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- **Comment: Comments on behalf of Democratic National Committee on NPRM: General Public Political Communications Coordinated With Candidates**

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January 24, 2000

Via Facsimile and First Class Mail

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999 E Street, N.W.
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Re: Supplemental Notice of Proposed Rulemaking Re: General Public Political Communications Coordinated With Candidates

Dear Ms. Smith:

The Democratic National Committee ("DNC"), by undersigned counsel, submits these comments in response to the Commission's Supplemental Notice of Proposed Rulemaking Re: General Public Political Communications Coordinated With Candidates, 64 Fed. Reg. 68951 (Dec. 9, 1999)(the "SNPRM"). The DNC also requests an opportunity to testify before the Commission with respect to the SNPRM, at the hearing scheduled for February 16, 2000.

In summary, the DNC believes, first, that the scope of the proposed regulation is too broad. While coordinated public communications may result in a prohibited in-kind contribution even in the absence of "express advocacy," it is clear that not all such communications including a clearly identified candidate should have that result. Some standard is required to define the content of communications which, if coordinated, result in an in-kind contribution. As explained in detail below, the DNC believes the Commission should adopt the same definition the DNC has previously offered—to replace the "electioneering" standard-- in the DNC's comments submitted in response to the Commission's Notice of Proposed Rulemaking on Public Financing of Presidential Primary and General Election Candidates. Further, the proposed regulation should be clarified so that it does not apply to communications which are distributed through press

releases, press conferences, media interviews or otherwise to representatives of the news media, rather than through paid communications.

Second, the proposed definition of coordination should be clarified in three respects. The definition should be modified, in conformity with the Christian Coalition decision, to make clear that coordination does not result from "substantial discussion" unless there is actual assent or other indication by the candidate indicating approval or agreement. Further, coordination should not result from requests, suggestions, or decision-making by the "agent" of a candidate or party committee unless the putative "agent" was in fact acting for and under the direction of the candidate or party committee with respect to the particular communication. Finally, the proposed regulation should be modified to make clear that coordination only with a party committee does not automatically result in an in-kind contribution to the party's candidates.

The DNC believes that the standard for coordination proposed in the SNPRM should not be applied to political party expenditures that are coordinated with candidates. As the DNC has stated in the separate, pending rulemaking proceeding addressing this issue, the relationship between parties and their candidates inherently and necessarily involves coordination to a degree that makes true independent expenditures by party committees virtually impossible. A different and far stricter standard of coordination is therefore required.

I. Scope of Proposed Regulation

The proposed regulation would apply to any "general public political communication" that includes a "clearly identified candidate" and is paid for by a person other than a candidate or party committee. Proposed section 100.23(b) & (c). Alternative 1-B for the introductory text of paragraph (c) would further limit the scope of the regulation to communications "distributed primarily in the geographic area in which a candidate is running." 64 Fed. Reg. at 68955. Even with the limiting language of Alternative 1-B, the scope of the proposed regulation is too broad in two respects.

A. The Regulation Should Be Limited to Communications That Meet an Appropriate Content Standard

In FEC v. The Christian Coalition, 52 F. Supp.2d 45 (D.D.C. 1999), the court held that a coordinated communication may result in an in-kind contribution to a candidate or party committee even if such communication does not contain "express advocacy." 52 F. Supp. at 87-90. The Court did not, however, address the question of whether some types of communications that are fully coordinated with a candidate or party should nevertheless, by virtue of their content, not be treated as in-kind contributions to that candidate or party. The answer to that question is clearly yes. And, although the Court in the Christian Coalition case had no need to deal with and define this class of communications, the Commission is required to do so in the instant rulemaking.

A corporation or labor organization may agree with a candidate (or party committee) that the corporation or union will produce and distribute a communication referring to the candidate in a context that is so far removed from the election and the candidate's role as a candidate that it makes no sense to treat the communication as an in-kind contribution—notwithstanding full coordination of the communication. Examples of such a context would include the candidate's role as principal sponsor or opponent of legislation, as a figure otherwise identified with such legislation, as spokesperson for a non-political organization or cause, or as a public advocate for or against public action unrelated to legislation or electoral politics.

