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06/11/2007 06:59 PM

To <hybridads@fec.gov>

cc "Sean Cairncross - Legal" <SCairncross@rnchq.org>

bcc

Subject Notice of Proposed Rule Making on hybrid ads

Dear Ms. Rothstein,

Please find attached comments from the RNC, NRSC, and NRCC with respect to the Notice of Proposed Rule Making on hybrid ads.

Thank you,

**Valerie Phillips**

Director of Staff and Special Projects

Counsel's Office

Republican National Committee

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Washington, DC 20003

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Hybrid.pdf

June 11, 2007

**BY ELECTRONIC MAIL**

Amy L. Rothstein, Esq.  
Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, D.C.

Re: *Hybrid Communications*

Dear Ms. Rothstein:

The Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee (collectively, the "Committees") write to comment on the Federal Election Commission's (the "Commission") Notice of Proposed Rulemaking on "Hybrid Communications," 72 FR 26569 (May 10, 2007) ("the Notice"). The Notice proposes a regulatory framework for "hybrid communications" – communications both generically supporting candidates of a political party and specifically supporting at least one candidate. The Committees believe that allocation is logical and appropriate, and that regulatory intervention into hybrid communications is unnecessary.

Allocation, and time-space allocation in particular, for hybrid communications attribute costs to each party "according to the benefit reasonably expected to be derived." See 11 C.F.R. § 106.1. Time-space allocation – assigning cost to a participating party based on the proportion of the time and space occupied in the communication – is simply the best method to ensure the Committees comply with the plain language of *existing regulation*. That is, the fact that time space allocation for hybrid communications is the current standard practice among the regulated community is not an accident. Indeed, such allocation is entirely consistent with the Commission's own approach to allocating communication costs in multiple other contexts.

- The Commission's final audit report on Bush-Cheney 2000, Inc. concluded that time space allocation was appropriate for allocating the costs of a hybrid telephone bank. Final Audit Report of Bush-Cheney 2000, Inc., pp. 28-29.
- The Commission's Kerry/Edwards 2004 final audit report, the Commission approved a "reasonable allocation" of costs for a

biographical film about Senator Kerry. Final Audit Report of Kerry/Edwards 2004, Inc., pp. 34-35.

- A 2004 advisory opinion issued to Bush-Cheney '04 and Alice Forgy Kerr's candidate committee the Commission stated that the cost allocation for a hybrid broadcast advertisement "shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates." A Op. 2004-1 (Bush/Kerr) (*overruled in part*).
- A 2004 advisory opinion issued to Congresswoman Maxine Waters with respect to allocation costs of a mail piece stated "attribution is determined by the proportion of space devoted to each candidate, as compared to the total space devoted to all candidates, whether Federal or non-Federal"). FEC A Op. 2004-37 (Waters).
- A 2006 advisory opinion to the Washington State Democratic Committee concluded that time space allocation is the appropriate method for determining the cost of a mass mailing. FEC AO 2006-11 (Washington State Democratic Committee).

Moreover, regulation will force the Commission into the details of virtually every hybrid communication, and risks fine semantic line drawing that result in content-based restriction on core political speech – a violation of the Committees' First Amendment rights. Political committees ought to be able to decide their own titles, names, or nicknames –and identify their opposition in their own terms – without government intervention. Such an intrusion is particularly unnecessary here because allocation of such costs is self-regulating among the Committees and the wider regulated community in general. The regulated community has shown itself capable of managing its own allocation; if a member of the regulated community allocates costs in an unreasonable manner, such allocation will be challenged through the existing Commission complaint process. This is the very reason that a detailed complaint procedure is provided for in the Commission's regulations.

Put simply, time-space is already the standard method relied upon by the regulated community for hybrid communication allocation; it works in practice; and it makes sense. The Commission should decline to regulate.

To the extent the Commission decides to continue to pursue its rulemaking the Committees urge the Commission to adopt the current practice of time-space allocation and amend 11 C.F.R. § 106.8 to include all "public communications" not just phone banks that refer to clearly identified federal candidates in allocating expenses for political party committees. This approach is the least intrusive regulatory path and would make clear that time-space is the proper way to allocate hybrid communication costs. Should the Commission decide to pursue regulation, the Committees raise the following three points for attention.

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*First*, time and space calculations should exclude the "stand by your ad" statements required by 2 U.S.C. § 441d(d)(1)(B) and 11 C.F.R. § 110.11(c)(3). Such statements are mandatory and do not serve to communicate any political message on behalf of the candidate or candidates. Moreover, the Commission has never assessed costs for any communication by factoring in the required disclaimer or approval statements, and there is no reason to break new regulatory ground here.

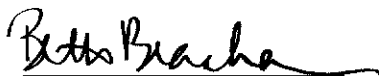
*Second*, any proposed revisions to 11 C.F.R. § 106.8 should continue to allow a political party committee to treat such costs as in-kind contributions, coordinated expenditures, or seek reimbursement from candidates within a reasonable timeframe. This would be consistent with the current regulation and past Commission advisory opinions. *See* 11 C.F.R. § 106.8(b); FEC AO 2004-37 (Waters).

*Finally*, communications involving two or more federal candidates and a generic party reference should be excluded from any fixed percentage rule should the Commission choose to impose such a rule upon single candidate and generic party communications.<sup>1</sup> For example, allocating a Presidential, Senate, House (candidates), and political party communication becomes nonsensical under any method other than time-space.

For the foregoing reasons, the Committees respectfully urge the Commission to refrain from regulating in this context. If the Commission decides to proceed, the Committees ask that it adopt the appropriate amendments to 106.8, as discussed above, codifying current practice. The Committees respectfully request that representatives of the Committees be permitted to testify before the Commission on July 11, 2007.

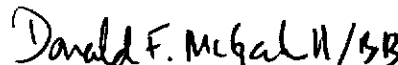
Sincerely,

For the National Republican Congressional Committee:



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Chief Counsel

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Donald F. McGahn, II  
General Counsel

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<sup>1</sup> Should the Commission decide to impose a fixed percentage allocation formula through regulation, the Committees believe that (1) that such regulation could logically and practically be applied only to single candidate / generic party hybrid communications, and (2) the formula should allocate to the single candidate the greater of fifty (50) percent or time-space. *See* 11 C.F.R. § 106.8.

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For the National Republican Senatorial Committee:



Chris K. Gober  
General Counsel

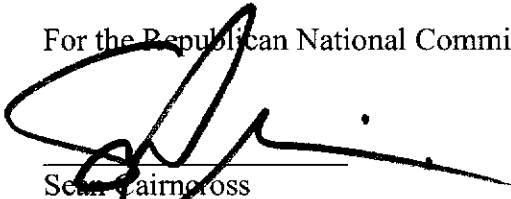
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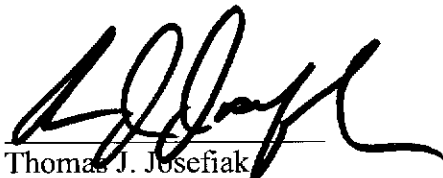
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