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06/11/2007 05:38 PM

To <hybridads@fec.gov>
cc
bcc
Subject Hybrid Communications

Attached below please find comments on behalf of the Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee on the above-referenced Notice of Proposed Rulemaking. Please do not hesitate to contact me at the address and phone number below if you have any questions or concerns.

Very truly yours,

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June 11, 2007

BY ELECTRONIC MAIL

Amy L. Rothstein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Hybrid Communications

Dear Ms. Rothstein:

We write on behalf of our clients, the Democratic Senatorial Campaign Committee ("DSCC") and Democratic Congressional Campaign Committee ("DCCC"), to comment on the above-referenced Notice of Proposed Rulemaking. Each committee requests the opportunity to testify at the Commission's hearing.

The central question in this rulemaking is whether the Commission will afford political party committees flexibility to spend their "hard" money on advertisements that aid not simply federal candidates, but also the party and ticket as a whole. Several factors counsel toward this flexibility – the logic behind recent "soft money" restrictions; the approach historically taken by Congress and the Commission to party spending under the Federal Election Campaign Act; and the basic allocation principles that the Commission has set forth in its rules and advanced through its advisory opinions.

Only the spending of federal money is at issue here. The Bipartisan Campaign Reform Act of 2002 prohibits national party committees from spending soft money at all. *See* 2 U.S.C. § 441i(a)(1) (2007). It also bars state party committees from spending nonfederal funds for public communications that promote, support, attack or oppose federal candidates. *See id.* §§ 441i(b)(1), 431(20)(A)(iii). Thus, whatever the potential

outcomes of this rulemaking may be, a new, so-called "soft money" loophole is not one of them.

Proponents of BCRA contend that the prohibitions and restrictions of McCain-Feingold have strengthened party committees, which in their view have now, as they have historically, "demonstrated a remarkable capacity to adapt and respond to changes in campaign finance laws in both intended and unintended ways." Anthony Corrado, *Political Party Finance under BCRA: An Initial Assessment,* at 2, *available at,* http://www.brookings.edu/views/papers/corrado20040311_paper.pdf.

Yet if examples of such adaptation include a greater emphasis on small-dollar fundraising, *see id.* at 4-7, and an expanded role for state party committees, *see id.* at 14-16, they also include efforts to collaborate with candidates and parties to achieve efficiencies in the raising and spending of hard money to which they are now limited. This adaptive behavior has produced the hybrid communications at issue in this rulemaking. Facing the constraints imposed by BCRA, and the broad framework of the contribution and coordinated expenditure limits, the party committees have settled on these sorts of communications as an efficient way to manage their limited "hard money" resources.

The Commission must decide whether it wants to stifle this sort of party adaptation, or instead encourage it. Seeing the recent growth of national party committee independent expenditure programs – another example of such adaptation – some have gone so far as to suggest that the coordinated expenditure limits should be repealed entirely. The Commission need not – and, in any event, cannot – go so far. But it remains true that BCRA's "explicit trade was a limitation on the source and size of contributions to parties in exchange for the freedom to spend those revenues as they deemed most efficacious." Thomas Mann, *Repealing the Limitation on Party Expenditures on Behalf of Candidates in General Elections, available at,* http://www.brookings.edu/views/testimony/mann/20070418.htm. Fresh restrictions on hybrid advertising are inconsistent with the terms of this bargain, and are inconsistent with its underlying policy rationale.

Giving parties flexibility to spend their hard money within the contribution and coordinated expenditure limits is not a new idea. Both Congress and the Commission have resisted rigid application of the limits in many circumstances, recognizing that the parties have an institutional role that transcends the interests of their current candidates. Thus, for example, when Congress amended the FECA in 1974, the chairs of the DCCC

and National Republican Congressional Committee took pains to clarify on the floor that Congress did not intend "to include whatever services we give to any candidate as far as the [contribution limit] is concerned." 120 Cong. Rec. H7807 (daily ed. Aug. 7, 1974) (remarks of Rep. Hays, in colloquy with Rep. Michel). From its earliest interpretations of the FECA, the Commission has respected this Congressional intent, and given parties the flexibility to spend funds without rigidly applying the limits.

