Republican
National
Committee

Counsel's Office

December 17, 1999

Ms. Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Ms. Smith:

These comments on the Federal Election Commission's ("the Commission") Notice of Proposed Rulemaking ("Notice"), 64 Fed. Reg. 68951 (proposed December 9, 1999) (to be codified at 11 C.F.R. pt. 100.23), regarding General Public Political Communications Coordinated with Candidates, are submitted on behalf of the Republican National Committee ("RNC").

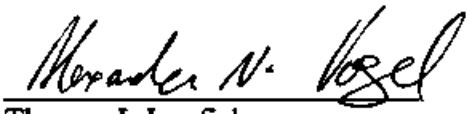
The Notice is a continuation of a long series of rulemaking proceedings addressing the issue of coordination. In response to a Notice of Proposed Rulemaking, 62 FR 24367 (1997) (proposed May 5, 1997), the RNC submitted detailed comments on the issue of coordinated party expenditures. (*See attached*). The RNC submitted additional comments on the issue of coordinated party expenditures in 1998, in response to another Notice of Proposed Rulemaking, 63 Fed. Reg. 69524 (1998) (proposed December 16, 1998). (*See attached*).

The latest Notice does not directly address the issue of coordinated party expenditures. However, the Notice does solicit comments on whether the Commission should revisit this area in the current rulemaking or continue to hold previous rulemaking in abeyance pending further judicial proceedings in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 41 F.Supp.2d 1197 (D. Colo. 1999).

In response to this invitation, the RNC resubmits its previous comments on coordinated party expenditures here. The RNC is opposed to revisiting the issue of coordinated party expenditures in the context of this rulemaking – a proceeding that involves a proposed regulation that specifically excludes political parties from its scope. Further, we believe that this issue has been fully addressed in the May 5, 1997 and December 16, 1998 coordinated party expenditure rulemakings and comments thereto.

At the very least, the Commission should continue abatement of these rulemaking proceedings regarding coordinated party expenditures pending further judicial proceedings in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 41 F.Supp.2d 1197 (D. Colo. 1999). In addition, the RNC stands by the statements in its previously submitted comments, urging the Commission not to issue any regulations that unconstitutionally chill or abridge the First Amendment rights of political parties.

Respectfully submitted,



Thomas J. Josefiak
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Republican
National
Committee

Counsel's Office

February 1, 1999

Ms. Susan Propper
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments of the Republican National Committee on Notice of Proposed Rulemaking regarding the public financing of presidential elections and national nominating conventions.

Dear Ms. Propper:

These comments on the Federal Election Commission's ("the Commission") Notice of Proposed Rulemaking ("NPRM"), 63 Fed. Reg. 69524 (1998) (to be codified at 11 C.F.R. pts. 9003, 9004, 9007, 9008, 9032, 9033, 9034, 9035, 9036 & 9038) (proposed December 16, 1998), regarding the public financing of presidential primary and general election candidates and national nominating conventions are submitted on behalf of the Republican National Committee ("RNC").

INTRODUCTION

Under this NPRM, the Commission contemplates extensive revisions to the public financing regulations applicable to presidential campaign committees and national nominating conventions. Although some of the proposed changes are administrative or technical in nature, many are substantive and will have a significant impact on presidential elections. As a result, the Commission must consider the effect of these regulations on the presidential election process.

Such analysis requires consideration of the Commission's authority under the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. § 431 et seq, the Presidential Election Campaign Fund Act ("the Fund Act"), 26 U.S.C. § 9001 et seq., and the First Amendment jurisprudence of the federal courts. Even after consideration of these threshold questions, the Commission still faces complex issues arising from the 1996 presidential election cycle which are far from resolution and may ultimately require disposition by the courts.

When considering whether to adopt any of the proposed regulations contained in the NPRM, the RNC respectfully suggests that the Commission should keep the following goals in mind. First, the Commission should seek to simplify the procedures applicable to presidential campaign committees and national nominating conventions. Second, the Commission needs to clarify its interpretations of these regulations and apply "bright line" distinctions wherever possible so that the regulated community has clear notice of the requirements and prohibitions contained in the regulations. Third, the Commission should provide the regulated community with flexibility under the public financing laws. Application of these suggestions would foster and strengthen compliance by the regulated community with these complex, and sometimes confusing, regulations.

Unfortunately, the Commission has not advanced these goals in prior rulemakings. The Commission typically initiates changes to the regulatory regime in reaction to issues from previous election cycles. As the history of presidential elections and national nominating conventions demonstrates, campaign financing issues are not consistent from election cycle to election cycle. This Commission practice has produced more complex regulations, has expanded the bureaucratic obligations of the regulated community, and has created greater confusion rather

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than clarity. As stated before, the Commission should facilitate the regulated community's compliance efforts by simplifying and clarifying these regulations.

This comment discusses the following proposed regulations in the NPRM.

First, the proposed regulations applicable to national nominating conventions fail to take into consideration the important distinction between the functions and purposes of host committees and national nominating conventions. While the RNC supports the Commission's proposed regulations that would permit local banks to make donations to host committees, the RNC opposes the proposed regulations applicable to donations to host committees from individuals outside the Metropolitan Statistical Area ("MSA"). The RNC also opposes the proposed regulation applicable to permissible host committee expenses.

Second, the RNC strongly opposes the proposed regulations relating to national party committee issue advocacy communications. The proposed regulation violates the First Amendment because it runs afoul of the express advocacy standard that the courts have held is necessary to save FECA and Commission regulations from constitutional infirmity. While the RNC supports the position advanced in the proposed regulation regarding to the timing of coordinated expenditures by national party committees on behalf of the party's presidential candidate, the RNC believes the proposed regulation is unnecessary because it reflects the current state of the law. The RNC strongly opposes the proposed regulations applicable to polling, consulting and employee salaries and expenses.

Finally, the RNC strongly opposes any regulations that do not provide presidential campaign committees with the flexibility necessary to conduct efficient campaigns.

