, and one troubling proposal, raised in the NPRM. Each question below evinces some interest of the Commission to look behind the message of the party committee or candidate, and attempt to quantify, quite unnecessarily, how much value the public, in the aggregate, will assign to any particular message. The questions are as follows:

- *"Is the value of a generic party reference in a hybrid communication diluted by the inclusion of more clearly identified candidates?"*

- *"Should the Commission conclude that a generic party reference benefits a political party committee in only certain prescribed circumstances?"*

- *"Are there data or other evidence that support a down-ticket benefit from ads that reference a clearly identified candidate and also contain a generic reference?"*

In asking such questions, the Commission goes from providing reasonable criteria to protect the Act's in-kind contribution limits to an apparent and unwarranted guarding against "sham electoral advocacy." But the Commission is not supposed to be determining if the political parties are winking at the FEC by complying with the law to the letter, and shouldn't be too awfully concerned if the Republicans or Democrats want to split the cost of hard-dollar ads four ways by saying: "President Smith, Senator Jones, Leader White, and America's greatest political party believe X."

[5] *Id.*

For the Commission to dictate the effectiveness of a party committee's chosen message by adjusting the paid percentage to determine "the benefit reasonably to be derived" is to substitute its judgment for that of the party committee. But it's worse than that, for the FEC is not a market competitor with the political party committees, nor even their advisor, but is their regulator. In substituting its judgment as to the relative value of various forms of generic references, the Commission not only creates a sclerotic policy, it must necessarily usurp the right of the party committee to choose its own generic references. This is not necessary for the Commission to adequately enforce its in-kind contribution limitations.

One Commissioner has argued that, "[i]f no other candidates receive a benefit, then the entirety of the communication has served to benefit the named candidate, and that candidate should be required to pay for the advertisement."[6] To the extent the Commissioner is saying that designations such as "leaders in Congress" or "liberals in Congress" are insufficient to hold a place for the party portion of the message, this argument may have merit, though CCP believes those designations are sufficient.[7] But if that is the concern, the Commission should consider what criteria are necessary to hold a place for the party committee.

In establishing these criteria, however, the Commission must remain mindful that the political party committees are autonomous entities, separate from their candidates, that care about who will be our next President and lead Congress. As autonomous entities, the party committees have a right to propagate their messages in ways the Commission might find ineffective, wasteful, crass, or even foolish. The Commission's job is to determine by objective criteria whether the RNC (or DNC) has used identifiable language sufficient to hold a place in the ad. This inquiry requires merely that the Commission to search text for certain words that evidence a placeholder by the party committee—words such "our Democratic Team" or "Leaders in Congress"—just as the Commission has always done with the time-or-space allocations of old. But this is a far cry from assessing aggregated and competing social research data to determine: whether a generic party reference is diluted by the inclusion of more clearly identified candidates; whether the party's down ticket candidates "actually benefit" from such ads; whether a generic reference benefits a party in only certain prescribed circumstances; and whether the Commission should codify the results of such research in regulation to say, for example, that party committees "actually" and "truly" receive—now and into future election cycles—only a 31.7% benefit from ads that mention "liberals in Congress" but not "Democrats." The Commission should not even broach these topics, as it does in its NPRM.

Worse than the questions seeking research data, above, is the proposal the Commission offers that could only be based on such data, its largest proposal for allocating hybrid communications: the 25%, 50%, 75% or 100% allocation proposal. At bottom, the problem with the 25%, 50%, 75% or 100% allocation proposal for candidates is that the Commission is trying

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[6] Statement of Commissioner Ellen L. Weintraub on the Report of the Audit Division on Bush-Cheney '04, Inc., http://www.fec.gov/members/weintraub/audits/statement20070322.pdf (March 22, 2007).

[7] CCP is joined in this belief by at least two members of the Commission. *See* Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Bush-Cheney '04, Inc., *http://www.fec.gov/members/von_Spakovsky/speeches/statement20070322.pdf* (March 22, 2007) ("The Commission should apply any 'generic reference' requirement with the flexibility required to avoid dictating advertising content.").

to determine now, and lock-in with hard-and-fast rules, how a communication will affect its hearer. This is an unsound approach, both for the Commission, as an agency, and for dynamism in political speech. The proposal seems an unwise analog to wage and price controls implemented from the 1st to 20th Centuries, proposals that have caused market dislocations and market failures all because the sovereign thought it knew better how valuable a good, service, or now—apparently—a political message *actually* was. The Commission would be saying, once and for all, how much a communication's form will affect its hearer.

