



## Answering Chairman Lenhard on Hybrid Ads ...

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FEC Chairman Robert Lenhard has posed some excellent questions in anticipation of tomorrow's hearing on hybrid ads. We have attempted quick answers.

He first asks:

*What exactly is a hybrid ad?*

Generally speaking, a hybrid ad is a communication attributed to multiple committees where each committee pays a share according to the benefit reasonably to be derived. The premise behind hybrid ads is that a committee that pays its fair share for a communication has not received an in-kind contribution. As such, hybrid ads accord the Commission's longstanding rules on allocation and its limitations on in-kind contributions. As stated in the Commission's NPRM, hybrid ads are "communications that refer both to one or more clearly identified Federal candidates, and generically to candidates of a political party." NPRM at 26570.

*How specific must [the ad] be in making reference to the party and its down-ticket candidates?*

The references must be sufficiently specific for the Commission to attribute a portion of the ad to the party committee (or the down-ticket candidate), and no more. The goal is to prevent an impermissible in-kind contribution while respecting the rights of the party committees to choose language and monikers they believe will help them to help down-ticket candidates. We will have more to say about this below.

*Does this apply to ads with only a single clearly identified candidate or can it apply to ads with multiple candidates?*

A hybrid ad can be an ad that references a single clearly identified candidate, such as "President Bush and the Leaders in Congress", or that references multiple candidates, such as "President Bush and Leaders in Congress would ... whereas John Kerry and Liberals in Congress would not" or, to take another example, an ad that begins "President Bush, Senator Jones and our Republican Team ...".

*What test should [the Commission] use to determine if an advertisement has "certain words that evidence a placeholder by the party committee"? [CCP's written] comments suggest the standard be drafted liberally to provide parties with flexibility, but also that it be clear so that it can be easily applied. What sort of language would you suggest?*

Chairman Lenhard then lists certain examples wondering whether the monikers in the

following phrases would “evidence a placeholder by the party committee?”

*“Congressman X has been battling Liberals in Washington.”*

*“Congressman X has been battling the tax and spend Washington crowd”*

*A photo of the Capitol behind a candidate running for the executive branch [with any accompanying text omitted as irrelevant to the hypothetical].*

*“Presidential candidate X has been working with Congressional leaders to pass key legislation.”*

At the outset, we stipulate that a photo of the Capitol behind a candidate for President, without more, is insufficient to evidence a placeholder for a committee claiming it is teaming with its Presidential candidate in an effort to elect down-ticket candidates. CCP would not be troubled if the Commission either removed such an example, or even used such an example to demonstrate insufficient evidence of a placeholder by the party committee. “The tax and spend Washington crowd” as a moniker is perhaps a borderline case, but we will address how the Commission should treat borderline cases, below.

The problems with the phrases “Congressman X has been battling *Liberals in Washington*,” or “Presidential candidate X has been working with *Congressional leaders* to pass key legislation” are not that the monikers “Liberals in Washington” or “Congressional leaders” are insufficiently precise. The problem is that the phrases as drafted do not include any action, policy positions, or beliefs about members of those groups; the phrases do not say anything presumably negative about “Liberals in Washington” or presumably positive about “Congressional leaders.” The phrases only say something about Candidate X. There is nothing that suggests to voters why they should favor “Conservatives in Washington” or continue to favor “Congressional leaders.”

This is no small point. In each of the ads run in the 2004 Presidential cycle there is language that evidences either:

<!--[if !supportLists]-->1) <!--[endif]-->some action (or belief) associated with the referenced group, such as actions taken, beliefs held, or votes cast by members of the group;

<!--[if !supportLists]-->2) <!--[endif]-->some suggestion that members of the group “stand” with certain constituencies;

<!--[if !supportLists]-->3) <!--[endif]-->some ascribing of attributes or policy positions to the referenced group; or

<!--[if !supportLists]-->4) <!--[endif]-->some statement or suggestion to voters that members of the referenced group should not be elected.

Here are examples of each from ads run by Bush-Cheney '04:

\* Some action (or belief) associated with the referenced group, such as actions taken, beliefs held, or votes cast by members of the referenced group:

#### "Economic Agenda"

President Bush and our Leaders in Congress have a plan. Strengthen our economy, lifelong learning, invest in education, new skills for better jobs, a fairer simpler tax code, reduce dependence on foreign energy, freer, fairer trade, incentives to create jobs, comp and flex time for working families, strengthen social security, legal reform, permanent tax relief, and agenda for America.

\* Some suggestion that members of the group "stand" with certain constituencies:

#### "Tort Reform"

There is a crisis in health care. There is a crisis in women's access to health care in this country. Maternity wards closing. OB-GYNs being forced out. The reason: frivolous lawsuits. John Kerry and the liberals in Congress side with the trial lawyers. They opposed legal reform ten times. If Mr. Kerry and his allies were elected, I don't think there would be any hope for tort reform in this country.