DISCUSSION

Proposed Regulations Applicable to National Nominating Conventions

1. Preliminary Comments.

At the outset it is important to note that the RNC has already selected the 2000 Convention site, secured the commitments of the host parties and executed a final agreement with Philadelphia 2000. These commitments and agreements were negotiated and finalized under the current regulatory scheme. Any changes to the current regulations would be disruptive and manifestly unjust. Therefore, if the Commission goes forward with any modification of the convention regulations, the RNC urges the Commission to defer the effective date until after the 2000 election cycle.

In addition, when deciding whether to adopt the provisions of the NPRM applicable to national nominating conventions, the Commission must consider the distinct difference between the goals and purposes of host committees and national nominating conventions. Host committees expand commerce and attempt to maximize the economic benefits of hosting a national nominating convention, in addition to promoting the host city as a premier convention site, business center and tourist attraction. Host committees are not interested in selecting the party's nominee. In fact, the non-profit tax status of most host entities strictly prohibits their political involvement. Also, historically the RNC's national nominating conventions have not been held in cities with a Republican administration, which further illustrates the nonpartisan functions and purposes of host committees.

To this end, the Commission should avoid unnecessary intrusion into the receipts and disbursements of cities and host committees. It should avoid increasing the bureaucratic maze for host cities, which are already confused by complicated Commission regulations. This

confusion is due in part to the Commission's inconsistent interpretation of its own regulations. Until recently, the Commission appeared to interpret its convention regulations so as to provide national nominating conventions and host committees with some latitude. However, with respect to the 1996 national conventions, the Commission appears to be applying a stricter standard to the convention-related activities of cities and host committees. The Commission must avoid sending mixed signals. The RNC believes that the Commission should adopt the presumption that the motives and functions of the city and the host committee are to promote the city and not to influence federal elections.

2. Host Committee Contributions from Local Branches of National Banks.

Current regulations allow local corporations to donate to host committees. However, the regulations prohibit similar donations from local branches of national banks unless those donations are made through a holding company. The statutory language prohibiting banks from involvement in national conventions is the same as the language applied to other corporations. However, the Commission has already concluded that, except for national banks, local corporate donations to host committees are permissible under the FECA.

There is no rationale for the disparate treatment of local branches of national banks. Local branches of national banks have the same interest in promoting the city and supporting commerce that all local businesses share. In the interest of consistency, the Commission should find that the prohibitions of 2 U.S.C. § 441b relating to national banks do not apply to bank donations to cities or host committees. Such donations are to non-profit, city related entities whose purpose is to generate economic benefit and promote the city. These local bank donations are not made to a political committee under Commission jurisdiction.

The arbitrary distinctions outlined above lead inevitably to the question of whether the Commission has any legitimate interest in, or jurisdiction over, donations made by any business, regardless of geographic location. Assuming that the funds are (1) donated to the host committee or city only, (2) used to promote the city's economic interests, and (3) not transferred to a political committee, then the Commission has little rationale for distinguishing between local corporations and any other corporation under 2 U.S.C. § 441b. It is unreasonable for the Commission to assume that only local businesses have an interest in the economic success of the host city. Many businesses not technically within the geographic boundaries of the MSA have legitimate business interests in supporting a host city. They may be investors in city projects; businesses in state who expect economic benefit from increased city commerce, or vendors expecting increased revenue from convention sales.

3. Host Committee Contributions from Individuals.

Since the argument for eliminating FEC restrictions on corporate donations to cities and host committees is valid, then the RNC's opposition to restrictions on individual donations to a host committee or city fund is even more compelling. Contrary to the Commission staff's interpretation of current rules (steeped in an overemphasis of advisory opinion dicta), the RNC respectfully submits that the current regulations place no restriction on where an individual must live in order to contribute to a host committee. This restriction should not be adopted and the current regulations should not be interpreted in such a manner.

Current Commission regulations clearly provide that a business must be local in order to contribute to a host committee. No such qualifier is found before the term "individual" in the language of that same regulation. Furthermore, the statutory restrictions applicable to corporate expenditures "in connection with" conventions under 2 U.S.C. § 441b are not applicable to

individuals. The Commission's jurisdiction over individuals applies only to contributions to federal candidates and federal political committees, not to donations to non-profit host committees or city funds. Again, there are many reasons why individuals may want to support the economy of the city by contributing to a host committee or city fund. The Commission simply should not interfere. Finally, a distinction between local and non-local individuals inherently lacks any fair or unambiguous application. "Local" may include, among other things, domicile, place of voting residence, primary residence, or primary place of work.

In summary, the RNC respectfully submits that the FEC has no jurisdiction over such individual donations under the FECA or the Fund Act. Therefore, the Commission's convention regulations should not be amended to add "local" prior to "individual," thereby allowing only those who reside in the metropolitan area of the convention city to contribute to the city's host committee. There are compelling reasons why an individual residing outside the metropolitan area of the convention city would want to support the local economy of the host city. Similarly, the Commission has no statutory basis to limit an individual's choice to support a city's host committee. These donations are not used to influence a federal election and they are not made to a political committee, as defined by FECA.

4. Permissible Host Committee Expenses.

The Commission suggests that the current regulations should be amended to clarify the types of expenses a city or host committee may make. The current regulations are adequate and provide the flexibility necessary to accommodate the unique circumstances found in different host cities. For example, a city may have a convention venue that is a state-of-the-art facility with all the necessary structural, lighting and sound requirements in place to produce a national nominating convention. However, other cities may have venues that require extensive

reconstruction to meet the requirements of holding a national nominating convention. Consequently, the needs of a convention and the corresponding necessary host committee commitments vary from city to city. The current regulations, in the RNC's view, provide the flexibility to address those differences. The proposed changes, however, appear to restrict rather than distinguish the goods and services that may be provided by a host committee. Therefore, the RNC strongly opposes the contemplated restrictions. Flexibility should be the touchstone of the Commission's convention regulations. The Commission should avoid creating more bureaucratic and unnecessary Commission oversight of host committees.

