"Paul Ryan" <PRyan@campaignlegalcenter.org>
06/11/2007 12:55 PM

To <hybridads@fec.gov>
cc
bcc
Subject CLC & D21 Comments on NPRM 2007-10

Ms. Rothstein,

Attached you will find comments from the Campaign Legal Center and Democracy 21 in response to NPRM 2007-10 (hybrid communications).

Best regards,

Paul S. Ryan

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CLC and D21 Comments on Notice 2007-10 (Hybrid Communications) 6.11.07.pdf

June 11, 2007

By Electronic Mail (hybridads@fec.gov)

Ms. Amy L Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2007–10: Hybrid Communications

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Notice of Proposed Rulemaking (NPRM) on "Hybrid Communications." *See* NPRM 2007-10, 72 Fed. Reg. 26569 (May 10, 2007). "Through this rulemaking, the Commission seeks to establish how political party committees attribute disbursements for 'hybrid communications' – communications that refer both to one or more clearly identified Federal candidates and generically to candidates of a political party ('generic party reference')." *Id.* at 26570. Specifically, the Commission proposes amending 11 C.F.R. § 106.8 to set out the scope, attribution formula, and treatment of disbursements under the proposed rule. *Id.* at 26571.

For the reasons set forth below, we urge the Commission to promulgate a rule requiring the entire amount (100%) of each disbursement for a so-called "hybrid communication" to be attributed to the Federal candidate(s) of the party making the communication (*i.e.*, Attribution Alternative 2 – Fixed percentage (100%)). "This alternative would be similar to the allocation rules for separate segregated funds and nonconnected committees" at 11 C.F.R. § 106.6(f) and is based on the commonsensical "proposition that a generic party reference could be reasonably expected to provide at most an insignificant benefit to the political party making the public communication, and that the Federal candidate of the political party making the communication could reasonably expect to derive all of the benefit from the communication." 72 Fed. Reg. at 26573-74.

In the event that the Commission instead chooses to promulgate a rule allowing parties to attribute to the party some portion of the cost of candidate-specific ads containing a generic party reference, we prefer Attribution Alternative 3 (The Greater of a Fixed percentage (75%) or a Space or Time Attribution, 72 Fed. Reg. at 26574), to Attribution Alternative 1. Under no circumstances should the Commission promulgate a rule allowing parties to attribute only 25% or 50% of the cost of so-called "hybrid communications" to the parties' candidate(s). Doing so would eviscerate the coordinated party spending limits and materially weaken the presidential public financing program spending limit.

With respect to the scope of the proposed rule, and the treatment of disbursements made under the rule, we comment below on the many alternative proposals set forth in NPRM 2007-10.

I. Background

In 1971, Congress enacted the Presidential Election Campaign Fund Act and, in 1974, amended the Federal Election Campaign Act (FECA), to create a voluntary system of public financing for presidential election candidates who agree to abide by spending limits. Presidential candidates Bush and Kerry both voluntarily participated in this system for the 2004 general election, and each received just over $74.6 million in public funds – on the condition that they not raise or spend any additional funds. This candidate spending limit is a vital part of the presidential public financing system.

Another vital component of the public financing system is the limit on expenditures by political party committees "in connection with the general election campaign of any candidate for President" who is participating in the voluntary public funding system. *See* 2 U.S.C. § 441a(d)(2). This limit, which was $16.2 million in 2004, is necessary to ensure that the candidate spending limit is not circumvented through unlimited expenditures by a political party committee made in support of, and in coordination with, the candidate receiving the public funding.

A. The scheme to evade the spending limits. In 2004, both the Republican National Committee (RNC) and the Democratic National Committee (DNC), and their presidential candidates, engaged in a new scheme to evade both the $74.6 million general election spending limit applicable to publicly financed presidential candidates, and the $16.2 million limit on party expenditures coordinated with their presidential candidates. *See* 26 U.S.C. § 9003(b); 2 U.S.C. § 441a(b)(1)(B); 2 U.S.C. § 441a(d)(2).

