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From: *Robert F. Bauer* Date *January 24, 2000*

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January 24, 2000

Via Facsimile and U.S. Mail

Rosemary Smith, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, NW – Sixth Floor
Washington, DC 20463

Re: Supplemental Notice of Proposed Rulemaking Re: General Public Political Communications Coordinated with Candidates

Dear Ms. Smith:

The Democratic Senatorial Campaign Committee ("DSCC") and the Democratic Congressional Campaign Committee ("DCCC") (collectively the "Committees") hereby submit these comments in response to the Commission's Supplemental Notice of Proposed Rulemaking Re: General Public Political Communications Coordinated with Candidates, 64 Fed. Reg. 68,951 (Dec. 9, 1999). The Committees request an opportunity to testify at the hearing scheduled for February 16, 2000.

The proposed rules contained in the Supplemental Notice represent the Commission's latest attempt to address non-express advocacy speech. Taking its cue from dicta contained in FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999), the Commission proposes to regulate what it terms "General Public Political Communications." The proposed rules raise constitutional issues which will affect any rulemaking initiative of this kind. The Commission should narrow the proposed regulations to be clearer and more certain. Finally, if the Commission does impose new restrictions on political speech it should not unduly burden political parties vis-a-vis other participants in the political process.

[04005-0001/DA003670.872]

1. The Commission's Proposed Rules Are Not Likely To Pass Constitutional Scrutiny

In April 1997 Attorney General Janet Reno clearly articulated the position of the United States regarding the coordination of political advertising. In a letter to Senator Orrin Hatch, Attorney General Reno wrote succinctly that, "[w]ith respect to coordinated media advertisements by political parties . . . the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message." Letter dated Apr. 16, 1997 from Attorney General Janet Reno to the Honorable Orrin G. Hatch.

Earlier this year, this Commission unanimously rejected the Audit Division's recommendation that millions of dollars of non-express advocacy advertisements sponsored by the Democratic and Republican Parties be treated as excessive in-kind contributions to the Clinton/Gore and Dole/Kemp campaigns. Four current commissioners wrote that "[e]ven in the context of coordinated, or presumably coordinated, communications . . . the Commission may not ignore . . . constitutional requirements." D. Wold, et al., Statement of Reasons for the Audits of Clinton/Gore '96 and Dole/Kemp '96, at 6 (June 25, 1999). The fact that this is the *latest attempt* at regulating non-express advocacy speech is significant in light of the nearly universal rejection similar Commission efforts have met. See, e.g., FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986); Clifton v. FEC, 114 F.3d 1309, 1312 (1st Cir. 1997); Maine Right-to-Life Comm. v. FEC, 98 F.3d 1 (1st Cir. 1996); FEC v. Christian Action Network, Inc., 92 F.3d 1178 (4th Cir. 1996); Foucher v. FEC, 928 F.2d 468, 471 (1st Cir. 1991); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (en banc); Right-to-Life of Duchess County v. FEC, No. 97 Civ. 2614 (SHS), 1998 WL 186905 at *5 (SDNY June 1, 1998); FEC v. National Org. for Women, 713 F. Supp. 428, 435 (D.D.C. 1999); FEC v. American Fed'n of State, County & Mun. Employees, 471 F. Supp. 315, 316-17 (D.D.C. 1979).

As the courts, the four Commissioners, and Attorney General Reno recognized, the First Amendment imposes significant restrictions on the powers of the Commission to regulate political speech. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976). Indeed, it is well settled that in order for a restraint on speech to withstand constitutional scrutiny, it must be narrowly tailored and serve a compelling governmental interest. "Preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985).

There are good reasons why the Commission must approach carefully restrictions on political party non-express advocacy and the coordination of such advocacy with candidates. As national political party committees, the DSCC and DCCC are constantly developing and promoting legislative policies and agendas. Not surprisingly, many of these positions originate with the Party's candidates and elected officials. The FEC should be careful not to try to prohibit political parties from coordinating their issue agendas with their leadership. The right of political parties to develop and discuss issue agendas is fundamental to the First Amendment and cannot be abridged through the type of ad hoc Executive Branch regulation offered here.