As discussed above, the motivation of the host committee and the city in providing goods and services to the convention is to promote the city and encourage its economic development. Their purpose and function is not to elect the next president. Therefore, the only restrictions that Commission regulations should place on cities and host committees should be related to their involvement with developing the convention's political message.

In addition, there is a difference between developing the message delivered at the convention and providing the facilities and technology for disseminating that message. For example, a host committee should not absorb the cost of producing a video introduction of the presidential nominee (political message), but should be able to continue to pay for the lighting, sound, and video production equipment necessary to broadcast that video at the convention (facilities and technology), whether in the convention hall or to a nationwide media broadcast. The Commission, therefore, should not attempt to allocate between lighting costs associated with transmitting the video inside the convention hall and broadcasting outside the venue.

In short, the regulations relating to categories of permissible national party and host committee disbursements are adequate in their current form. In light of swiftly changing

practices and constant technological advances, any further rulemaking with respect to these categories would lead only to distinctions that are arbitrary and impractical, if not technologically obsolete.

Proposed Regulations Applicable to National Party Committees

1. Preliminary Comments.

The RNC urges the Commission to recognize that the proposed regulations pertaining to national party committee communications will, if adopted, severely chill the fundamental First Amendment rights of national party committees. The First Amendment seeks to guarantee that participants in the political process, including political party committees, have the right to engage in robust political debate. Any proposed regulation of political communications must be guided by the strict express advocacy test that the courts have held is necessary to preserve FECA and Commission regulations from constitutional infirmity. Thus, the RNC urges the Commission not to adopt any proposed regulation that would directly or indirectly chill or abridge the fundamental constitutional rights of national party committees to participate in the political process.

The RNC also opposes the proposed regulations affecting the technical operations of a national party committee, such as the timing of coordinated expenditures, polling and consulting costs, and employee salaries and expenses. These proposed regulations demonstrate a failure to understand the traditional and proper operation of a national party committee.

2. Proposed Regulations Allocating Party Issue Advertising to Candidates.

The proposed regulation, which is still in the conceptual phase, would regulate a national party committee issue advocacy communication as a coordinated expenditure on behalf of the party's presidential nominee if the advertisement clearly identifies a presidential candidate,

unless the communication satisfies a "safe-harbor" exception. The safe harbor exception would apply only if the three conditions are satisfied: (1) the advertisement is "focused on a legislative or public policy issue;" (2) the advertisement is addressed to an audience that would "normally be affected by the legislation or proposal;" and (3) the mention of a candidate in the advertisement is "incidental" and "related" to the candidate's role as sponsor, proponent or leading opponent to the legislation or proposal. In addition, costs for a political communication by a political party that clearly identifies a presidential candidate of another party (except when it satisfies the safe harbor conditions) would be considered expenditures on behalf of the sponsoring party's nominee or eventual nominee, regardless of whether such nominee accepts public financing.

The RNC strongly opposes this proposed regulation because it runs afoul of the strict express advocacy test as defined by the courts. The proposed regulation is unconstitutionally vague and would make it virtually impossible for party committees to know in advance which advertisements were subject to contribution and expenditure limits and which were not. For example, there is no indication of how a party committee is to determine whether an advertisement is sufficiently "focused on a legislative or public policy issue" to satisfy the Commission's safe-harbor exception. Similarly, it is unclear how party committees would determine in advance whether the "mention of a candidate"—whatever that is-- is merely incidental to the candidate's role as "sponsor, proponent or leading opponent" of a legislative initiative.

The First Amendment prohibits the Commission from promulgating ambiguous and vague regulations that do not provide the regulated community with clear prior notice as to which communications may be regulated and subject to contribution and expenditure limits.

This proposed regulation vests the Commission with the authority to make subjective determinations as to which communications constitute issue advocacy communications and those that constitute coordinated expenditures on behalf of the party's presidential candidate. Regulations applicable to political communications must be objective and not vulnerable to subjective determinations by the Commission. As the courts have repeatedly held that the express advocacy test is the only standard that passes constitutional muster, the Commission must reject this proposed regulation.

Furthermore, under this NPRM, the Commission appears to be promulgating a rebuttable presumption that national party committee communications that reference a presidential candidate who has accepted public funding are coordinated expenditures subject to the limitations and prohibitions established by FECA and Commission regulations. This rebuttable presumption applies unless the communication satisfies the proposed three-part "safe-harbor" exception. As shown above, the Commission's proposed safe-harbor exception is unconstitutionally vague. Even if it did satisfy vagueness concerns, this presumption would result in the unconstitutional abridgment of a national party committee's fundamental First Amendment right to engage in the discussion of important public issues during the presidential election time period.

Further, the Commission does not have the statutory authority to adopt this proposed regulation. As applied to national party committees, FECA is limited almost entirely to federal election activity. See 2 U.S.C. §§ 431(8) (defining "contribution" as limited to federal election activity) & 431(9) (defining "expenditure" as limited to federal election activity); see, e.g., Common Cause v. FEC, 692 F. Supp. 1391, 1395 (D.D.C. 1987) ("It is clear from the language as a whole that FECA regulates federal elections only."). Further, because this proposed

regulation gives FECA an unconstitutional construction under the First Amendment by severely chilling the fundamental First Amendment rights of national party committees, the Commission's construction of FECA will not be afforded deference by the courts. See, e.g., DeBartolo v. Florida Coast Bldg. & Constr. Trade Council, 108 S. Ct. 1392, 1397 (1988) (principles of deference must give way to the principle that statutes are to be read to avoid constitutional problems). Thus, the courts will not afford deference to the Commission's construction of FECA in support of this proposed regulation since the proposed regulation gives FECA an unconstitutional construction and is not supported by the language of FECA.