Both the RNC and the DNC coordinated so-called "hybrid ad" campaigns with their respective presidential candidates – producing ads that referred by name to Senator Kerry or President Bush, and typically contained some kind of generic reference to members of Congress, but identified no other candidate.

Although no statute, regulation or advisory opinion authorized them to do so, the party committees unilaterally decided they could allocate just 50% of the cost of these ads to the party's presidential candidate, and allocate the other 50% to the party itself (as if half of the ad were irrelevant to the presidential campaign), which thus would not tally against the party spending limit.

The parties argue that because the ads contained some incidental language purportedly benefiting the party generally instead of the presidential candidate specifically, the cost of those generic references could be attributed to the party rather than to the candidate, and further, that the value of such generic references amounted to 50% of the total cost of the ad.

The premise of this argument is that half of the ad simply did not influence the election of the candidate named in, and promoted by, the ad, and instead had some "generic" impact that is not attributable to any candidate campaign. The result of the argument is that half of the cost of the ad is functionally taken off-the-books – it is not counted as a party coordinated expenditure for purposes of the party's section 441a(d) limit.

Of course, the money spent by the party for the other half of the ad – the half attributed to the candidate – would be so counted, and would tally against the party's section 441a(d) limit (unless reimbursed by the candidate). Thus, the party could engage in this 50-50 allocation of its spending on such ads up to an amount that is double the party spending limit, or up to a total of $32.4 million – at which point the party would have used up its $16.2 million spending limit for allocating half of the costs of the ads, *i.e.*, the half attributable to its presidential candidate.

But in fact the parties carried this scheme one step further.

The Bush and Kerry campaigns did reimburse their party for the 50 percent cost of the ad attributed to the candidate, so that none of the disbursement tallied against the party coordinated spending limit (although the reimbursement by the candidate to the party did count against the candidate's spending limit). Thus, the effective limit on this scheme was not double the $16 million party spending limit, but rather, double the $74 million candidate spending limit.

In reality, this scheme amounted to a means of having the party subsidize half of the cost of the candidate's campaign ads, and doing so outside the spending limits that applied to both the candidate and the party – all based on the simple expedient of including an incidental generic reference in an ad that otherwise was plainly a candidate campaign ad.

For example, in addition to making $16 million in coordinated expenditures in support of President Bush – the maximum allowed by law – the RNC and the Bush-Cheney '04 campaign equally split the cost of $81,414,812 (plus an additional $1.7 million in commissions) in television advertisements that promoted President Bush and/or criticized John Kerry, and referenced no other candidates for office; the ads did, however, make generic references to members of Congress (*e.g.*, "President Bush and our leaders in Congress," "John Kerry and liberals in Congress," "John Kerry and his liberal allies"). *See* Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub *re* Audit of Bush-Cheney '04, Inc. ("Statement of Democratic Commissioners") (Mar. 21, 2007) at 1;[1] *see also* Statement of Commissioner Ellen L. Weintraub On the Report of the Audit Division on Bush-Cheney '04, Inc. ("Weintraub Statement") (Mar. 22, 2007) at 1-2.[2]

A statement released by Commissioner Weintraub contains the scripts of fifteen of these so-called "hybrid ads" – none of which so much as mention the party names "Democrats"

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[1] Available at http://www.fec.gov/members/lenhard/speeches/statement20070321.pdf.

[2] Available at http://www.fec.gov/members/weintraub/audits/statement20070322.pdf.

or "Republicans." *See* Weintraub Statement at 5-6. Indeed, only one of the 27 "hybrid ads" run by the RNC in coordination with Bush-Cheney '04 mentioned a party's name. *See* Statement of Democratic Commissioners at 3.