\* Some ascribing of attributes or policy positions to the referenced group:

#### "The Choice"

When it's finally quiet, here's the choice. President Bush and his Congressional allies: Strong leadership to protect America, tax relief, common sense healthcare, strengthen and protect social security. John Kerry and his liberal allies: Higher taxes, voting to tax social security benefits, government run health care, a record of slashing intelligence, and reckless defense cuts. Alone in the booth, why take the risk?

\* Some statement or suggestion to voters that members of the referenced group should not be elected:

#### "Wolves"

In an increasingly dangerous world, even after the first terrorist attack on America, John Kerry and the liberals in Congress voted to slash America's intelligence operations by \$6 billion. Cuts so deep they would have weakened American defenses and weakness attracts those who are waiting to do America harm.

We do not have the time here to recommend precisely how the Commission should make use of the fact that most every hybrid ad ascribes some action or makes some suggestion about the referenced group. We do note, for purposes of answering Chairman Lenhard and for the Commission's deliberations, that ascribing actions, policy positions or beliefs to referenced groups in his hypothetical would go a long way toward making those monikers legitimate placeholders for party committees attempting to run hybrid ads.

*In establishing this test, how should we balance the clarity, ease of compliance and rigidity that comes with a bright line with the ambiguity, second guessing in enforcement and freedom that comes from a more flexible test?*

This presumes a regulation is needed. We have stated in our written comments that

additional regulation may not be needed. If there is to be a new regulation, however, the Commission should create a standard for evidencing a party placeholder by promulgating a test, then list examples of permissible ads according to the test, without excluding other possibilities. Committees that want to run ads that are not fairly analogous to the examples listed would still retain the ability to run such ads, as running the ads would not be specifically precluded by the regulation. But that committee would bear a more difficult burden of convincing the Commission in an enforcement matter that the ad contains a generic reference, that is, that part of the ad is fairly attributable to the party committee. This would balance the clarity of bright lines with the ambiguity that may come with providing party committees flexibility in choosing adequate placeholders.

*Should the generic party reference be limited to the clearly identified candidate's party or should you be able to create a hybrid ad that identifies your party's candidates but makes a generic reference to your opponent's party?*

We cannot think of an example of an ad that meets the hypothetical as posed, but the possibility that such an ad could be crafted should not be foreclosed by the Commission.

*Does it matter if an ad refers to other political actors in their status as legislators as opposed to candidates in assessing the benefits reasonably to be derived by down-ticket candidates from hybrid ads?*

No, it does not matter. This is a good place to make a far larger point. The task for the Commission is to adjudge the "benefit *reasonably* to be derived," not the "benefit actually to be derived." In short, the Commission's phrase "benefit reasonably to be derived" has been interpreted as an objective test to guide committees in splitting their activities without running afoul of the limits on in-kind contributions. The "benefit reasonably to be derived" formulation has not been and ought not become license for the Commission to look behind the words chosen by a party committee to divine whether that message, in the aggregate mind of millions of voters, would "actually benefit," the party committee in question.

In establishing these criteria the Commission must remain mindful that the political party committees are autonomous entities -- separate from their candidates -- that care about down-ticket candidates. As autonomous entities, the party committees have a right to propagate their messages in ways the Commission might find ineffective, wasteful, crass, or even foolish. The Commission's job is to determine by objective criteria whether the RNC (or DNC) has used identifiable language sufficient to hold a place in the ad. This inquiry requires the Commission to search advertising text for certain words that evidence a placeholder by the party committee—words such "our Democratic Team" or "Leaders in Congress"—just as the Commission has always done with the time-or-space allocations of old, and blessed recently in its phone bank regulations.

Essentially, the Chairman is asking if the coattail effect is real. But the Commission should not be looking to empirical studies to determine if down-ticket benefit or the coattail effect is real. This is not the province of a regulatory agency in a First Amendment context. The answer to this question is that the party committees believe it is real. If the party committees happen to be incorrect or late to the findings of social

science, they retain a right under the First Amendment to be idiots. The question for the Commission is how to set up rules to make sure that the message, however ineffective, is reasonably attributable to the party committee.

If the Commission insists on getting to the bottom of whether the coattail effect is real, however, or whether there is truly such a thing as down-ticket benefit, we would note that the Commission has no basis for believing otherwise. In the 2004 cycle, the era of the hybrid ad, Republicans ran with President Bush to increase their 14-seat advantage in the House to 17, and to win 7 of 8 open seat races for a net gain of 4 seats in the Senate. Just two years later, plagued by ethics scandals and unable to shake their affiliation with a President Bush then-unpopular on issues of war and domestic spending, the advantage in both houses eroded with losses of 31 seats in the House, 6 seats in the Senate.

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