In addition, unless a political communication contains express advocacy as defined by the courts, its costs cannot be allocated to a federal candidate as a contribution or a coordinated expenditure. See, e.g., Buckley v. Valeo, 424 U.S. 1, 44 n. 52 (1976) ("This construction [restricts] the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat such as 'vote for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) ("Buckley adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons."); FEC v. Christian Action Network, 110 F.3d 1049, 1051 (4th Cir. 1997) ("[T]he Court held that the Federal Election Campaign Act could be applied consistently with the First Amendment only if it were limited to expenditures for communications that literally include words which in and of themselves advocate the election or defeat of a candidate.").

In sum, the RNC opposes this proposed regulation because it runs afoul of the strict express advocacy requirement that the courts have held is necessary to apply FECA's regulation of political communications consistent with the constitution. Adoption of this proposed

regulation will waste Commission resources litigating the constitutionality of this provision. When adopting proposed regulations that affect fundamental First Amendment rights, the Commission should adopt bright lines consistent with the express advocacy test. In so doing, the Commission will preserve the constitutionality of its regulations and provide the regulated community with clear notice of the kinds of activities and communications that are subject to regulation and limitation.

3. Proposed Regulation Regarding Timing of Coordinated Expenditures.

Under this proposed regulation, national party committees would be permitted to raise federal funds and make coordinated expenditures on behalf of a presumptive nominee when, in the party's determination, the identity of the nominee is clear. Any coordinated expenditure made on behalf of the nominee would count against the party's general election coordinated expenditure limit.

Although the RNC supports this position, the RNC believes that this is the current state of the law based upon Commission advisory opinions. Therefore, the regulations do not need revision in order to effectuate this interpretation. The Commission took the position long ago that party committees could make coordinated expentitures prior to the actual selection of a nominee. See, e.g., FEC Advisory Opinion 1984-15 (permitting the RNC to make coordinated expenditures on behalf of its presumptive nominee before the national nominating convention.); see also FEC Advisory Opinion 1985-14. In Advisory Opinion 1984-15, the Commission ruled that "nothing in the Act, its legislative history, Commission regulations, or court decisions indicate that coordinated party expenditures must be restricted to the time period between nomination and the general election." The Commission clearly and correctly noted that "[w]here a candidate appears assured of a party's presidential nomination, the general election campaign,

at least from the party's perspective, may begin prior to formal nomination." Id. Thus, national party expenditures in connection with that campaign are possible. Id. Also, since a party committee's coordinated expenditures are limited by law, irrespective of when expenditures are made, the party committees should be allowed to decide when to spend those resources.

The Commission should also be aware that RNC Rules prohibit RNC candidate expenditures in the primary. Therefore, until a candidate is the de facto presidential nominee (has sufficient delegates to be nominated at the national convention) the RNC is precluded from supporting a presidential candidate under its party rules. In addition, the ability to make coordinated expenditures is not predicated on the acceptance of public financing by presidential campaigns. In fact, party committees may make these expenditures on behalf of all federal candidates.

It must be reiterated that spending for issue advocacy advertisements and other communications that do not contain express advocacy or that are not presidential campaign committee bills paid for by the national party committee do not and cannot be counted against the party's coordinated expenditure limits for the general election. See infra part 3 (discussing that the Commission cannot regulate party committee communications consistent with the First Amendment if the communications do not contain express advocacy).

4. Polling, Media and Consulting Services.

The Commission seeks comments as to whether the regulations should be amended to treat joint polling, media production, and consulting services as coordinated expenditures. The RNC believes that the current regulations are appropriate. Current regulations relating to polling are probably the most definitive in assessing the value of a poll and how polls should be allocated among their recipients. Similarly, current allocation rules for media production and

consulting services also appear to be adequate. The RNC believes that there is no need for additional or expanded regulations. Furthermore, if the Commission proposes that all of the costs of joint activities must be assessed to the nominee's presidential campaign, then the RNC strongly opposes the proposal. Such a proposal would contradict the Commission's long standing policy that recipients pay their allocable share of the costs.

5. Transfer or Sharing of Employees.

The Commission also proposes treating the salary and expenses of any employees hired by the RNC from an active presidential campaign as expenditures attributable to that presidential campaign committee. The RNC strongly opposes such a rule. This sort of Commission intrusion will discourage people from getting involved in the political process because of questioned motivation and potential bureaucratic challenges. The standard applied to any possible allocation should be what the employee actually does during the course of their employment, not his or her prior work history or prior place of employment. If the RNC were to undertake the work of a campaign, such activity would be treated as an in-kind contribution or expenditure, or would be reimbursed by the campaign. In any case, the value of such services would necessarily include staff time.

In addition, as stated above, the RNC is precluded under the national party rules from making primary expenditures. See infra part 3 (discussion of the prohibition under RNC rules regarding RNC involvement in primary election on behalf of any candidate.).

Proposed Regulations Applicable to Presidential Campaign Committees

1. Primary and General Election Expense "Bright Line" Distinction.

This proposed regulation would apply to expenditures for goods and services that are used by a candidate in both the primary and general elections. With some exceptions,

expenditures for goods and services that may benefit both the primary- and general-election campaigns must be attributed on the basis of whether they were used before or after the candidate received the nomination. This proposed regulation also contains language addressing the costs of campaign offices. Under this proposed regulation, the "exclusive use" definition would be changed to apply to periods when the campaign office is used only by persons working "full time" on general election campaign preparations. The RNC opposes this proposed regulation.

Initially, it is important for the Commission to consider a brief history of the bright line distinction between primary and general election expenses. In the 1984 Presidential Audits, the Commission adopted a bright-line test to distinguish between primary and general election expenditures. Namely, expenditures prior to nomination at the convention were counted as primary expenses, unless specifically made for post-convention activity. Expenses made after the convention were treated as general-election expenses. For example, if the presidential campaign purchased media time prior to the national convention for advertising to be aired after the convention, those expenses were classified as general-election expenses. The Commission appeared to depart from that approach in the 1992 election cycle, only to reinstate the 1984 standard in the 1996 regulations.