By splitting the cost of this $81 million ad campaign evenly between the RNC and the Bush-Cheney '04 committee (*i.e.*, having the Bush committee reimburse the RNC for half the costs of the ads), the Bush-Cheney committee was able to supplement the $74 million in public funds it received, and the $16 million in coordinated party expenditures it benefited from, with an additional $41 million in private funds routed through the RNC. The $41 million paid by the Bush Committee (in reimbursements to the RNC) counted against its spending limit, but the $41 million paid by the RNC was attributed "to the party" because it purportedly funded the "generic" half of the ads, and thus counted against neither the party nor the candidate spending limits. The $41 million spent by the RNC for the Bush-Cheney ads was, in this sense, simply off-the-books.

As correctly explained by Commissioner Weintraub, the result of this 50%-50% allocation strategy "was to increase by more than 55% the funds subject to the [Bush-Cheney] General Committee's direction and control" in a "way that was surely not contemplated by the architects of the public funding system." Weintraub Statement at 1. Commissioner Weintraub continued: "As a result, I believe Bush-Cheney '04 failed to honor its commitment to abide by the expenditure limit. Moreover, both Bush-Cheney '04 and the RNC violated the coordinated contributions limit." *Id.* Chairman Lenhard together with Commissioners Walther and Weintraub stated publicly their belief that the Bush-Cheney '04 campaign "impermissibly accepted $42,409,406 in in-kind contributions from the RNC" and that the committee "should be required to repay this amount to the U.S. Treasury." Statement of Democratic Commissioners at 3.

Following in the footsteps of the RNC and the Bush-Cheney committee, the DNC and the Kerry-Edwards committee adopted the same allocation strategy to evade the same general election spending and party coordinated expenditure limits. According to Vice Chairman Mason and Commissioner von Spakovsky, "Kerry-Edwards 2004, Inc. aired materially indistinguishable 'hybrid advertisements,' sharing the costs equally with the Democratic National Committee, shortly after Bush-Cheney '04, Inc. and the Republican National Committee did so." Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Kerry-Edwards 2004, Inc. (May 31, 2007) at 1.[3] The Kerry-Edwards "hybrid ad" campaign was valued at approximately $22 million. *See id.* (indicating that the DNC paid $11 million for its Kerry-Edwards "hybrid ads" under a 50-50 allocation formula).

B. The Commission's deadlocked response to this scheme, and this rulemaking. The Commission to date has been deadlocked on the legality of this 50% allocation scheme. As noted in the Bush-Cheney '04 Audit Report:

> There were not the minimum four affirmative votes among the Commissioners required to make a finding as to whether or not the 50% allocation complied with

[3] Available at http://www.fec.gov/members/von_Spakovsky/speeches/statement20070531.pdf.

> the Act and Commission regulations. Some Commissioners considered the 50% allocation to be in accord with past precedent and relevant Commission regulations, so there was no adjustment required to expenditures applied to the expenditure limits applicable to the General Committee. Some Commissioners were of the opinion that the Act and Commission regulations regarding hybrid ads require the General Committee to pay more than 50%, in which event any adjustment above 50% would apply against the expenditure limits applicable to the General Committee and would have resulted in an Audit staff finding of expenditures over the allowable limit.

See Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc. ("Bush-Cheney '04 Audit Report") (approved March 22, 2007) at 11. Nearly identical language was used to describe the disagreement among Commissioners with respect to the Kerry-Edwards audit. *See* Report of the Audit Division on the Kerry-Edwards 2004, Inc. and the Kerry Edwards 2004 Inc. General Election Legal and Accounting Compliance Fund ("Kerry-Edwards 2004 Audit Report") (approved May 30, 2007) at 32.

Just as the allocation practices of the Bush-Cheney 2000 campaign prompted the Commission to adopt the phone bank allocation rule in 2003,[4] so too have the allocation practices of the Bush-Cheney and Kerry-Edwards 2004 campaigns prompted the Commission to initiate this rulemaking.

