

February 1, 2006

**By Electronic Mail**

Mr. Brad C. Deutsch  
Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Supplemental Comments on Notice 2005–28: Coordinated  
Communications**

Dear Mr. Deutsch:

During Mr. Noble’s testimony on January 26, 2006 at the hearing in this rulemaking, Commissioner Mason raised two matters to which we believe a response is in order. We ask that the Commission include these supplemental comments in the record of this proceeding.

**1. Ads outside the 120 day period.** In Appendices to our principal comments, we submitted a total of 236 discrete ad scripts that were aired outside both the 120-day pre-primary election and the 120-day pre-general election time periods in the 2000, 2004 and 2006 election cycles.<sup>1</sup>

Our principal point in submitting these ads was to respond to the question raised by the D.C. Circuit Court of Appeals in the *Shays* litigation as to whether “campaign-related advocacy” is limited “to the four months surrounding elections, or does substantial election-oriented advertising occur outside that window?” *Shays v. FEC*, 414 F.3d 76, 102 (D.C. Cir. 2005). The ads contained in the Appendices plainly show that substantial “campaign-related advocacy” by candidates, parties and outside groups occurs more than 120 days prior to both primary and general elections.<sup>2</sup>

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<sup>1</sup> Certain ad scripts were English and Spanish versions of the same ad. We count those as one ad.

<sup>2</sup> This point is reinforced by an article earlier this week in *Roll Call*, which discusses a new ad campaign launched this week by Club for Growth in relation to the 2006 Rhode Island Senate primary, which will be held on September 12, 2006 – more than seven months from now. The article states that CFG “launched its first television ad supporting Cranston Mayor Stephen Laffey’s bid to unseat Sen. Lincoln Chafee (R-R.I.) in September’s GOP primary.” The article also states that, in addition to the Club for Growth ad, “Laffey began airing ads for the GOP primary fight last September. And the National Republican Senatorial Committee has aired ads attacking Laffey.” *See*

Commissioner Mason questioned Mr. Noble about whether certain ads in our Appendices fell into the 120-day *pre-convention* period also encompassed in the content standard of the Commission's coordination rule, 11 C.F.R. § 109.21(c)(4)(ii).

The 120-day pre-convention time frame in the rule has no effect on four of the six Appendices submitted with our comments: the two Appendices containing ads prior to the 120-day pre-primary period in the 2000 and 2004 presidential campaigns (Appendices I and III), and the two Appendices containing ads relating to the 2004 and 2006 congressional campaigns (Appendices V and VI). (Congressional campaign ads are not subject to the presidential nominating convention time frame.) There are a total of 136 ads in these four Appendices.

The ads contained in Appendices II and IV were run in the period after the presidential primary elections in 2000 and 2004, and before the beginning of the 120-day pre-general election period. When these ads were run, the nomination contests had been decided in both parties, and the presumptive nominees were known. It is clear from the content of the ads and their context, that these ads were intended to influence the *general election*, not the nomination process.

Thus, for instance, MoveOn PAC ran an ad on April 27, 2004 (App. IV-77) that compared the military services of John Kerry and President Bush, and ended with the conclusion, "This election is about character. It's between John Kerry, who left no man behind, and George Bush, who simply left." We think it is obvious that the ad is aimed at influencing the general election, not the Republican or Democratic nominating process.

The same is true of the ads run by the candidates themselves. An ad by the Bush campaign, for instance, aired on April 26, 2004 (App. IV-82), talks only of John Kerry's record on national security, which it calls "troubling." Conversely, an ad by the Kerry campaign, aired on May 13, 2004 (App. IV-60), said that "George Bush is taking America in the wrong direction" and "we can defeat George Bush, but to do it, your voice needs to be heard."

Given that these ads were sponsored by a candidate who was the presumptive party nominee at the time the ad was run, and given that the ads criticized the presumptive nominee of the other party, the only logical conclusion is that the ads were for the purpose of influencing the general election, not the nomination.

Thus, the ads in Appendices II and IV all stand for the proposition that "campaign-related advocacy" takes place more than 120 days prior to the election that the ads were aimed at. This is responsive to the Court's question as to whether "substantial election-

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Apps. VI-16, VI-18, VI-20. We attach a copy of the *Roll Call* article, dated January 30, 2006. Thus, in this one race, a candidate, a party committee and an outside group have all run ads well outside the 120-day pre-primary period – in the candidate's case, a year before the primary.

related communication occur[s] outside” the 120-day pre-election window. We continue to believe the ads in these two Appendices have a high probative value to the Court’s inquiry.

Nonetheless, we do also want to be responsive to Commissioner Mason’s specific question about the effect of the 120-day pre-convention timeframe on the ads in Appendices II and IV.

Applying that rule, 12 of the ads in Appendix II, and 53 of the ads in Appendix IV fall within the pre-convention time frame and are thus covered by the content test in the existing rule.<sup>3</sup> One ad in Appendix II,<sup>4</sup> and 34 ads in Appendix IV,<sup>5</sup> were run after the primary election in at least one state, but prior to the 120 day pre-convention time frame, and are thus not covered by the content test in the existing rule.