The Commission's current proposal of a "benefit derived" standard serves only to cloud the previous bright line test. The proposal produces great uncertainty for campaigns and provides the Commission total discretion to allocate between primary and general election expenses. The standard is not only subject to varying interpretations from cycle to cycle, but more disturbing, is subject to varying applications between campaigns in the same cycle. To

avoid greater ambiguity, the Commission should preserve its original bright line standard. The RNC urges the Commission not to adopt the proposed change.

2. Allocation of Winding Down Costs.

The purported purpose of this proposed regulation is to clarify winding down costs; specifically, whether all salary and overhead costs incurred after the candidate's nomination must be attributed to the general election campaign, including those associated with winding down the primary campaign. Under this proposed regulation, salary and overhead expenses may not be treated as winding down costs until after the end of the expenditure report period, which is thirty days after the general election.

The RNC opposes this proposed regulation. The chief result of this proposed regulation is that primary election expenditure limits for presidential candidates who accept primary matching funds are reduced. Such a rule would extend the primary campaign period for an additional thirty days after the date of the general election, effectively acting as a "success penalty" for primary candidates who win their party's nomination. It is immaterial whether a candidate wins the nomination or not, as each candidate's primary committee must incur wind down costs. Moreover, no costs incurred by a candidate's primary committee after the nomination can influence a primary election. Therefore, the Commission has no basis to characterize a primary expense incurred after nomination as anything other than a wind down cost and the RNC objects to any other designation.

3. Pre-nomination Formation of a GELAC Fund.

The RNC supports the Commission's fifth proposed alternative in its effort to amend the current rules regarding the formation of a General Election Legal and Accounting (GELAC) fund. Under the fifth approach, a presidential primary candidate is permitted to establish and

raise funds for a GELAC at any time. Presidential primary candidates who do not win their party's nomination would not have to return all of the funds that they raise. Rather, they could offset their fundraising and administrative expenses and would only need to refund, or obtain donor authorization for other permissible uses of, the funds remaining in their account as of the date their party selects its nominee.

The fifth proposal wisely allows any presidential primary candidate to establish and raise money at any time for their GELAC fund. Further, it encourages compliance and contemplates that not all moneys contributed to a GELAC fund may be returned. Under this approach, candidates are only obligated to refund, or obtain donor authorization for other permissible uses of, the amount in their GELAC account at the time the party selects its nominee.

4. Joint Primary/GELAC Solicitations.

The RNC supports the Commission's proposal, which would continue to allow presidential campaign committees to allocate solicitation expenses between the primary committee and GELAC. However, the RNC believes that this proposal should be expanded so that the primary committee and GELAC are permitted to allocate all of the costs incurred in connection with fund-raising such as event and travel costs, and not just the costs of solicitation. This assumes that presidential primary candidates who are not selected as the nominee will only have to refund, or obtain other donor authorization for, funds remaining in their GELAC account and not the total amount raised for GELAC.

5. Net Outstanding Campaign Obligations – Capital assets.

The RNC believes that, as applied to both the primary and the general election campaign committees, depreciation figures for capital assets should be based on fair market value, and not arbitrary percentages imposed by Commission regulations. The Commission should not penalize

a primary presidential election candidate by imposing an arbitrary depreciation percentage on the sale of assets from the primary campaign to the general election campaign. This regulation would produce an absurd result. For example, the primary election candidate who wins the nomination, and thereby becomes the political party's general election candidate, could purchase the capital assets of a losing primary election candidate at fair market value. However, if the same general election candidate purchased the capital assets from his own primary election campaign, his general election campaign would then have to pay at least sixty percent (60%) of the purchase price of the capital assets. Thus, the RNC believes that the regulations would provide the most clarity and notice to candidates by allowing primary and general election campaigns to use fair market value as the depreciation figure for capital assets.

6. Transportation and Services Provided to the Media.

The RNC believes that presidential campaigns should be permitted to bill the media for legitimate costs incurred for the benefit of, or at the request of, the media since the campaign committees would not have otherwise incurred such costs. Such legitimate costs include, but are not limited to, security services for the media, sound and lighting equipment, press risers and camera platforms, carpeting, bunting, skirts, railings, and electrical service for the media platforms.

7. Pre-Nomination Vice Presidential Committees.

Under this proposed regulation, the payment of expenses incurred in connection with seeking the nomination of a political party for the office of Vice President are considered expenditures by the candidate who is nominated for President. This proposed regulation would apply only to the campaign expenditures of the candidate who becomes the Vice Presidential nominee of the party, and not to the others who are not nominated.

The RNC strongly opposes the proposed regulation. Vice presidential committees are permitted by FECA and are not publicly financed. These committees are entirely separate from any presidential committee until the political party nominates the vice presidential candidate at its convention. The Commission simply has no authority to retroactively allocate to the presidential nominee's campaign the expenditures made by the vice presidential candidate while seeking his or her party's nomination as vice president.

By allocating the expenditures of the vice presidential primary candidate to the presidential nominee's committee, the presidential campaign committee could inadvertently exceed the matching fund expenditure limits. Further, if the expenditures are allocated to the presidential nominee's primary campaign, then the contributions must be allocated as well. Therefore, individuals who contribute to the vice presidential candidate's committee risk exceeding their primary contribution limits to a nominee's primary committee if their combined donations to both the vice presidential committee and the nominee's committee exceed the FECA limits.

8. Primary Election Legal and Accounting Costs.

Under this proposed regulation, a presidential primary committee can only categorize an amount equal to ten percent (10%) of all operating expenditures for each reporting period as compliance expenses not subject to the candidate's spending limits. This proposed regulation would not permit committees to demonstrate that they have actually incurred a higher amount.

The RNC believes that the current regulations are adequate and, therefore, opposes this proposed regulation. The proposed change is not in the interest of campaign committees or of the FEC as a regulatory body. Campaign committees routinely exceed a ten percent (10%) threshold with respect to compliance costs, and such a rule would only serve as a disincentive for

compliance with FEC regulations and a burden to campaign committees who wish to maintain rigorous compliance standards. Such a rule would encourage campaign committees to consider curtailing compliance efforts that exceed the ten percent (10%) threshold when they lack any mechanism to report and recoup the excess compliance expenses.