To be clear, the issue of "hybrid communications" is relevant in the context of all Federal elections, because federal law limits party expenditures coordinated with all Federal candidates. However, attribution of "hybrid communications" in the context of publicly financed presidential elections raises distinct and important legal and policy considerations.

The 50% allocation scheme employed by both the RNC and the DNC for so-called "hybrid communications" in 2004 directly undermined both the candidate spending limit in publicly financed presidential elections and the party coordinated spending limit (as well as, more incidentally, the limit on contributions from a party to its candidate). In addition to exhausting their coordinated party spending limit, both parties fully coordinated so-called "hybrid ad" campaigns with their respective presidential candidates – producing ads targeted to battleground states[5] that were clearly intended to benefit the presidential candidates and that did not name a single candidate for another office. Yet only 50% of the value of these so-called "hybrid ads" were attributed to the parties' candidates. This 50% allocation scheme was used to facilitate the making of expenditures well in excess of the $74.6 million candidate spending limit and the $16.2 million coordinated spending limit.

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[4] *See* Weintraub Statement at 2.

[5] Commissioner Walther commented at the Commission's March 22, 2007, public meeting that all of the ads at issue in the Bush-Cheney '04 audit had been targeted to battleground states. An audio file containing Commissioner Walther's comments can be found on the Commission's Web site here: http://www.fec.gov/agenda/2007/agenda20070322.shtml.

NPRM 2007-10 notes that current 11 C.F.R. § 106.8, along with Advisory Opinion 2006-11, permit 50-50 allocation for certain "hybrid communications" made in the form of party committee phone banks and mass mailings.[6] A question presented by the NPRM is whether to employ a similar allocation scheme for all public communications.

To the extent that the Commission, in section 106.8 and Ad.Op. 2006-11, has already permitted the evasion of the coordinated party spending limit (applicable in all federal elections) and the candidate spending limit (applicable in publicly financed presidential elections) by allowing 50% attribution to party committees of the purported "generic" portion of certain candidate-specific communications, *i.e.*, phone banks and mass mailings, the Commission has already erred. The Commission should refrain from compounding the error by extending that erroneous methodology from the realm of phone banks and mass mailings to the much more potent realm of all broadcast ads, and other means of public communications.

Whether the Commission will correct its error, or dramatically compound its error, is what is at stake in this rulemaking.

Not only should the Commission refrain from extending the precedent established by 11 C.F.R. § 106.8 and Ad.Op. 2006-11, the Commission should repeal the 50-50 allocation scheme of section 106.8 and supersede Advisory Opinion 2006-11 with a regulation requiring the full costs of ads coordinated with one or more Federal candidates to be attributed to those candidates.

II. Attribution Formula

NPRM 2007-10 seeks comment on the (a) scope, (b) attribution formula, and (c) treatment of disbursements for "hybrid communications" attributed to candidates, in that order. However, because the attribution formula is of paramount importance in this rulemaking, we address that issue first.

NPRM 2007-10 proposes three alternative attribution formulas. Alternative 1 would establish a fixed attribution percentage of either 25%, 50% or 75%. Alternative 2 would establish a fixed attribution percentage of 100%. Alternative 3 would require attribution in an amount equal to the greater of a fixed percentage (either 25%, 50% or 75%) or a "space and time attribution" similar to the attribution required by 11 C.F.R. § 106.1(a).

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[6] The Campaign Legal Center and Democracy 21 filed comments with the Commission in response to AOR 2006-11, arguing that "the new rule of law requested by the [Washington State party] Committee would eviscerate existing statutory limits on coordinated activity between party committees and federal candidates" and urging the Commission to advise the requestor that its "payment for the mass mailing would constitute either an in-kind contribution to the clearly identified federal candidate subject to contribution limits established by 2 U.S.C. § 441a(a), or a coordinated party expenditure subject to the limits established by 2 U.S.C. § 441a(d)." Campaign Legal Center and Democracy 21, Comments on Advisory Opinion Request 2006–11 (Mar. 13, 2006).