Thus, for example, when the NRCC asked permission to host a conference for its candidates "without counting the expenses against the candidates' limits", the Commission agreed. "The legislative history of the contribution and expenditure limits unmistakably indicates that these provisions were not intended to cover every expenditure by a multicandidate committee." Advisory Opinion 1975-87.

Commission rules still echo this principle. 11 C.F.R. § 110.8(e) allows parties to reimburse candidates for their appearances at certain party-related events. 11 C.F.R. § 106.1 allocates expenses among candidates "according to the benefit reasonably expected to be derived," 11 C.F.R. § 106.1(a)(1), and does not count certain types of expenses like training and get-out-the-vote drives against candidate limits, *see* 11 C.F.R. § 106.1(c). The Commission's polling rules allow poll costs to be allocated by any "method which reasonably reflects the benefit derived." 11 C.F.R. § 106.4(e)(4). The phone bank allocation rules now in place at 11 C.F.R. § 106.8 are just the most recent example. Hybrid advertising rules that apply these same principles to other types of media would simply be another.

Section 106.1's language about "the benefit reasonably expected to be derived" is especially apt in the context of hybrid advertising. There is no question that a federal candidate faces a diminished value from advertising that accords equal space to someone or something else. This was the logic that the Commission apparently employed when it allowed a federal candidate to pay jointly with a corporate funded ballot initiative for an advertisement before his voters that both referred to him and supported the initiative. *See* Advisory Opinion 2004-29. *See also* Advisory Opinion 2006-11 (allowing state party committee to allocate no more than 50% of the costs of a mailing to generically referenced party candidates, based on time/space).

Similarly, there is no question that a political party enjoys a distinct benefit from a communication that references the party or urges support for its ticket. Our clients' political experience has been that communications of this sort have proven beneficial to so-called downballot races – and not simply because of the federal candidate's own

success. The logic is simple: a communication that is based on a party appeal energizes the party's base, brings the parties into the on-air dialogue, and contributes to the turnout effort on behalf of all the party's candidates.

All of the above considerations should provide the Commission with a framework to evaluate the proposed rules:

- The innovation and flexibility counseled by BCRA should lead the Commission to refrain from placing arbitrary conditions on the contents of hybrid advertising, whether by limiting the number of candidates to which it may refer; or by requiring the communication to refer specifically to candidates of a political party, rather than to the party itself.

- The Act's history of flexibility in applying the party contribution and spending limits should lead the Commission to shun a fixed allocation of 100% of hybrid advertising costs to the affected federal candidate.

- Finally, the allocation principles embraced by the Commission in the past should lead it to extend the current rule at 11 C.F.R. § 106.8 to other types of media. The revised rule should provide that 50% of the disbursements for a communication that refers to a clearly identified federal candidate, and that also refers generically to a party or to its candidates, are not attributable to any federal candidate.

If the rulemaking serves, through adoption of the above proposal, to codify party practices in the financing of hybrid ads, it does not harm and, by removing all doubt, accomplishes some good.[1] The question is whether the rulemaking will be the occasion for squelching party initiatives which strengthen their hand in a "hard money" world without undermining vital statutory objectives. And this is not a case where the parties and candidates have pulled the hybrid advertising program from thin air. They hewed carefully to a path that the Commission had laid out previously, in the allocation rules generally and in the treatment of other shared communication costs, such as those associated with phone banks, in particular.

While this rulemaking presents the Commission and the regulated community with a large number of complex alternatives, the basic questions before the Commission are

[1] These practices could stand without their incorporation into a final rule. But as the Commission is instituting this proceeding to consider new rules, we are advocating that these practices – consistent with sound policy and other comparable rules, and well familiar to the parties – become the rule.

really quite simple. Should the parties be allowed the discretion to manage their limited "hard money" resources within the broad parameters of the contribution and expenditure limits, or should they be tightly constrained through artificially tailored rules? Do the parties continue to have a legitimate and recognized role in building adherence and developing support for a ticket, or are they always and everywhere presumed to be interested solely in the fate of a single candidate? Is the FEC best situated to decide what kind of advertising, and the text best suited to that advertising, will serve party purposes?

The Commission's answers to these questions will have great significance for the parties, and for their continued vibrancy in a post-BCRA world.

Very truly yours,

Robert F. Bauer
Judith L. Corley
Marc E. Elias
Brian G. Svoboda

Counsel to the Democratic Senatorial Campaign Committee and to the Democratic Congressional Campaign Committee