Take an ad, for example: "President Jones and Leaders in Congress have a plan on taxes, national security, and the environment." The language applies equally to both "the President Jones" and "Leaders in Congress." It would be folly for the Commission to entertain and assign allocations on the belief that the discussion of taxes or national security more benefits the President, and less the Congressional candidates, therefore, the taxes and national security portion of the ad should be weighed more heavily in favor of the President. It would equally be folly for the Commission to conclude that Presidents always benefit more.

Just as candidates and parties are best positioned to judge the value of a hybrid ad, so too are they in the best position to know what words or phrases will be most useful to achieving their electoral goals. And they should be allowed as much freedom as possible in selecting those words. Fundamentally, it is not the role of government to police the words speakers select in making their points, even if the government believes that different words might be more appropriate to the task.[8] Therefore, any requirement that hybrid advertisements contain a "generic party reference" should be drafted and construed liberally to include references that do not explicitly state the name or nickname of the party. The clear implication of even the most generic reference in a hybrid ad is that the referents are members of the same party as the named candidate. This argument is strengthened by the existing requirement of disclaimers that explicitly name the political party funding a portion of the ad.[9]

Of the many alternative proposals in the NPRM, we believe these concerns are best addressed by the proposal to "amend 11 CFR 106.1 to include expenditures that contain generic party references, and require that such expenditures be attributed . . . according to a ratio based on the number of candidates referenced, including the generic party reference."[10] This proposal respects the rights and autonomy of federal candidates and their parties; it does not second-guess their decisions by substituting them for those of social scientists. Moreover, the ratio division of expenditures is clear and simple to calculate, both for the Commission to promulgate, and for the political committees to implement prospectively. Provided the "generic party reference" requirement is drafted liberally to address the concerns discussed above, and sufficiently clearly to assure the Commission can detect the party committee's portion of the message, we believe that this would be an acceptable approach.

If the Commission lacks the votes to amend 106.1, CCP questions the need for a rulemaking at this time. We believe, for the reasons recently expressed by Vice Chairman

[8] *Cf.*, *Cohen v. California*, 403 U.S. 15 (1971).
[9] 11 CFR 110.11.
[10] 70 Fed. Reg. 26574 (May 10, 2007).

Mason and Commissioner von Spakovsky, that the allocation of expenses for hybrid ads between federal candidates and their parties is permissible under *existing* Commission regulations and precedent, and that these allocations do not represent in-kind contributions to federal candidates.[11] The Commission may also wish to delay rulemaking while Congress considers acting on the related issue of party coordinated expenditure limits.[12] On April 11th, 2007, Sen. Bob Corker introduced the "Campaign Accountability Act of 2007" (S. 1091), which would repeal these limits. If adopted into law, this change could have a substantial effect on any rule the Commission adopts. Indeed, the support Sen. Corker's bill has received even from well-known proponents of campaign finance regulation suggests a substantial likelihood that this will occur.[13]

Should the Commission choose to go forward with this rulemaking, however, any rule adopted should preserve the right of federal candidates and their parties to produce hybrid ads and allocate the costs between themselves. It must be remembered that these ads, while they can be expensive, are paid for exclusively with hard dollars. The allocation of costs between federal candidates and parties for the mutual benefits they receive from hybrid ads is an innovative response to these hard-dollar limitations and, in Presidential races, has the potential to relieve stain on a failing system of taxpayer financing. The Commission should not stifle innovation where, as here, it presents no discernable risk of corruption.

We appreciate the opportunity to submit these comments and respectfully request the opportunity to testify at any subsequent oral hearings on this matter.

Sincerely,

/s/ Stephen M. Hoersting

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[11] Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Bush-Cheney '04, Inc., *http://www.fec.gov/members/von_Spakovsky/speeches/statement20070322.pdf* (March 22, 2007).
[12] 2 U.S.C. §441a(d).
[13] See, e.g., Thomas Mann, *Reform Agenda*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 264, 296-70 (Anthony Corrado, ed. 2005); Michael Malbin, *Bauer on Kerry, Malbin and Public Financing*, available at http://electionlawblog.org/archives/005375.html; *See also*, *Campaign Finance Success; The second election without soft money suggests that 2004 was not a fluke*, WASHINGTON POST, Nov. 3, 2006, at A20 (describing the §441a(d) limits as "one particularly ridiculous aspect of campaign finance law that ought to be fixed before 2008").