We strongly urge the Commission to adopt Alternative 2, establishing a fixed 100% attribution requirement for so-called "hybrid communications." As acknowledged in the NPRM, Alternative 2 is similar to the allocation rules at 11 C.F.R. § 106.6(f) for separate segregated funds and nonconnected committees. Those rules require such committees to use 100 percent hard money to fund public communications that refer to one or more Federal candidates, and that also include a generic party reference. Alternative 2 is based on the premise that "a generic party reference could be reasonably expected to provide at most an insignificant benefit to the political party making the public communication, and that the Federal candidate of the political party making the communication could reasonably expect to derive all of the benefit from the communication." 72 Fed. Reg. at 26573-74.

Viewed in another perspective, Alternative 2 is similar to the provision of BCRA that requires state parties to use 100 percent hard money for public communications that PASO a Federal candidate, even if the communication also refers to a state candidate as well. 2 U.S.C. §§ 441i(b), 431(20)(A)(iii). The principle here is that any such ad by a party that promotes a Federal candidate should be entirely attributable to that candidate, for allocation purposes, even if the ad promotes a non-Federal candidate as well. Certainly, for the same reason, this provision would require a state party to use 100 percent Federal funds for a party ad that promotes a Federal candidate and that also has a generic party reference – the ad would be considered entirely attributable to the Federal candidate. By analogy, the same ad should be similarly attributable in its entirety to the Federal candidate for purposes of the coordinated party spending limits of section 441a(d).

The NPRM notes that in 2003, "the Commission did not adopt a 100% candidate attribution alternative for phone bank communications" and asks whether "evidence or experience indicate that the Commission should reconsider this conclusion[.]" 72 Fed. Reg. at 26574.

The extensive exploitation of the "generic party reference" scheme in 2004 by both parties and both presidential campaigns as a means to evade both the coordinated spending limits and the candidate spending limits is the best "evidence or experience" warranting such reconsideration. Whatever the evidence was in 2003 when the Commission adopted the 50-50 allocation for phone banks, we now <u>know</u> that this allocation scheme will be aggressively used by the parties and their presidential candidates – and undoubtedly soon by their congressional candidates as well – as a means to eviscerate the party coordinated spending limits (and in presidential campaigns, the candidate spending limits as well). Based on this experience, the Commission should now correct its 2003 error by fixing a 100% attribution requirement for all public communications – regardless of whether such communications contain a generic party reference.

In the event the Commission declines to adopt the fixed 100% attribution requirement, and instead chooses to promulgate a rule allowing parties to attribute to the party some portion of the cost of hybrid ads, we prefer Alternative 3 to Alternative 1. Although both would undermine the existing statutory limits on coordinated party spending and publicly-funded presidential candidate spending, Alternative 3 would do less harm.

Alternative 3 better comports with the Commission's longstanding "general rule for attributing disbursements for a communication made on behalf of more than one Federal candidate clearly identified in the communication . . . based on the 'benefit reasonably expected to be derived' by the candidates." 72 Fed. Reg. at 26570 (citing 11 C.F.R. § 106.1(a)). The fixed percentage established by Alternative 3 would serve as a minimum percentage of the disbursement that must be attributed to a candidate, with the "space and time" provision increasing the amount attributable to the candidate where it is clear from the communication that the candidate receives a benefit in excess of that which is contemplated by the minimum fixed percentage.[7] By contrast, the fixed percentages proposed by Alternative 1 (variously 25%, 50% and 75%) would establish a maximum amount that would be required to be attributed to a candidate – regardless of whether it was clear from the face of the communication that the candidate received all or nearly all of the benefit of the ad.

