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Subject Coordinated Communications--Supplemental Notice of Proposed Rulemaking-- Comments of Democratic National Committee

Attached in PDF format are comments on behalf of our client, the Democratic National Committee, in response to the Commission's Supplemental Notice of Proposed Rulemaking re Coordinated Communications, 71 Fed Reg 13306 (March 15, 2006).

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March 22, 2006

Via E-Mail

Brad C. Deutsch, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Coordinated Communications—Supplemental Notice of Proposed Rulemaking—Comments on behalf of Democratic National Committee

Dear Mr. Deutsch:

These comments are submitted on behalf of our client, the Democratic National Committee (“DNC”), in response to the Commission’s Supplemental Notice of Proposed Rulemaking re Coordinated Communications, 71 *Fed. Reg.* 13306 (March 15, 2006).

The DNC submitted comments in response to the Commission’s original Notice of Proposed Rulemaking, 70 *Fed. Reg.* 73946 (Dec. 14, 2005), with respect to the “content” prong of the Commission’s test for determining when a communication by a party committee is a “coordinated communication.” If the “conduct” prong of the test is also met, the amount spent on a “coordinated communication” by a party committee counts as an in-kind contribution to or coordinated expenditure on behalf of the candidate with whom the communication was coordinated, and is then subject to dollar limits.

As the Supplemental NPRM notes, in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), the Court invalidated that element of the “content” test that covers non-express advocacy communications referencing a federal candidate only if those communications occur within 120 days of an election, caucus or convention at which the candidate is running. The Court ordered the Commission to undertake a factual inquiry, in particular, to address the question, “Do candidates in fact limit campaign-related advocacy to the four months surrounding elections.....?” 414 F.3d at 102.

In our original comments on behalf of the DNC, we noted that, with respect to the presidential election, the 120 day time-frame precludes party advertising based on the “content” standard for most of the presidential election year, in most states, even if a presumptive nominee emerges relatively early in the year. We noted further that, in 2004, the DNC in fact made *no* expenditures for public communications, otherwise meeting the “conduct” standard, referencing the presidential candidates, Senator Kerry and President Bush, outside the 120-day window.

The data licensed by the Commission from TNS Media Intelligence/CMAG now definitively addresses the question raised by the Court of Appeals in *Shays v. FEC*, with respect to the presidential, Senate and House elections in 2004. With respect to the presidential election, the only data relevant are summarized in graph P7, which shows the number of media spots airing on or before a presidential primary, caucus or convention in all media markets fully contained within a single “battleground” state. That graph shows that 91.6% of all presidential candidate spots in each battleground state ran within 120 days of the primary, caucus or convention in that state. Indeed, 87.5% of all such spots ran within 90 days of the primary, caucus or convention.

A number of other graphs summarize CMAG data showing the number of days before the *general* election in which presidential candidate ads were run. These graphs are not relevant, however, in determining the impact of the 120-day window. The reason is that, under the Commission’s existing rule, the 120-day window covered advertisements run anywhere in the entire nation from July 5, 2004 (120 days before the general election) through election day. No spot mentioning Sen. Kerry would have been exempt from the current definition of “coordinated communication” if such a spot had been run at any time during the period from March 28, 2004 (120 days before the Democratic National Convention) through July 29, 2004 (the last day of that Convention)—so the 120-day period for ads mentioning Kerry, nationwide, was March 28 all the way through election day. For ads mentioning President Bush, the 120-day period would have extended from May 2, 2004 (120 days before the Republican Convention) all the way through election day. So the only ads that would not meet the “content” standard because they fall outside the 120-day window would be ads run 120 days or more before a primary or caucus in a particular state—as shown in graph P7.

With respect to U.S. Senate elections, graph S3 shows that 99.8% of Senate candidate ads ran within 120 days of the general election and, indeed, 94.7% ran within 60 days of the general election. As to Senate ads run earlier in the cycle, graph S1 shows that 99.5% were run within 120 days of the primary, caucus or convention in which the candidate was running, and 99.1% ran within 60 days of that primary, caucus or convention.

With respect to U.S. House elections, graph H3 shows that 99.8% of all House candidate ads were aired within 120 days of the general election and, indeed, 98% were aired within 60 days of the general election. As to House candidate ads run earlier in the

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cycle, 99.5% were run within 120 days of the relevant primary, caucus or convention and 91.6% were run within 60 days of that event.

Given these data, the answer to the Court of Appeals' factual question is now clear. Candidates *do* in fact limit paid communications to no more than four months prior to the relevant election, and indeed most of those communications appear to run during an even shorter time period in advance of the election.

For these reasons, and for the reasons set forth in the DNC's original comments, the Commission should adopt an appropriate content standard for party coordinated communications and should limit that standard, in the case of non-express advocacy, to public communications promoting, supporting, attacking or opposing a candidate within 120 days of the election, primary, caucus or convention.

Respectfully submitted,

/s/

Joseph E. Sandler

Neil P. Reiff