9. Modifying the Audit and Repayment Procedures.

The RNC believes that the Commission should revert to its prior regulations regarding audit procedures. Under those rules, after an exit conference, the Commission would consider and modify an interim audit report, and committees would have an opportunity to respond to the interim report prior to the Commission publicly considering the final audit report. The reason for changing past audit procedures was to expedite the process. From the perspective of the RNC, this goal has not been achieved. What is apparent is that there is clear harm done to the regulated community, and to the credibility of the Commission, when the staff exit conference findings are publicly disclosed without prior input from the Commissioners. The record reflects that final audit reports are substantially modified by the Commission, and the Commissioners should have the opportunity to review and revise the staff recommendations prior to their public release.

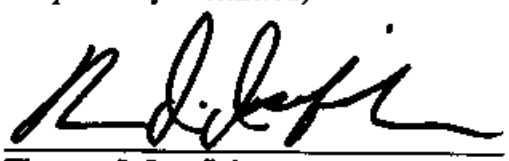
10. Primary Matching Fund Payments.

Credit card contributions received by presidential primary candidates are not eligible for matching funds under the Commission's current regulations. While the RNC understands the Commission's concern that proper documentation and contributor verification must be obtained in order to determine eligibility for matching funds, we would encourage the Commission to re-examine this issue in light of current technology.

CONCLUSION

The foregoing constitutes the comments by the RNC. The RNC respectfully urges the Commission to consider these comments in connection with its deliberations on the matters discussed above.

Respectfully submitted,



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May 30, 1997

Ms. Susan E. Propper
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Ms. Propper:

These comments on the Federal Election Commission's ("the Commission") Notice of Proposed Rule Making ("Notice"), 62 Fed. Reg. 24367 (1997) (to be codified at 11 C.F.R. pts. 100, 104, 109 & 110) (proposed May 5, 1997), regarding independent expenditures and coordinated expenditures made by national, state and local party committees on behalf of federal candidates, are submitted on behalf of the Republican National Committee ("RNC").

The RNC hereby respectfully requests an opportunity to present oral testimony regarding the Notice at an oral hearing to be held on June 18, 1997, at 10:00 a.m.

I. INTRODUCTION

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309, 135 L. Ed. 2d 795, 1996 U.S. LEXIS 4258 (1996) ("*Colorado Republicans*"), the Supreme Court held that political parties have a fundamental right under the First Amendment to make independent expenditures. The Court also held that the Commission's irrebuttable presumption that all party spending is coordinated is unconstitutional. In the wake of this ruling, the Commission has been petitioned to revise its existing regulations governing these expenditures.

As a preliminary matter, independent expenditures and coordinated expenditures are limited to expenditures which expressly advocate the election or defeat of a clearly identified candidate. As such, independent expenditures are not issue advocacy, which the federal courts have repeatedly ruled is constitutionally protected speech that the Commission does not have the authority to restrict. Therefore, any rules promulgated by the Commission governing independent party expenditures must clearly and unambiguously state that the rules are applicable to express advocacy exclusively. The RNC's comments on the proposed rules must be read with the understanding that independent party expenditures, like coordinated party

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expenditures, are limited to communications that include express advocacy and do not include generic get-out-the-vote messages or issue advocacy.

The RNC supports and encourages any Commission efforts to implement the Supreme Court's holding in *Colorado Republicans*. In doing this, it is essential that the Commission follow the tenets laid out by the Court and promulgate clear and unambiguous regulations. The RNC's primary concern with the Commission's proposed rules is that the fundamental First Amendment rights of political parties not be chilled or abridged in any way. The First Amendment seeks to guarantee that citizens have the greatest amount of information possible when determining their positions on the issues of the day and which candidates they will vote for in any election. Political organizations, including political party committees, have the fundamental right to provide that information, independent of any candidate. It is these First Amendment rights that the RNC seeks to preserve, protect and promote with these comments. The RNC believes that citizens must be information-wealthy, and not impoverished, when exercising their right to vote. Accordingly, the RNC supports those Commission regulations that recognize the fundamental right of political parties to communicate through independent expenditures which, in turn, provide voters with the greatest amount of information possible. The RNC's position is consistent with the Supreme Court's First Amendment jurisprudence.

II. INDEPENDENT EXPENDITURES ARE "CORE" FIRST AMENDMENT ACTIVITIES.

A. Under The First Amendment, Expenditures Are Entitled To Greater Protection Than Contributions.

Contribution and expenditure limitations touch the "most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). In *Buckley*, the Court articulated the general principles behind the First Amendment rights of speech and association. "The First Amendment affords the broadest protection to political speech in order to assure (the) unfettered interchange of ideas for the bringing about of political and social change by the people." *Id.* The primary purpose of the First Amendment is to protect the free discussion of governmental affairs and candidates. *Id.* To this end, the Court has consistently stated that our nation has made a commitment "to the principle that debate on public issues and candidates should be uninhibited, robust and wide open." *Id.* (citing *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, "the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we will follow as a nation." *Buckley*, 424 U.S. at 15.

Because of the fundamental nature of the rights affected under the Federal Election Campaign Act of 1971, as amended ("FECA"), the Court in *Buckley* applied "the closest scrutiny." 424 U.S. at 25. Applying strict scrutiny, the Court held that the prevention of corruption or the appearance of corruption are the only "sufficiently important interests . . ." which justify a limitation upon campaign contributions and expenditures. *Id.* at 25-26. The Court also expressly rejected the government's other purported rationales for restricting campaign financing, including equalizing campaign resources and reducing the total amount of

money in politics. 424 U.S. at 48-49 & 56-57. The Court has adhered to this view ever since. See, e.g., *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests identified thus for restricting campaign finances"); *Colorado Republicans*, 1996 U.S. LEXIS 4258 (Kennedy, J., concurring) (same).