Thus, there remain 171 discrete ads in the Appendices attached to our comments which were run outside the 120 day window in the Commission’s existing content rule.<sup>6</sup>

**2. “Character, qualifications or fitness.”** On a separate matter, Commissioner Mason asked Mr. Noble about the origin of the standard we propose for the content test that should be applied to ads outside the 120-day window as it relates to spenders who are not political committees or section 527 groups. In our comments, we propose that an ad outside the window meet the content test if it “refers to the character or qualifications or fitness for office of a clearly identified candidate....” Comments at 29.

The origin of this test is the NPRM in the Commission’s 2002 rulemaking on coordination. In “Alternative C” of the proposed content tests, the Commission proposed a test that a public communication meet the content standard if it “makes express statements about the record or position or views on an issue, *or the character, or the qualifications or fitness for office, or party affiliation*” of a clearly identified candidate. 67 Fed. Reg. at 60065 (Alternative C) (Sept. 24, 2002) (emphasis added). This, in turn, appears based on a proposal made by the Commission in the 2002 Title II NPRM, where the Commission proposed an

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<sup>3</sup> The Commission has never clarified the methodology of how to apply the pre-convention time-frames to ads run in this period. Because the two party conventions are held on different dates, the applicable time frame is different, depending on which convention an ad is attributed to. Since these ads are, in substance, directed to the general election, not the nominating conventions, the methodology to be used is not obvious. For purposes of the count set forth above, we adopted a conservative approach: ads clearly identifying a single presidential candidate were considered to be in connection with the party nominating convention of that candidate, and ads clearly identifying more than one presidential candidate were considered to be in connection with both party conventions, and thus measured by both windows.

<sup>4</sup> App. II-24.

<sup>5</sup> Apps. IV-74, IV-77, IV-80, IV-84, IV-86 (2 ads), IV-98, IV-100, IV-102 (7 ads), IV-108, IV-121, IV-123 through IV-154 (17 ads).

<sup>6</sup> This consists of the 136 ads, discussed above, from Appendices I, III, V and VI, and the 35 ads from Appendices II and IV.

exception to the definition of “electioneering communications” for broadcast ads which contain “no reference to the candidate’s record, position, statement, *character, qualifications, or fitness for an office* or to an election, candidacy or voting....” 67 Fed. Reg. at 51145 (Alternative 3-B) (Aug. 7, 2002) (emphasis added).

Our proposal in this matter is based in part on these earlier proposals made by the Commission. As we noted in our comments, the Commission characterized this test in the 2002 coordination NPRM as an objective standard that would “focus as much as possible on the face of the public communication” and would “require as little characterization of the meaning or the content of the communication, or inquiry into the subjective effect of the communication on the reader, viewer or listener as possible....” 67 Fed. Reg. at 60049.

We appreciate the opportunity to submit these supplemental comments.

Sincerely,

*/s/ Fred Wertheimer*

*/s/ J. Gerald Hebert*

*/s/ Lawrence M. Noble*

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# ROLL CALL

## Club for Growth Airing Anti-Chafee Ads

January 30, 2006

By Nicole Duran,  
Roll Call Staff

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### Related Stories

The Club for Growth on Friday launched its first television ad supporting Cranston Mayor Stephen Laffey's bid to unseat Sen. Lincoln Chafee (R-R.I.) in September's GOP primary.

[Reynolds Confident GOP Will Keep Majority](#)

In a 30-second spot titled "Impossible," the anti-tax, pro-business group proclaimed Laffey the savior of the Ocean State's second-largest city.

"When the City of Cranston faced bankruptcy, some might have thought change was impossible," a narrator intones as the words flash on screen. "Steve Laffey knew better. Leaving a successful business career to become mayor, Laffey demanded a thorough audit, cut costs, took on the special interests and brought the city back."

Later it shows a picture of Laffey and maintains that he can cut "pork barrel" spending in the Senate.

In a radio commercial that began airing Thursday, the club takes aim at Chafee.

"In the U.S. Senate, Lincoln Chafee votes against the Republican Party more often than any other Republican," the minute-long ad called "Bells and Whistles" states. "That's right. Chafee votes with liberal Democrats John Kerry and Hillary Clinton over 60 percent of the time.

"No wonder Chafee publicly proclaimed he didn't even vote to re-elect President Bush."

Then in a trademark Club for Growth complaint, the ad continues: "Chafee voted for higher income taxes and pushed \$48 billion in higher government spending. Then Chafee voted to spend \$230 million on that 'Bridge to Nowhere' boondoggle up in Alaska. That's amazingly liberal. That's Lincoln Chafee."

A campaign spokesman for Chafee dismissed the ad campaign.

"The main thing here is the Club for Growth is an extremist organization that is trying to impose a litmus test," said the spokesman, Ian Lang. "It's really all about an effort to purify the party and they don't care at all about Rhode Islanders because if they did, they'd try to support Lincoln Chafee."

Both the TV and radio ads will run for 10 days statewide — meaning airtime was bought on Providence stations, which cover the whole state — according to the club, which declined to disclose how much the ads cost.

Laffey began airing ads for the GOP primary fight last September. And the National Republican Senatorial Committee has aired ads attacking Laffey.

Rhode Island Secretary of State Matt Brown, one of two Democrats running for Senate, has aired three separate ads this month. The Democratic frontrunner, former state Attorney General Sheldon Whitehouse, has yet to put ads on TV.

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