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Subject Notice of Proposed Rulemaking: Hybrid
Communications--Comments of Democratic National
Committee

Ms. Rothstein: In response to the Commission's Notice of Proposed Rulemaking: Hybrid Communications, 72 Fed. Reg. 26569 (May 10, 2007), attached are comments submitted on behalf of our client, the Democratic National Committee. Thank you and the Commission for your consideration of these comments.

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Re: Notice of Proposed Rulemaking—Hybrid Communications Comments on Behalf of Democratic National Committee

Dear Ms. Rothstein:

These comments are submitted on behalf of our client, the Democratic National Committee (“DNC”), in response to the Commission’s Notice of Proposed Rulemaking re: Hybrid Communications, 72 *Fed. Reg.* 26569 (May 10, 2007).

In summary, the DNC supports issuance of a regulation that would permit attribution in the case of any public communication referring to one or more federal candidates, regardless of party, and also generically to other Federal or non-federal candidates by using the name or nickname of the political party. The DNC believes that the costs of such a communication should be allocated based on a reasonable estimate of the time or space devoted to the candidate and to the generic party reference, but with a minimum of 50% required to be allocated to the candidate(s). In the event that there is more than federal office mentioned, the minimum allocable to federal candidates should be increased proportionately.

I. Need for and Application of Clarifying Regulation

The DNC supports issuance of the proposed regulation, which would provide clarification and consistency with respect to the treatment of hybrid communications. As noted in the background discussion of the NPRM, the Commission has already issued a specific regulation addressing hybrid communications made through phone banks, 11 C.F.R. §106.8; has addressed hybrid communications made through party-paid mailings

in an advisory opinion, A.O. 2006-11 (Washington Democratic State Central Committee); and has addressed but not resolved the issue of hybrid communications in the form of broadcast advertising, in the context of the audits of the publicly-financed 2004 campaigns of the two major party tickets, Kerry-Edwards 2004 and Bush-Cheney 2004. Continuation of such a piecemeal approach to regulation can only lead to further confusion and uncertainty on the part of the regulated community, in particular, the national and state party committees. The current situation calls for issuance of a regulation.

With respect to the general application of such a regulation, there is simply no logical reason for the Commission to adopt different treatment for different forms of public communication. The general principle behind the phone bank regulation, the Advisory Opinion and the ultimate treatment of the presidential broadcast advertising was articulated in AO 2006-11. There the Commission recognized that a mailing that advocates the election of a specific federal candidate “as well as the election of generically referenced, but not clearly identified candidates, serves in large measure the purpose of influencing the election of the clearly identified Federal candidate....” At the same time, the Commission acknowledged that “such a communication also encourages support for all of the party’s other candidates, and hence the State Party Committee itself derives some benefit from the mailing....”

That same reasoning logically holds regardless of whether a party communication is made through a phone bank, a mailing or paid media advertising. For that reason, the Commission should clearly issue a new rule reflecting that basic principle, and providing for the allocation of the costs of any party “hybrid” public communication between the candidate(s) and the party itself.

II. Scope of Regulation

As long as the attribution formula—addressed separately below—accurately captures the respective degree of benefit to whoever is mentioned in a communication, there is no logical reason to limit the scope of the regulation to communications that mention only one candidate or mention two candidates but only if they are of different parties and running for the same office from opposite parties. In fact, if the attribution formula is appropriate, there is no reason to limit the number of federal candidates or offices that can be specifically identified in the communication.

For that reason, the DNC does not support any of the alternatives set forth in the NPRM but rather would support a regulation that allows any number of federal candidates to be referenced, regardless of party, as well as generic party reference.

The NPRM also focuses on the issue of exactly what constitutes a “generic party reference.” In that regard, we do not believe it sufficient to refer to a group of candidates

or officeholders unless there is a specific reference to the party affiliation of those candidates or officeholders. AO 2006-11 based its logic on a communication in which candidates of the Democratic Party were referred to as such: "One example of such a message would be: 'Vote for John Doe and our great Democratic team.'" AO 2006-11 n. 1. One of the concerns of those Commissioners that did not support allocation in the case of the Bush-Cheney hybrid broadcast advertisements was that virtually none of those ads "contained a reference to either the Republican or Democratic Party." (Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub, Audit of Bush-Cheney '04, Inc. at 3 (March 21, 2007)). In this regard, the DNC would support treatment as a generic party reference of expressions that referred to the party even though the reference included officeholders or others affiliated with the party who are not necessarily candidates, *e.g.*, "Democrats in Congress" or "Republicans in Congress."

The reasoning of AO 2006-11 should be followed with respect to this issue. A generic party reference should require actual reference to the name (or nickname) of the political party.

III. Attribution

In AO 2006, the Commission suggested that the allocation in case of a communication referencing one specifically identified candidate together with a generic party reference, should be based on the time or space devoted to each reference, but with a minimum percentage—a floor—for the percentage allocated to the candidate or office, given that "[a]dvocacy related to the election of the clearly identified candidate is the most salient feature of such a communication, as compared to the generic reference to the party's candidates, which does not single out any particular candidate to the reader." In that case, with two references involved (one to a candidate, one to the candidates of the party generically), the Commission ruled that the minimum percentage attributed to the candidate should be 50%.

The reasoning of AO 2006-11 implies that the attribution formula should be based on a reasonable approximation of the time and space devoted to the generic party reference as opposed to the specifically identified federal offices, but with an appropriate minimum percentage allocated to the federal candidate(s). In a communication in which, as in AO 2006-11, there is only specifically identified federal office and a generic party reference, the minimum percentage should be 50%. In the case in which more than one federal office is referenced, the minimum percentage should simply be proportional—that is, it should be $n/n+1$ where n is the number of specifically identified federal offices referenced. Thus, for example, if a communication refers to three specifically identified candidates for different federal offices in addition to a generic party reference, the minimum percentage should be 75%. The DNC supports this approach in lieu of any of the specific alternatives set forth in the NPRM.

IV. Conclusion

For the reasons set forth above, the DNC urges the Commission to adopt a regulation that would permit attribution in the case of any public communication referring to one or more federal candidates, regardless of party, and also generically to other Federal or non-federal candidates by using the name or nickname of the political party; and would include an attribution formula that allocates the amount attributable to each candidate and the party based on a reasonable estimate of time or space, subject to a minimum percentage that simply reflects the proportion of the total number of offices represented by the specifically identified candidates to that total number plus one, representing the generic party reference.

Thank you for the opportunity to submit these comments on behalf of the DNC. If the Commission holds a hearing on the proposed rule, the DNC would request an opportunity to testify at that hearing, through undersigned counsel.

Sincerely yours,

\s\ Joseph E. Sandler

Joseph E. Sandler
Neil P. Reiff

Attorneys for Democratic National
Committee