The Court in *Buckley* examined separately the need for limiting contributions and expenditures. With respect to independent expenditures, the Court observed that a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by reducing the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. Applying strict scrutiny, the Court held that the prevention of corruption and the appearance of corruption were inadequate to justify FECA's limitations on independent expenditures. *Id.* at 45. The Court reasoned that advocacy of the election or defeat of a particular candidate for federal office is entitled to no less protection than the discussion of general political policy or advocating the passage of legislation. *Id.* at 48. The Court expanded upon this reasoning and rejected the purported governmental interest of equalizing the speech of competing groups when it stated the following:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to "to secure the widest possible dissemination of information from diverse and antagonistic sources. . . .

424 U.S. at 49.

The Court noted that unlike contributions, independent expenditures may not necessarily provide assistance to a candidate's campaign and may in fact be counterproductive. 424 U.S. at 47. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id.* Thus, the Court held that FECA's limitations upon independent expenditures were unconstitutional. *Id.* at 51.

By contrast, the Court in *Buckley* found that a limitation upon how much a person or group may contribute to a candidate or political committee "entails only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 21. Under its test, the Court held that the governmental interests of preventing corruption and the appearance of corruption were sufficiently important to justify the contribution limitations established by the Act. *Id.* at 26-27. The Court reasoned that the contribution limitations focused precisely on the government's interests while "leaving persons free to engage in independent political expression. . . ." *Id.* at 28. The Court further reasoned that the contribution limitations do not undermine to any material degree the robust and effective discussion of political issues and candidates by citizens because such limitations do not affect their ability to make independent expenditures. *See id.* at 28-29.

B. Political Parties Have A Fundamental Right to Make Independent Expenditures.

In the *Colorado Republicans* case, the Court held that independent expressions by a political party are "core" First Amendment activities. 1996 U.S. LEXIS 4258 at 22. The Court found that the Colorado Party's advertisements were independent despite the fact that : (1) the Party's general practice was to coordinate with its candidates; (2) the Party's general practice was to make party assets available to candidates; and (3) the Party chairman was typically involved with candidate campaigns. *See id.* at 14-23.

In determining whether a party expenditure is independent, the Court reasoned that the Commission must look at the particular advertising campaign at issue, and that general party practices are insufficient. 1996 U.S. LEXIS 4258 at 25. "In any case, the constitutionally significant fact, . . . is the lack of coordination between the candidate and the source of the expenditure." *Id.*

Further, the Court affirmed *Buckley's* holding that the only compelling governmental interests which justify limits on contributions and expenditures are the prevention of corruption and the appearance of corruption. U.S. LEXIS 42358 at 25-27. Once again, the Court rejected the governmental purpose of reducing wasteful and excessive campaign spending as an insufficient basis for restrictions on core First Amendment activity. *Id.* at 26. The Court reaffirmed the important and legitimate roles of political parties in American elections. *Id.* at 27.

Finally, the Court admonished the Commission when it stated that "an agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." 1996 U.S. LEXIS 4258 at 32 (citing *NAACP v. Button*, 371 U.S. 415, 429 (1963) (the government cannot foreclose the exercise of constitutional rights by mere labels); *Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963) (State may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations)). Therefore, after *Buckley* and *Colorado Republicans*, it is clear that independent party spending is a protected "expenditure" and not an in-kind contribution subject to limitation. How the Commission chooses to label independent party spending is irrelevant because the nature of the spending, not the government's labels, controls such determination. Party spending is the party's speech alone and not anyone else's. Therefore, under the Constitution such spending is an expenditure and not a contribution.

III. THE COMMISSION SHOULD RECOGNIZE THE UNIQUE ROLE OF POLITICAL PARTIES WHEN ATTEMPTING TO DEFINE COORDINATED PARTY SPENDING.

A. Political parties are different than any other political entities and the Commission's regulations must reflect their unique status.

Major political parties are little more than loose confederations of similarly thinking people. *See, e.g.,* Kirk J. Nahra, *Political Parties And The Campaign Finance Laws: Dilemmas,*

Concerns and Opportunities, 56 Fordham L. Rev. 53, 99 (1987). Voters who claim association with a particular political party represent a diverse and eclectic group of individuals. Common sense dictates that all members of a given political party do not agree with the all of the issues that the party stands for and seeks to advance. Membership in a political party constitutes a trade off: voters review and evaluate the positions and principles of the parties and choose to associate themselves, and contribute to, that party which they believe best represents their values and beliefs. Rarely is this relationship a perfect match between the two.

Moreover, political parties are unique because of their nomination procedures for selecting candidates. *Id.* at 105. Political parties select candidates within electoral districts through their nomination processes to represent the party in the general elections. *Id.* "This ability to run candidates is what sets the parties apart from the myriad of other groups involved in the political process." *Id.* Further, "[u]nlike the PACs, which arouse most of the suspicion in the political arena, the parties cannot be strictly ideological or narrowly bound to specific views because their interest lies in the ability of their candidates to win office rather than in any specific ideological proposition." *Id.* at 106. Thus, the anti-corruption rationale which has allowed the Court to uphold limits in specific cases is not applicable in the case of political parties. *Id.* at 105. It is impossible for parties to corrupt the candidate they have chosen because the candidate has been chosen by the party based in large part upon the candidate's agreement with the views of the party. *Id.* This situation eliminates the threat of quid pro quo corruption that the Court has required to find the threat of corruption. *Id.*

In *Colorado Republicans*, the Court stated that an independent expenditure "controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by [the] donor." 1996 U.S. LEXIS 4258 at 25. The Court recognized that in promulgating FECA, Congress did not indicate a special fear about the corrupting influence of political parties. Rather it sought to enhance what it saw "as an important and legitimate role of political parties in American elections." Id. at 26 (citing *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981) (Coordinated party expenditure provisions were intended to "assure that political parties will continue to have an important role in federal elections); S. Rep. No. 93-689, p. 7 (1974) ("[A] vigorous party system is vital to American politics. . . . Pooling resources from many small contributors is a legitimate function and an integral part of party politics")). The Court concluded its discussion of political parties by stating "[w]e do not see how a Constitution that grants to individuals, candidates and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Colorado Republicans*, 1996 U.S. LEXIS 4258 at 27.