The Commission's first hypothetical in the SNPRM provides an excellent example. The cost of the hypothetical advertisement, paid for by a local savings and loan association, in which fictitious "U.S. Senator William Moore" appears to endorse the safety of savings and loan associations, should certainly not be viewed as an in-kind contribution to the Moore campaign—regardless of the timing of the advertisement.[1]

The SNPRM's example of a legislative campaign in support of the Shays-Meehan bill is also instructive. The SNPRM concedes that an advertisement supporting the "Shays-Meehan" legislation should not be considered an in-kind contribution to Rep. Chris Shays (R-Ct.) or Rep. Martin Meehan (D-Mass.). The SNPRM would remove such

an advertisement from the scope of the proposed regulation by limiting that scope to communications distributed "primarily in the geographic area in which the candidate was running," thereby rendering the regulation inapplicable to "national legislative campaigns that refer to clearly identified candidates." 64 Fed. Reg. at 68954. It should make no difference however, that such an advertisement is run, say, by an incorporated campaign finance reform group, primarily in the districts represented by those two Members of Congress, if such a group decides that it is essential to the bill's chances for constituents of Rep. Shays and Rep. Meehan to express their support to those Members.

To distinguish such communications from expressive communications that, if coordinated, should be deemed to result in in-kind contributions, the Commission should adopt a content standard. The Commission previously adopted the "electioneering" standard for precisely this purpose. The "electioneering" standard was applied to communications by party committees presumed to be coordinated with the party's candidates. See, e.g., Advisory Opinions 1984-15, 1985-14. Similarly, the Commission's rules governing voter guides prepared by corporations and labor organizations provided that a corporation or labor organization may direct written questions to candidates for purposes of preparing a voter guide, but if a corporation or labor union does so, "[t]he voter guide and its accompanying materials shall not contain an electioneering message." 11 C.F.R. § 114.4(b)(5)(ii)(D).

It is clear at this juncture that a majority of the Commission has abandoned the "electioneering" standard. "Given the procedural and substantive infirmities with the 'electioneering message' standard, the Commission may not employ it in administering the FECA. . . . " Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of "Dole for President Committee, Inc.", et al. at page 6 (June 24, 1999). Further, the court in Clifton v. Federal Election Commission, 114 F.3d 1309 (1st Cir. 1997), cert. denied, 118 S. Ct. 1036 (1998), remanded to the District Court the question of the constitutionality of the "electioneering" message standard as used in 11 C.F.R. §114.4(b)(5)(ii)(D). On remand, however, the Commission chose to stipulate that the

[1] The addition of the words, "Please support Senator William Moore"—words of express advocacy—clearly transforms the advertisement into an impermissible coordinated communication, and its costs into

"electioneering message" test was not severable, thereby allowing the "electioneering" test to be declared unconstitutional and invalidated by the District Court along with the other provisions of the regulation, rather than even trying to defend its constitutionality. (Federal Election Commission Record, July 1998, p. 4).

The Commission is thus called upon to devise a new content standard for coordinated communications. The Commission attempted to devise such a standard in the context of party communications coordinated with presidential candidates, in a recent separate rulemaking. Notice of Proposed Rulemaking on Public Financing of Presidential Primary and General Election Candidates, 63 Fed. Reg. 69524 (Dec. 16, 1998). In response to that NPRM, the DNC suggested a new standard that the DNC believes would achieve the Commission's policy goals while providing party committees clearer and more meaningful guidance than the standard proposed in the Public Financing NPRM. The DNC believes this standard is equally appropriate for communications by persons other than parties or committees, when such communications are in fact coordinated with such parties or committees.

Under this standard, the costs of a corporate or labor union communication mentioning or depicting a clearly identified federal candidate, which communication has been coordinated with that candidate or a party committee, would not count as an in-kind contribution to or expenditure on behalf of that candidate or party, unless:

(1) The communication expressly advocates the election or defeat of any clearly identified candidate; or

(2) The communication contains words or images referring to voting (by voters), or to the election or the campaign or candidacy, of the candidate or any of his or her opponents. The Commission would, in defining the meaning of this condition, specify at least by way of example the exact kinds of words and expressions that would fall into this category.