This would, for instance, allow a coordinated party ad to be almost entirely devoted to promoting a candidate, with only an incidental or inconsequential generic reference thrown in, yet have only a portion of the ad (possibly as little as 25%) be attributed to the candidate, even if it is clear that the "space or time" of the ad devoted to promoting the candidate is manifestly larger. Adopting this kind of formula is a recipe for abuse.

If the Commission does, however, adopt a fixed percentage allocation (even if it can be adjusted upwards on a time-space basis, as provided in Alternative 3) , we urge the Commission to set the fixed percentage at 75%. Again, given that a generic party reference could be reasonably expected to provide at most an insignificant benefit to the political party making the public communication, and that the Federal candidate could reasonably expect to derive all of the benefit from the communication, a fixed attribution percentage of 75 percent is far more appropriate to maintaining the integrity of existing coordinated party spending limits and publicly financed candidate spending limits than would be a fixed attribution percentage of either 50% or 25%.

We remind the Commission that a 50-50 attribution percentage enabled the RNC to augment the Bush-Cheney '04 publicly financed campaign with more than $40 million in private funds over the campaign's spending limit; and it enabled the DNC to augment the

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[7] As explained in the NPRM, Alternative 3 is based on the attribution formula in Advisory Opinion 2006–11:

> In Advisory Opinion 2006–11, the Commission concluded that at least 50% of the disbursements for the mass mailing must be attributed to the clearly identified Federal candidate, even if the space attributable to that candidate is less than the space attributable to the generically referenced candidates. However, the Commission concluded that if the amount of space in the mailing devoted to the clearly identified Federal candidate exceeds the space devoted to the generically referenced candidates, then the disbursements attributed to the clearly identified Federal candidate must exceed 50% and "reflect at least the relative proportion of the space devoted to that candidate," similar to the space or time attribution under 11 CFR 106.1(a).

72 Fed. Reg. at 26574 (emphasis added).

Kerry-Edwards '04 publicly financed campaign with $11 million in private funds. Just as several Commissioners were correctly troubled by this evasion of federal campaign finance laws during the 2004 election, the Commission should reject a regulation that would expressly authorize such abuses in the future.

III. Scope

Proposed section 106.8(a) would apply to all types of "public communication" made by a national, State, district or local committee or organization of a political party that contain both a "candidate reference" and a "generic party reference." NPRM 2007-10 poses questions regarding at least four distinct aspects of this "scope" section of the proposed "hybrid communication" rule.

First, the Commission seeks comment on whether to apply the new rule to all types of "public communication," as defined in 11 C.F.R. § 100.26. 72 Fed. Reg. 26571. As a general matter, we support this approach, given that all forms of public communication are used by parties and candidates to influence voters. We also urge this result on the assumption that the Commission adopt a 100% attribution requirement, for the reasons discussed above. If the Commission adopts a 100% attribution requirement, but then fails to apply that rule to all forms of public communications, the evasions of the spending limits discussed above will just shift to those forms of public communication excluded from the rule.

Second, the Commission seeks comment on whether to apply the rule equally to any national, State, district or local committee or organization of a political party. 72 Fed. Reg. 26571. We support the equal application of the rule to any party committee, for the same reason: evasion will just shift to that level of the party exempted from the rule.

In this regard, the Commission should be especially mindful of the experience prior to BCRA, when soft money spending to influence federal elections significantly flowed through state party committees, precisely because state parties were beneficiaries of an FEC rule that gave them a comparative advantage in allocation formulae applicable to party spending. The same dynamic could replicate itself here with regard to hybrid ads, if state parties are given a more favorable allocation rule than national parties when they run ads that refer to federal candidates.

Third, the Commission proposes two alternative "candidate reference" content standards (proposed section 106.8(a)(i)) for defining what constitutes a "hybrid communication" within the scope of the proposed rule:

- Alternative one would include two types of public communications—(1) those referring to only one clearly identified Federal candidate, and (2) those referring to two or more clearly identified candidates for the same Federal office, only one of whom is the candidate of the party making the communication;

- Alternative two would include three types of public communications—types (1) and (2) described above, as well as (3) those referring to two or more clearly

> identified candidates for <u>different</u> Federal offices, all of whom are candidates of the political party making the communication.

