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AGENDA ITEM

For Meeting of: 11-21-02

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner *[Signature]*

SUBJECT: Possible amendments to Agenda Document 02-82 (draft final rule regarding BCRA "other provisions")

I believe we should require disclaimers on communications that take the form of e-mail or websites. As these tools become more popular, they are reaching thousands in many cases. Moreover, candidates, party committees, and other persons are spending significant sums setting up and using this technology. The Commission has for years required disclaimers on such communications (see, e.g., AO 1999-37).

While independent exponents must subsequently disclose the source of funding if the costs exceed \$250 (and political committees must itemize receipts and disbursements after relatively low thresholds are met), the disclaimer provisions are much more comprehensive in that they provide the voting public instant awareness of who is behind election-related messages and whether the candidate authorized the message. They cover coordinated activity as well as independent activity. Further, cost is not the only issue. Obviously, a mailing of 501 pieces could be conducted by an individual for less than \$250 (the independent expenditure reporting threshold), yet even the draft regulation contemplates requiring application of the disclaimer rule in such situation. It only makes sense, therefore, that an e-mail to thousands or a website that will reach at least as many should have a disclaimer if it otherwise meets the statutory tests.

The suggestion that we seek symmetry between the Title I area and the disclaimer provision is appealing on its face, but it fails to deal with the fundamental difference. The Title I soft money concepts impose strict prohibitions on certain communications being paid for in certain ways. It makes sense that Congress might have treaded lightly regarding Internet activity there. The disclaimer provision does not impose any such restrictions. It is designed simply as a disclosure tool. It applies to individuals, non-party committees, and MCFL-type corporations, as well as persons covered by Title I.

Accordingly, I would try to retain as much of the symmetry concept as possible, but expand the disclaimer coverage to e-mail reaching more than 500 persons and public websites. **This could be done by amending proposed 110.11(a) as follows: "This section applies only to public communications, defined for this section to include the communications at 11 CFR 100.26 plus electronic mail of more than 500 identical or substantially similar communications and Internet websites available to the general public, and electioneering communications, as defined in 11 CFR 100.29."** I have not drafted accompanying E & J language, but this could be accomplished quickly.

Second, I believe we should clarify that party communications that in fact are coordinated with a candidate, other than pre-nomination communications, must state that the candidate has authorized them. This concept is noted in the E & J in the sentence beginning on p. 23, line 22. It needs to be in the regulations themselves, however.

While party committees have been used to run attack ads that the candidates don't want to run themselves, we should not allow the ads to say "not authorized" if indeed they have been authorized. If, on the other hand, the ads are truly independent, there is no problem with saying the ads are not authorized.

I would incorporate this concept by amending proposed 11 CFR 110.11(d)(2) to read:

For purposes of this section, a communication paid for by a political party committee, other than a communication covered by paragraph (d)(1)(ii) of this section, that is being treated as a coordinated expenditure under 2 U.S.C. 441a(d) and that was made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or the agent of either shall identify the political party that paid for the communication and shall state that the communication is authorized by the candidate or candidate's committee.

Again, I have not drafted E & J language for this revision, but this could be done quickly.