The first condition is relatively easy to apply because of the numerous judicial interpretations of "express advocacy." The second condition is an effort to articulate a condition whose existence would be relatively easy to determine based on specific words

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an in-kind contribution to the Moore campaign unlawful under 2 U.S.C. §441b.

or images, and that would accomplish the Commission's policy goal of ensuring that the costs of a coordinated communication that is electoral in nature are treated as an in-kind contribution to the candidate whose candidacy is benefited by the communication. Adding this condition would make clear that coordinated communications present a special case, for which, as the court in the Christian Coalition case recognized, the mere "express advocacy" test, without more, is not appropriate.

As the DNC pointed out in its comments in response to the 1998 NPRM, this proposed new condition is consistent with the Commission's actual application of the "electioneering" test in the few cases in which that test has been applied to specific factual situations. In FEC Advisory Opinion 1985-14, Fed. Elec. Camp. Fin. Guide ¶ 5819 (1985), the Commission considered two television advertisements proposed to be run by the Democratic Congressional Campaign Committee. One advertisement criticized "the President and his Republican supporters in Congress" for their farm policy, and referred to a joke by President Reagan to the effect that the farm crisis should be solved by "keeping the grain and exporting the farmers." The ad concluded with the line, "Let your Republican congressman know that you don't think this is funny." The second advertisement criticized the "President and his Republican allies in Congress" for their economic policies. The ad concluded with the line, "Let your Republican Congressman know that their irresponsible management of the nation's economy must end--before it's too late."

The Commission ruled that the limitations on what a party could contribute in-kind to a federal candidate would apply to a party communication if "the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message." The Commission further ruled that the advertisement referring to "your Republican congressman" would not be subject to limitation as long as it did not say "Vote Democratic," which is the only part of the advertisement the FEC considered to be an "electioneering" message. Similarly, under the DNC's proposed new standard, the reference to "voting" in such an advertisement would preclude a finding that the second condition had been met, and thus result in treatment of the costs of the advertisement as an in-kind contribution to the candidate.

In Advisory Opinion 1995-25, CCH Fed. Elec.Camp. Fin. Guide ¶ 6162 (1995), the Republican National Committee asked the Committee to consider proposed media advertisements on various legislative proposals before the U.S. Congress, which might refer to specific federal officeholders, but without any express advocacy or electioneering message. The RNC submitted the texts for three proposed advertisements. One urged support for the Balanced Budget amendment and the other two urged that the Medicare program be saved and restructured. The Balanced Budget advertisement and first Medicare advertisement did not mention a federal candidate. The second Medicare advertisement, however, a proposed newspaper advertisement entitled "Too Young to Die," mentioned President Clinton's name six times. The advertisement read, in pertinent part:

> Medicare, you see, is going bankrupt in seven years. That's right, bankrupt. . . Republicans think Medicare is too young to die. We won't let Medicare go bankrupt. . . That's why Republicans are saving Medicare. . . President Clinton knows Medicare is dying, but he has done nothing to save it. . . If Clinton lets Medicare go bankrupt, you can keep your existing coverage--but only for seven years. If Clinton lets Medicare go bankrupt, you can keep your own doctor--but only for seven years. If Clinton lets Medicare go bankrupt, you can still get sick--but only for seven years. If Clinton lets Medicare go bankrupt, Medicare won't be there when you need it. Medicare will be gone.

The Commission ruled that that the Medicare advertisement, "Too Young to Die," along with the two others, were generic Republican Party communications that "focus on national legislative policy and promote the Republican Party." CCH Fed. Elec. Camp. Fin. Guide ¶ 6162 at p. 12,109. The Commission acknowledged that the advertisements' "stated purpose--to gain popular support for the Republican position on given legislative measures and to influence the public's positive view of Republicans and their agenda--encompasses the related goal of electing Republican candidates to Federal office." Id. Nevertheless, the Commission found that such "[a]dvocacy of the party's legislative agenda is one aspect of building or promoting support for the party that will carry forward to its future election campaigns." Id. Therefore, the Commission, assuming that these advertisements did not contain any "electioneering" message, id. at p. 12,108 n.1, ruled that these advertisements were generic party communications, classifiable as

administrative expenses or generic voter drive costs, not in-kind contributions to or expenditures or behalf of a specific candidate; and that the costs of the advertisements were thus allocable as generic voter drive costs to be allocated between the RNC's federal and non-federal accounts, i.e., paid for by the RNC with a combination of "hard" and "soft" money. Id. at p. 12,109-10.