2. The Commission's Proposed Rules Do Not Provide Clear Guidance with Respect to those Activities that Are and Are Not Permissible.

Even if constitutional, the Commission's proposed regulations raise troublesome issues because they fail to provide sufficiently concrete guidance to political parties. As Judge Green stated in Christian Coalition, "First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents . . . ." 52 F. Supp. 2d at 91. In formulating her own standard for defining "coordination," Judge Green recognized that it

> must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative quid pro quo palpable without chilling protected contact between candidates and corporations and unions.

Id.

The proposed definition of "coordination" does not meet the test. For example, section 100.23(c)(3) of the proposed regulations would define coordination to include "substantial discussion or negotiation" between the advertisement's sponsor and a candidate's campaign. Yet, the regulations fail to clearly define what is meant by "substantial." Is substantial based upon the number of "discussions" or their length? Do "negotiations" become substantial based upon their intensity or complexity? The proposed regulations raise as many questions as they answer.

Numerous courts, including the Supreme Court, have held that "standards of permissible statutory vagueness are strict in the area of free expression." NAACP v. Button, 371 U.S. 415, 432 (1963). Bright-line rules in the area of First Amendment

speech are favored because "[w]here a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 109 (1972) (notes, internal quotations, and citations omitted).

Therefore, the Committees urge the Commission to adopt a clearer, more bright-lined approach. Specifically, at least with respect to political parties, the Committees suggest that the Commission adopt a standard of coordination based solely upon the ultimate control over the public communication. This proposed rule is similar to the rule set forth in proposed section 100.23(c)(2) – except it would make the rule conjunctive rather than disjunctive. In other words, a contribution would only be found in those circumstances where the communication's sponsor did not retain ultimate control over the development and airing of the public communication.

Such a rule would alter section 100.23(d) to make explicit that consultation between a campaign and a party regarding the communication is not impermissible. As long as ultimate control rests with the party, mere consultation (even regarding non-public information) should not violate the law.

As noted above, the primary advantage of this standard – allowing consultation but not control – is that it is easily applied and therefore is easily followed. It leaves relatively little uncertainty with respect to what conduct is and not permissible. It is also narrowly drawn and minimizes the burden placed on the First Amendment. The Committees therefore respectfully request that in lieu of the definition of coordination offered by the Commission in its proposed rule, it substitute the bright-lined approach offered by the Committees.

3. Any New Rule Governing the Coordination of Non-Express Advocacy Issue Speech Should Not Disadvantage Political Party Committees

Among the issues addressed in the Notice of Proposed Rulemaking is whether the same standard of "coordination" should apply to party committees as applies to labor unions and corporations. As the Commission knows, the DSCC and the DCCC filed the original request for a rulemaking following the 1996 Supreme Court decision in Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). However, that Petition for Rulemaking addressed a very different issue – the definition of independent in the context of "independent expenditures." Obviously the standard of "coordination" for

purposes of non-express advocacy public communications is considerably less stringent than the level of independence necessary for independent expenditures.

Without addressing the standards that should apply to independent expenditures, or expenditures by corporations or unions, the Committees feel strongly that candidates and officeholders should be free to consult and discuss with their party all aspects of the party's issue agenda, including how that issue agenda will be promoted, so long as ultimate control over the agenda remains with the party.

Finally, the Supreme Court in Colorado Republican made clear that the Commission may not promulgate regulations that facially discriminate against political party committees. Therefore, whatever treatment is offered labor unions and corporations regarding the standard of "coordination," party committees, and party committees should enjoy at least as much latitude, and likely more.

Very truly yours,

Robert F. Bauer
Judith L. Corley
Marc E. Elias
Counsel to the DSCC and DCCC

communication is suspect; and every political speaker is a potential lawbreaker.

While the intent of the proposed regulation is to narrow the definition of coordination, it still falls short is some critical respects, while the proposed regulations are salutory in others. The James Madison Center for Free Speech urges the Commission to complete its rulemaking by making further changes in the proposed rules consistent with these comments.