Because the danger of corruption or the appearance of corruption does not exist when political parties make independent expenditures, any rules promulgated by the Commission must not unduly burden the political speech of those political party committees. In addition, the Commission's rules must recognize and respect the unique and important role that political parties play in the political process and if anything be more flexible rather than more restrictive.

B. Because independent expenditures are fundamental First Amendment activities, the Commission must establish unambiguous rules so that political parties may know with reasonable certainty what will be subject to Commission regulation.

The Commission's proposed rulemaking effects fundamental First Amendment rights and, as such, it must establish clear and unambiguous rules for independent party expenditures.

The proposed rules contain a number of ambiguities that need clarification. For example, the Commission's proposed rules concerning "coordination" at 11 C.F.R. pt. 100.23 contain troubling ambiguities that may chill the First Amendment rights of political parties. In Alternatives 2-B and 2-C, the proposals state "an express or implied agreement or intention for one or more persons to take action necessary to achieve a common goal." What is a "common goal?" The election of the candidate? The advocacy of the party's platform? The passage of certain legislation? Because independent party expenditures do not raise the specter of corruption or the appearance of corruption, it appears that such a broad and all-inclusive definition of "coordination" would chill the constitutional rights of political parties and adversely affect the information available to voters. Such language is not supported by any legitimate compelling governmental interests. Rather, it appears that the Commission is attempting to circumvent the Court's holdings by defining any independent party expenditure as coordinated in an effort to equalize or reduce the speech in the political marketplace by political party expenditures. This language appears to be contrary to the Court's holdings on these issues.

C. Whether an expenditure is coordinated or independent turns on the facts of that particular expenditure.

For political party expenditures, the coordination analysis must be expenditure by expenditure. A political party must determine whether a particular expenditure made by that particular political party for a particular candidate at a particular time was coordinated or independent. That should also be the analysis used by the Commission when reviewing political party activity. In *Colorado Republicans*, the Court stated that a "general or particular understanding with a candidate" is sufficient to find coordination. This language, however, should be construed under *Colorado Republicans* to encompass only explicit understandings. There must be a particular understanding between the candidate and the party concerning that particular expenditure. Moreover, because of their unique role in the American political process, political parties must interact with their candidates to function. It is clear from *Colorado Republicans*, that this general interaction between candidates and political parties is not sufficient to find coordination.

D. The Commission cannot categorize independent expenditures by political parties as contributions and thereby limit their use.

Independent party expenditures are the party's speech exclusively and cannot be categorized as coordinated. As the Court stated in *Colorado Republicans*, "an agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." 1996 U.S. LEXIS 4258 at 32. Any rules that the Commission may

promulgate must keep this important admonition in mind. The Commission cannot categorize the speech of a political party as another's speech because to do so severely infringes the First Amendment rights of political parties.

If the Commission promulgates rules which categorize legitimate independent party expenditures as coordinated, it will effectively limit and stifle the speech and information that voters rely on when making their choices in the political marketplace. The Commission must follow the Court's holding in *Buckley* and its progeny and permit the greatest amount of speech possible by promulgating a narrow definition of coordination.

E. The RNC opposes making presidential and convention public funding available only to those parties that agree not to make independent expenditures during the primary and general elections.

A political party's ability to make independent expenditures should not depend upon whether a presidential campaign and the political party convention receives public funding. *See, e.g., FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 105 S.Ct. 1459 (1985) (holding section of Presidential Election Campaign Fund Act making it a criminal offense for an independent "political committee" to expend more than $1,000 to further the election of a candidate receiving public financing violated the First Amendment). With respect to the public funding of presidential campaigns, the arrangement would unconstitutionally chill the speech of political parties because independent expenditures are the parties speech exclusively. Such expenditures are, by their very definition and the Court's holdings, not coordinated with the presidential campaigns. The public funding of a separate and distinct political entity should not force a political party to forgo the exercise of its First Amendment rights.

With respect to the public funding of political party conventions, the arrangement would effectively punish the major political parties for exercising their First Amendment rights. Such a proposal appears to advance the illegitimate governmental interest of equalizing and reducing the amount of speech in the political marketplace. The Court has consistently held that such interests do not justify limitations on the speech of political entities and individuals. Therefore, the RNC opposes any rule that forces political parties to sacrifice their First Amendment rights in an effort to equalize and reduce the amount of speech in the political marketplace by making public funding contingent upon the agreement of a political party not to make independent expenditures.

F. The RNC supports the Commission's proposed rules concerning the reporting of independent expenditures by political parties.

The RNC supports the Commission's proposed rules to require independent party expenditures to be reported like other types of independent expenditures. As stated before, the RNC believes that voters must have the greatest amount of information possible when deciding which candidates to support and it supports broad disclosure of campaign activity. Disclosure is one of the few aspects of FECA that has worked and has not burdened the First Amendment

rights of political parties. Disclosure is at the heart of FECA and the RNC supports the Commission's proposed rule in this regard.

G. The RNC supports the Commission's proposed rules concerning disclaimer for independent expenditures by political parties.

The RNC also supports the proposed Commission rules which would extend the same disclaimer rules to party independent expenditures that apply to other independent expenditures. The RNC supports such proposed rule for the same reasons discussed in the preceding paragraph.

IV. CONCLUSION

For all of the reasons stated above, the RNC respectfully requests the Commission to promulgate only those proposed rules which would advance the ability of political party committees to communicate with voters through independent expenditures.

I look forward to addressing the specific proposed rules at the oral hearing on June 18, 1997.

Respectfully submitted,

Thomas J. Josefiak