Likewise, under the DNC's proposed new standard, it would be clear that the first and second conditions would both be met in the case of the RNC advertisement, "Too Young to Die." Therefore, as in A.O. 1995-25, the costs of the advertisement would not be treated as an in-kind contribution to the Republican nominee for President.

The introductory text of proposed paragraph 100.23(c), therefore should be modified to incorporate the above new content standard.

B. The Regulation Should Exclude Communications Made Through the Press

As worded, the proposed regulation would apply to "general public political communications paid for by persons other than candidates, authorized committees and party committees." Proposed section 100.23(a). Left unclear by this wording is the status of coordinated communications made by a corporation or labor organization through normal press channels, rather than through the purchase of time or space on a media outlet or through other paid means of communication such as mailings and telephone banks.

Corporations, incorporated organizations and labor organizations commonly make their views on issues, elected officials and candidates known through press releases, press conferences and interviews with reporters. Since there may be some very minimal costs associated with this dissemination of views, the regulation as worded could embrace such communications.

Regardless of the nature of the content of such communications or whether they are coordinated with a candidate or party, such communications should not result in an in-kind contribution to that candidate or party. Section 114.4(c)(6) of the Commission's rules provides that a corporation or labor organization may communicate even the endorsement a candidate endorsement through a press release and press conference, as

long as the public announcement of the endorsement is not coordinated with the candidate and as long as the press release and notice is distributed "only to the representatives of the news media that the corporation or labor organization customarily contacts when issuing non-political press releases or holding press conferences for other purposes."

Consistent with this approach, the proposed regulation on coordinated communications should be revised to exclude any communication by a corporation or labor organization, regardless of content, made through or to representatives of the news media that the corporation or labor organization customarily contacts when issuing information to the press for non-political purposes, including posting on the web site of the corporation or labor organization. Candidates and party committees should be able to coordinate the content of such communications with corporations and labor organizations—just as a candidate may solicit an endorsement which is made under section 114.4(c)(6)--as long as the timing and other aspects of the actual communication of that content are not coordinated.

II. Definition of Coordination

The DNC supports the Commission's effort to codify the definition of coordination set forth in the Christian Coalition case. The wording of the Commission's proposed definition, however, should be clarified in three respects.

A. The Requirement That There Be Actual Assent or Agreement By the Candidate or Party Should be Clarified

The proposed regulation, Alternative 2-B, paragraph (c)(3), would treat as a coordinated communication any communication that is paid for by a person other than the candidate, the candidate's authorized committee or a party committee and that is created, produced or distributed—

> After substantial discussion or negotiation between the creator, producer or distributor of the communication, or the person paying for the communication, and the candidate, the candidate's authorized committee or a party committee,

> regarding the content, timing, location, mode intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement.

Under this language, "substantial discussion" of a communication by a corporation or labor organization could result in impermissible coordination even if the corporation or labor organization was not given any indication by the candidate or party committee of whether the communication (or its content, timing, location, etc.) was considered desirable by the candidate or party. In this regard, the requirement that there be "collaboration or agreement" is too vague. Although the term "collaboration" was used in a different context by the court in Christian Coalition, that term does not adequately express what is actually required under the court's test: namely, some express indication of assent or agreement by the candidate or party to one or more of the mentioned elements in reference to that specific communication:

> Substantial discussion or negotiation is such that the candidate or spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. This standard limits §441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants.

Christian Coalition, 52 F. Supp.2d at 92 (emphasis added).

In view of this essential requirement, the DNC would suggest that Alternative 2-B, paragraph (c)(3), be reworded as follows:

> (1) After substantial discussion or negotiation between the creator, producer or distributor of the communication, or the person paying for the communication, and the candidate, the candidate's authorized committee or party committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that specific communication, the result of which is express agreement or assent by such candidate, authorized committee or party committee to such content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that specific communication.

