



"McGinley, William"
<wmcginley@nrsc.org>

01/12/2006 07:34 PM

To <coordination@fec.gov>

cc

bcc

Subject National Republican Senatorial Committee

Dear Mr. Deutsch:

Please find attached the National Republican Senatorial Committee's comments on the Notice of Proposed Rulemaking on Coordinated Communications. Please do not hesitate to contact me with any questions.

Respectfully submitted,

William J. McGinley
General Counsel
National Republican Senatorial Committee
425 Second Street, NE
Washington, DC 20002



(202) 675-6000 [NRSC Coordination NPRM Comments.pdf](#)

National Republican Senatorial Committee

William J. McGinley
General Counsel

January 12, 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:
Coordinated Communications

Dear Mr. Deutsch:

The National Republican Senatorial Committee (“NRSC”), through counsel, submits the following comments to the Federal Election Commission (“Commission”) on the Notice of Proposed Rulemaking (“NPRM”) listed above. 70 Fed. Reg. 73946 (Dec. 14, 2005). The NRSC appreciates the opportunity to submit written comments on the NPRM and hereby requests an opportunity to testify at the Commission’s hearing on this matter.

Introduction

The NRSC is an unincorporated association formed in 1916 and comprised of sitting Republican members of the United States Senate. The NRSC’s primary functions are to aid the election of Republican Senate candidates, promote conservative public policies, and otherwise support the goals of the Republican Party. The NRSC is registered with the Commission as a national party committee and files periodic reports disclosing its receipts and disbursements.

The coordination regulations impact every facet of the NRSC’s operations, including its relationship with candidates, other political party committees, and like-minded outside groups. The regulations also affect which vendors will be retained by the NRSC to produce and distribute its communications and to provide strategic political advice. Therefore, the NRSC provides these comments as a member of the regulated community that must operate under these rules.

Any changes adopted by the Commission must provide the regulated community with clear notice concerning which communications will be subject to the coordination regulations. The Appellate Court specifically left the door open to develop objective, bright-line tests

Ronald Reagan Republican Center
425 Second Street, N.E. • Washington, D.C. 20002 • (202) 675-6000

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that provide the regulated community with fair notice concerning which communications will be subject to the coordination regulations. See Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (“Moreover, we can hardly fault the FEC’s effort to develop an ‘objective, bright-line test [that] does not unduly compromise the Act’s purposes,’ considering that we approved just such a test for ‘contribution’ in Orloski. Accordingly, we reject Shays’s and Meehan’s argument that FECA precludes content-based standards under Chevron step one.”) (citations omitted).

The Commission must reject any proposed changes that would create subjective, expansive standards for determining which communications are subject to analysis under the coordination rules. Similarly, the coordination rules must not be developed through the enforcement process or by advisory opinions. Failure to provide the regulated community with clear notice in the regulations themselves will result in lengthy investigations for inadvertent violations. Such investigations will have a chilling effect on participation in the political process. Since these regulations apply to core First Amendment activities, the Commission must make every effort to avoid this situation. See Buckley v. Valeo, 424 U.S. 1, 15 (1976) (“[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. The First Amendment protects political association as well as political expression.”) (citations omitted).

Finally, if the Commission elects to expand the types of communications subject to the coordination regulations, the effective date should be postponed until after the 2006 general election. Any effort to expand the coordination time frame beyond 120 days before an election at this late stage in the election cycle will unfairly burden and disrupt the political plans already in place that were designed and implemented based upon the existing rules. On the other hand, if the Commission revises the regulations by limiting the types of the communications covered by the regulations (including limiting the applicable time frames under the fourth content prong), the regulations should take effect immediately.

Alternative Proposals for Revising the Content Prong

The NRSC urges the Commission to adopt a different time frame for determining which communications are subject to the coordination regulations under the fourth content prong. Specifically, the NRSC believes the electioneering communication time frame -- sixty days before the general election, and thirty days before a primary election -- is the appropriate time frame for the fourth content prong. The sixty/thirty day period will ensure that the regulations are narrowly tailored to cover the time period when the overwhelming majority of election-related communications are distributed to voters while leaving other non-election related political communications free from burdensome regulation. McConnell v. Federal Election Comm’n, 540 U.S. 93 (2003); see also Brief for Intervenor-Defendants Senator McCain et al. at 56-57, McConnell, 540 U.S. 93 (2003) (“And [the electioneering communication time frame] is still further limited to ads run in the final weeks before an election, because objective empirical evidence makes clear that, so limited, it will reach the vast majority of candidate specific issue ads, at the time when they are almost certain to convey an electioneering message – while imposing even its modest burdens only during the most circumscribed period when they are most clearly necessary to serve compelling public interests.”) (emphasis added); 70 Fed. Reg. 73946, 73949 (“For example, the data appear to

indicate that, during the 2004 election cycle (1) coordinated party expenditures made in connection with the general election were made mostly after September 1, 2004 – roughly within 60 days of the general election . . .”). In fact, the Commission has argued that the vast majority of issue advertisements aimed at influencing federal elections occur sixty days or less before a general election or thirty days or less before a primary election:

The timing requirement is also directly tied to Congress’ objective of capturing advertisements that are likely to influence the outcome of federal elections. The record “overwhelmingly demonstrate[s] the appropriateness of BCRA’s sixty and thirty day benchmarks,” and confirms with remarkable clarity the common-sense conclusion “that issue advertisements aimed at influencing federal elections are aired in the period right before an election. Supp. App. 725sa-728sa, 847sa-848sa (Kollar-Kotelly) (discussing evidence); see id. at 851sa (“The sixty and thirty day figures are not arbitrary numbers selected by Congress, but appropriate time periods tied to empirically verifiable data.”).