While the first alternative would encompass only party communications that reference one of that party's candidates, the second alternative is "intended to reach communications that promote a 'slate' of a political party's candidates, along with the party itself." 72 Fed. Reg. at 26571. Alternative two "would permit attribution of a public communication that refers to a political party's candidates for both U.S. Senate and U.S. House of Representatives." *Id.*

Again, we urge the Commission to establish a fixed 100% attribution requirement for so-called "hybrid communications." Under such a fixed 100% attribution requirement, it would be unnecessary for the Commission to include in this new allocation rule communications referring to candidates for different Federal offices ("alternative two" of the "candidate reference" standard) because such communications are already subject to the allocation requirements of current section 106.1. Section 106.1 applies to any and all expenditures "made on behalf of more than one clearly identified Federal candidate." We submit that current section 106.1 can and should be read to include communications that contain generic party references. Consistent with the reality that "a generic party reference could be reasonably expected to provide at most an insignificant benefit to the political party making the public communication," 72 Fed. Reg. at 26574, the inclusion of a generic party reference should have no bearing on the applicable attribution requirements for expenditures made on behalf of more than one clearly identified candidate under section 106.1.[8]

Fourth, the Commission proposes two alternative means of defining "generic party reference" and seeks comment on these alternatives. The first alternative would require the generic party reference to refer to the other candidates as candidates of a political party by using the name or nickname of the political party (e.g., "our wonderful Democratic team," or "the great Republican ticket"), rather than simply referring to a political party (e.g., Candidate Y and the Republican Party). *See* 72 Fed. Reg. 26571. The second alternative would retain the language of current 11 C.F.R. § 106.8, which requires a generic reference to candidates (e.g., "Liberals in Congress" or "Leaders in Congress"), but does not require the candidates to be identified as candidates of a political party, or that the political party be clearly identified.

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[8] The NPRM proposes, as an alternative to adopting proposed 11 C.F.R. § 106.8, to instead simply amend 11 C.F.R. § 106.1 "to also include expenditures that contain generic party references." 72 Fed. Reg. at 26574. We submit that current section 106.1, which requires 100% attribution to candidates, can and should be interpreted as applicable in its current form to communications containing a generic party reference. The Commission may, however, consider refraining from adopting proposed section 106.8 and instead amending current section 106.1 to apply it to "expenditures made on behalf of <u>one or more</u> clearly identified Federal candidates," and requiring attribution of the total expenditure to candidates. In the event that the communication clearly identifies only one candidate, 100% of the expenditure would be attributed to a single candidate (*i.e.*, a single candidate is reasonably expected to receive the full benefit of the ad); in the event that the communication clearly identifies more than one candidate, the expenditure would be attributed by proportion of benefit reasonably expected to be derived by each candidate according to "space or time devoted" to the candidate.

The value of a party-disseminated public communication identifying one or more Federal candidates inures entirely to the party's candidate(s) – regardless of whether a generic party reference is included in the communication, and regardless of which of the two alternative means is employed to define "generic party reference." For this reason, we have no preference between the alternative definitions of "generic party reference." The issue is irrelevant because, for the reasons stated above, a party ad that refers to one or more federal candidates should be attributed to the candidate(s) for purposes of the coordinated party spending limits (and for purposes of a publicly financed candidate's spending limits). Thus, if no part of the ad is to be attributed to the party as a "generic party reference" spending, it does not matter how the term "generic party reference" is defined.