B. Common Vendors Should Not Be Treated As the "Agent" of a Candidate or Party Unless They Are Acting as Such

Alternatives 2-A and 2-B for proposed new paragraph (c)(1) define a coordinated communication by a corporation or labor organization as one made "[a]t the request or suggestion of, or authorized by, the candidate, the candidate's authorized committee, a party committee or the agent of any of the foregoing ...." The underscored language, however, would embrace a situation in which a party committee and a corporation, incorporated organization or labor organization use a common vendor—for example a media consultant—who "suggests" or "authorizes" a communication by the corporation, organization or union, in the course of performing services for that corporate or union client, but without any discussion whatsoever with the party committee.

To be sure, under the Commission's existing regulation, 11 C.F.R. §109.1(b)(4), use of a common vendor raises an automatic presumption of impermissible coordination, because of the vendor's possession of "inside information" about the plans, projects and needs of the candidate or party. The court in the Christian Coalition case, however, held that this regulation is unconstitutionally overbroad, and specifically ruled that "the FEC's 'insider trading' or conspiracy approach is overbroad, at least with respect to expressive coordinated expenditures." 52 F. Supp. 2d at 90.

For this reason, the formulation in the proposed regulation should be revised to make clear that the request, suggestion or authorization of a corporate or union communication by the "agent" of a candidate or party committee results in impermissible coordination only when that "agent" is in fact acting on behalf of the candidate or party committee in making the request, suggest or authorization. Specifically, the phrase "or the agent of any of the foregoing," in paragraph (c)(1), should be revised to read: "or the agent of any of the foregoing acting on behalf and under the express direction of any of the foregoing."

C. Coordination With a Party Without More Should Not Result in an In-Kind Contribution to a Candidate

The Commission's current regulations do not make clear whether coordination by a corporation or labor union with a party committee, of a communication including a clearly identified candidate, results in an in-kind contribution to the party committee, the candidate or both. The Commission should avail itself of this rulemaking proceeding to clarify this issue. In the DNC's view, if a corporation or labor organization coordinates only with a party committee, and not with the candidate referred to in the communication, the result should be an in-kind contribution to the party committee, not to the candidate. Depending on the content of the communication, of course, the costs may also count as an in-kind contribution from the party to the candidate, subject to the limits of section 441a(a) and 441a(d).

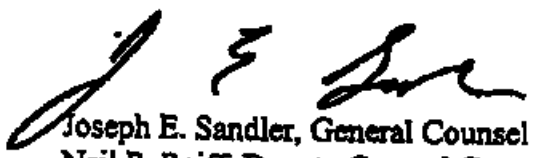
III. Coordinated Party Expenditures

In the SNPRM, the Commission raises the question of whether the standard for coordination proposed in the SNPRM "should be applied to political party expenditures for general public political communications that are coordinated with particular candidates." The DNC believes that the standard for coordination proposed in this SNPRM should not be applied to such political party expenditures.

As explained in the comments submitted by the Democratic national party committees in the separate rulemaking proceeding addressing this matter, party committees have a unique relationship with their candidates. The very nature of a party committee requires that the party engage in ongoing communication and coordination with its candidates. Although the decision in Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) bars the Commission from imposing an automatic presumption that a party committee is incapable of making independent expenditures, a heavy burden should be placed on party committees to demonstrate that any communication they make that includes a clearly identified candidate has not been in some way coordinated with that candidate. The nature of that burden should be addressed in the separate, ongoing rulemaking proceeding addressing the standard for determining coordination between party committees and candidates.

Of course, the fact that virtually all party communications identifying a candidate should be found to be coordinated with the candidate does not mean that the costs of all such communications should be treated as an in-kind contribution to the candidate. As explained in the DNC's comments submitted in the Public Financing rulemaking, the Commission should replace the "electioneering message" standard with a more workable content standard, such as that suggested in those comments and in section I(A) above, to distinguish those coordinated party communications that count as in-kind contributions from those which do not.

Respectfully submitted,



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Dated: January 24, 2000