Brief for the Federal Election Commission et al. at 94, McConnell, 540 U.S. 93 (2003) (discussing the timing requirement under the definition of electioneering communication) (emphasis added). Accordingly, the data cited by the Commission in the present NPRM and in briefs defending the electioneering communication provisions of BCRA provide empirical support for revising the coordination time frame for the fourth content prong to sixty days before a general election and thirty days before a primary election.

Finally, the NRSC also supports the adoption of a Promote, Attack, Support or Oppose (“PASO”) standard in addition to the sixty/thirty day time frame to ensure that the coordination regulations apply only to election-related communications.

Other Issues Regarding the Content Prong

The “Directed to Voters” Requirement: The NRSC favors adopting a minimum number of persons who must be able to receive the communication in order for it to be subject to the coordination regulations. The regulations should exclude from the coordination regulations communications of 500 or less pieces or copies under all content standards -- including the express advocacy and republication of campaign material standards -- as *de minimis*. Candidates and other political actors receive little, if any, benefit from communications distributed in such small quantities.

In addition, the express advocacy and republication of campaign materials content standards should be revised to clarify that such standards apply only if the communications are distributed to voters within the jurisdiction of the candidate referenced in the communication. The coordination regulations should not apply to communications that are distributed outside the candidate’s jurisdiction.

Likewise, the Commission should exempt communications from the coordination rules that are distributed in the jurisdiction of a candidate referenced in the communication if such distribution is “incidental” to a larger advertising project. “Incidental” should be defined using a ratio between the total number of persons who can receive the communication and the number of persons who receive the communication inside the candidate’s jurisdiction.

The NRSC notes that the Commission has used similar rules in the context of solicitations by separate segregated funds that are received by an “incidental” number of persons outside the corporation’s restricted class.

Endorsements by Federal Candidates: The NRSC urges the Commission to revise the coordination regulations to exempt a federal candidate’s endorsement of another federal candidate -- or a non-federal candidate -- in an advertisement paid for by the candidate receiving the endorsement. If the endorsing candidate does not promote his or her candidacy or refer to his or her status as a candidate in the advertisement, the coordination regulations should not apply to the advertisement. Similarly, the NRSC urges the Commission to make clear in the Explanation and Justification for the new coordination regulations that its holding in Advisory Opinion 2004-01 is superceded by the new regulations.

Party committee solicitations that reference a federal candidate should not be subject to the coordination regulations. National party committees such as the NRSC are recognized under the Federal Election Campaign Act and Commission regulations as national party committees operating on behalf of Republican Senators and candidates for US Senate. Therefore, the NRSC should be free to reference the candidates it supports in its fundraising solicitations without fear that someone may allege that they constitute coordinated communications on behalf of the candidates referenced in the solicitations.

Proposed Clarification of 120-day Time Frame Requirement: The coordination regulations should be revised to clarify that no in-kind contribution is made to a federal candidate/officeholder referenced in a communication if he or she will not appear on the ballot as a federal candidate within the relevant time frame. This means that the regulations should explicitly provide that a Senator’s endorsement of a Congressman or state or local candidate in an advertisement during the 2006 election time frame will not result in an in-kind contribution to the Senator if he or she is not up for re-election until 2008.

Issues Regarding the Conduct Prong

Request or Suggestion Conduct Standard: The NRSC supports retaining the content prong of the coordination analysis as applied to communications made at the request or suggestion of a candidate or party committee.

Common Vendor and Former Employee: Party committees, candidates, vendors and other actors in the political process pay a heavy process penalty for enduring subpoenas, depositions and other discovery in connection with Commission enforcement matters. There should be a minimal evidentiary threshold that must be met before the Commission finds Reason to Believe and initiates an investigation based upon a coordination allegation involving a common vendor. Accordingly, the NRSC supports creating a rebuttable presumption against coordination for vendors that erect internal “firewalls” to ensure that no material information from one client is used in connection with the communications of another client. If the vendors are able to demonstrate through counsel’s response to a complaint that proper firewalls were constructed and maintained, a rebuttable presumption against coordination should protect the vendor and its clients from the burden of an investigation.

Use of Publicly Available Information: The NRSC supports creating a safe harbor under the conduct standards regarding the use of publicly available information. Specifically, a safe harbor should be adopted by the Commission that makes clear that the use of publicly available information in connection with a communication -- including summaries of publicly available information -- does not satisfy any of the conduct standards under the coordination regulations. This safe harbor exception should cover the distribution of public information through press releases, websites, advertisements, speeches, and other types of public distributions, and the non-public distribution of such information from the candidate or party committee to the person paying for the communication.

Party Coordinated Communications

The Commission should make conforming changes to the party coordinated communications regulations at 11 CFR § 109.37 if the content standards regulations are revised to the sixty/thirty day time frames. On the other hand, if the Commission adopts amendments that expand the time frame covered by the coordination communications, it should adopt a shorter, defined time frame for the party coordinated communications regulations.

Conclusion

The NRSC believes that the adoption of the amendments discussed above are necessary to provide the regulated community with clear notice concerning which communications will be subject to the coordination regulations. The proposed amendments also ensure that the regulations are narrowly tailored to cover the time period when the overwhelming majority of election-related communications are distributed while leaving other non-election related communications free from burdensome regulation.

Please note that the NPRM raised a number of questions concerning proposed amendments to the coordination regulations that are not addressed in these comments. I will be happy to comment on any proposals and questions raised in the NPRM during my testimony at the public hearing on this matter.

Thank you for the opportunity to present these comments. Please do not hesitate to contact me with any questions.

Respectfully submitted,

/s/ William J. McGinley

William J. McGinley