IV. Treatment

Proposed 11 C.F.R. § 106.8(c) would permit a political party making a "hybrid communication" to treat disbursements attributed to a Federal candidate as an in-kind contribution to that candidate or as a party coordinated expenditure on behalf of that candidate. The proposed rule would also allow the Federal candidate or the candidate's authorized committee to reimburse the political party for the costs attributed to the candidate within a reasonable time. *See* 72 Fed. Reg. 26574.

We oppose the reimbursement option. The candidate's reimbursement to the party of the 50% cost of the party ad attributable to the candidate – discussed above as the second step of the 2004 evasion scheme – exacerbates the evisceration of the party and candidate spending limits that is at the heart of the 50-50 attribution scheme. For the reasons discussed above, the impact of a 50-50 attribution, absent reimbursement, is effectively to double the section 441a(d) limit, an impact that in itself is bad enough and should not be countenanced by the Commission (which is, after all, charged with enforcing the coordinated party spending limits, not undermining them). But when the candidate is allowed to reimburse the party for the cost of that portion of the party ad which would otherwise tally against the section 441a(d) limit, then the effect of the reimbursement is to eliminate the party spending limit altogether, because no cost of the party ad is then tallied against the limit.

Of course, the candidate must use his or her funds to make this reimbursement. But the advantage of this scheme to the candidate is plain. Assume a candidate wishes to run an ad promoting his campaign that costs $1 million: the candidate would have to spend that amount from his campaign committee. But if the candidate coordinates with his party to have the party run the same $1 million ad (and includes an incidental generic reference in the ad), then half the cost of the ad is not attributable to the party spending limit (because of its generic nature). If the candidate reimburses the party for the other half of the ad, or $500,000, then that spending also does not tally against the party's spending limit. The effect, however, is that the party has been able to subsidize half of the cost of the candidate's ad without using any of its section 441a(d) limit. Instead of spending $1 million to run the ad, the candidate has spent only $500,000, and the money spent by the party for the other half is counted against no limit. Thus, as a practical matter, the reimbursement element of the scheme allows parties to provide an unlimited subsidy for ads run by candidates. And by making the reimbursements, the candidates are beneficiaries of those unlimited subsidies by their parties.

In the context of publicly financed presidential candidates, the effect of reimbursement is the same – it allows avoidance of the party coordinated spending limit, but it also dramatically increases the amount of spending by the candidate in excess of the candidate's own spending limit. Although the candidate's reimbursement to the party is theoretically capped by the candidate's own spending limit, the candidate is able to receive the benefit of the party subsidy up to that amount, without that subsidy – *i.e.*, the party's payment for half of the cost of the ads run by the candidate – counting against either the party spending limit or the candidate's own spending limit.

We reiterate that 100% of the disbursement for a so-called "hybrid communication" should be attributed to the candidate and, therefore, treated as an in-kind contribution or coordinated party expenditure. If the Commission allows any portion of a party ad to be not attributed to the candidate, it should not compound the error by also allowing the candidate to reimburse the party for the portion of the ad that is attributed to the candidate.

V. Conclusion

For the reasons set forth above, we urge the Commission to adopt a policy – whether it be through the amendment of an existing rule (*e.g.*, 106.1 or 106.8), or though an Explanation and Justification of an existing rule (*e.g.*, 109.37) – making clear that a party committee disbursement for a public communication that clearly identifies one or more Federal candidates is fully attributable to the Federal candidate(s), regardless of whether the communication also contains a generic party reference, however defined. Consequently, a party committee's disbursement for such a communication would be either an in-kind contribution to the party's candidate(s) or a coordinated party expenditure – both of which are subject to statutory limits. *See* 2 U.S.C. §§ 441a(a) and 441a(d).

Any new rule allowing attribution of any amount of candidate-specific ads to the party – simply by including a generic party reference in the ad – would eviscerate longstanding statutory provisions limiting political party coordinated expenditures and in-kind contributions, as well as presidential expenditure limits. No statutory basis or policy justification exists for such a rule.

We appreciate the opportunity to submit these comments.

Respectfully,

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