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Subject Comments Regarding Coordinated Communications

Dear Ms. Rothstein:

Attached please find comments regarding the Notice of Proposed Rulemaking, Coordinated Communications, 74 Fed. Reg. 53,893 (Oct. 21, 2009).

Very truly yours,

Ezra W. Reese

<<Democratic Party Committees Coordination Comments.pdf>>

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Democratic Party Committees Coordination Comments.pdf

January 19, 2010

Ms. Amy L. Rothstein  
Assistant General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
coordinationshays3@fec.gov

**Re: Comments Regarding Notice of Proposed Rulemaking, Coordinated Communications, 74 Fed. Reg. 53,893 (Oct. 21, 2009)**

**A. Introduction**

The Democratic National Committee, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee ("Democratic Party Committees") submit these comments in response to the Notice of Proposed Rulemaking on Coordinated Communications<sup>1</sup> regarding proposed changes in response to the decision of the U.S. Court of Appeals for the District of Columbia in *Shays v. FEC* ("*Shays III*").<sup>2</sup>

The *Shays III* court held that the current regulation, codified at 11 C.F.R. § 109.21, does not meet the "reasoned decisionmaking" standard of the Administrative Procedure Act. First, the court found that the regulation applies a "functionally meaningless" standard to advertisements aired by outside groups beyond the 90- and 120-day periods before elections.<sup>3</sup> Because "very few ads contain magic words,"<sup>4</sup> the court said, and because there are a significant number of ads run by outside groups beyond the 90- and 120-day periods, the current rule leaves many election-related

<sup>1</sup> 74 Fed. Reg. 53,893 (Oct. 21, 2009).

<sup>2</sup> 528 F.3d 914 (D.C. Cir. 2008).

<sup>3</sup> *Id.* at 924.

<sup>4</sup> *Id.*; see *McConnell v. FEC*, 540 U.S. 93, 127 n.18 (2003).

communications unregulated, thus frustrating "Congress's goal of 'prohibiting soft money from being used in connection with federal elections.'"<sup>5</sup> The court also found that the Commission had not adequately justified the 120-day time period of time contained in the rule regarding common vendors and former employees.<sup>6</sup>

The Democratic Party Committees agree that 11 C.F.R. § 109.21 must be revised to regulate communications outside of the 90- and 120-day periods that are intended to influence federal elections. The *Shays III* decision leaves the Commission with no alternative but to follow the court's decision, and lend greater effect to BCRA's soft money restrictions, thereby minimizing the "possibility of corruption Congress sought to stamp out in BCRA."<sup>7</sup>

The problem of soft money identified by the *Shays III* court is unique to spending by non-candidate, non-party groups. These concerns are diminished when the spender is a political party committee – especially a national party committee, which is banned altogether from raising or spending "soft money." For this reason, the party coordinated communication provisions, found at 11 C.F.R. § 109.37, need not and should not be changed to match the judicially-required revision of § 109.21.

To do so would go beyond the *Shays III* holding. It would also compound a problem that has persisted since 2003, when – despite express statutory direction to the contrary – the Commission adopted coordination rules that were substantially the same for "hard money" party spenders as for soft money-funded, nonparty spenders. The party coordinated communications rules should be preserved in their current form for now, and divorced entirely from the rules for non-candidate and party payors; if the Commission makes any modification to § 109.21 that would affect § 109.37, such as a change to the common vendor and former employee standards, the current version of those standards should be preserved with regard to party committee spending. The Democratic Party Committees also urge the Commission to begin a separate rulemaking for the purpose of drafting coordinated communication rules that, for the first time, take into account the unique relationship between political parties and their candidates.

<sup>5</sup> *Id.* at 925 (quoting *McConnell*, 540 U.S. at 177 n.69).

<sup>6</sup> *Id.* at 928-29.

<sup>7</sup> *Id.* at 925.

## **B. Party Coordinated Communications Should Never Have Been Modified by the BCRA Regulations**

In 1996, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee filed a Petition for Expedited Rulemaking with the Commission that requested, *inter alia*, meaningful guidance regarding independent expenditures by the national committees of political parties. The Commission did issue a Notice of Proposed Rulemaking, but never completed the process of crafting rules for political party spending.

When Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"),<sup>8</sup> it repealed the coordination rules then in place.<sup>9</sup> It directed the Commission to "promulgate new regulations on coordinated communications" – but rules that would cover only "communications paid for by persons other than candidates, authorized committees of candidates, and party committees."<sup>10</sup> Congress evidenced a plain intent to regulate political party spending differently than outside group spending.

And yet the Commission did exactly the opposite. Despite contrary congressional intent, the Commission acted *ultra vires* to create a definition of party coordinated communications that mirrored the definition of coordinated communications by other organizations.<sup>11</sup> The definitions were not created with party committee hard money spending in mind; they were simply the same rules as for outside groups, hastily applied to party committee spending.

At the time, the Democratic Party Committees told the Commission that party coordinated communications should be dealt with "when it can take up the matter judiciously, with ample time to work with the regulated community on the selection and shape of rules." They warned: "The current rulemaking does not present this opportunity."<sup>12</sup> The Commission proceeded anyway; the final rules justified tying the party committees to the same standard as outside

<sup>8</sup> Pub. L. No. 107-155.

<sup>9</sup> *See id.* § 214(b).

<sup>10</sup> *Id.* § 214(c).

<sup>11</sup> *See* 11 C.F.R. § 109.37; Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003).

<sup>12</sup> *See* [http://fec.gov/pdf/nprm/coord\\_and\\_ind\\_expenditures/dnc.pdf](http://fec.gov/pdf/nprm/coord_and_ind_expenditures/dnc.pdf).

groups only by noting that it was "doing so to give clear guidance to those affected by BCRA."<sup>13</sup> That clarity came at the expense of fulfilling the statutory mandate.

### C. The Commission Must Not Repeat Its Error

Appropriately, the Commission now asks whether any changes to the common vendor and employee conduct standards should be imported into the party coordination rules; it also asks if a notice of proposed rulemaking should be issued regarding party coordinated communications. The Democratic Party Committees believe that the current rules governing party committee spending can and should continue to apply – at least for now – in the wake of *Shays III*. Furthermore, the Democratic Party Committees request a rulemaking that would follow the statute and result in separate coordination regulations tailored to party committees.

BCRA already treats the political parties more strictly than other groups in the funds they may receive and spend in the first instance.<sup>14</sup> National political parties operate in an entirely "hard money" world; they are the only entities that cannot raise funds under any circumstances unless they are subject to the limitations, prohibitions, and reporting requirements of the Federal Election Campaign Act ("the Act").<sup>15</sup> Not even federal candidates are so heavily regulated. State and local parties, too, are highly restricted, in that any public communication that promotes, supports, attacks, or opposes a clearly identified federal candidate must be paid for with funds subject to the limitations, prohibitions, and reporting requirements of the Act.<sup>16</sup> These heightened restrictions were justified by Congress and the Supreme Court because they understood that a close relationship exists between political parties and candidates: they saw BCRA's financing restrictions as a necessary bulwark against candidate corruption.<sup>17</sup>

But these same financing restrictions render political parties structurally incapable of posing the threat addressed by the court in *Shays III*.<sup>18</sup> Anything paid for by a national party committee, and any public communication that promotes, supports, attacks, or opposes a clearly identified federal candidate paid for by a state or local party committee, will be paid for with hard money

<sup>13</sup> 68 Fed. Reg. at 448.

<sup>14</sup> See 2 U.S.C. § 441i.

<sup>15</sup> See *id.* § 441i(a).

<sup>16</sup> See *id.* §§ 431(20)(A)(iii), 441i(b).

<sup>17</sup> See *McConnell*, 593 U.S. at 629, 670-71.

<sup>18</sup> See *Shays III*, 528 F.3d at 925.

no matter how far out from the election it is. The coordination regulations for outside groups are designed to prevent a threat of circumvention that political parties are already unable to pose.

Thus, there is no reason – whether under the statute or the *Shays III* holding – to place political parties under the same onerous restrictions vis-à-vis their own candidates that the *Shays III* court asks the Commission to apply with respect to outside group spending.

#### D. Conclusion

The Democratic Party Committees request that the Commission begin a rulemaking to consider how coordinated communications rules should apply to political party committees. In the meantime, the Commission should leave the rules that apply to party committee spending in their current form, pending future rulemaking.

As before, we appreciate the opportunity to comment on these issues and request an opportunity to testify in person on these important matters.

Very truly yours,



Marc E. Elias

Judith L. Corley

Brian G. Svoboda

Counsel to the Democratic National Committee, Democratic Senatorial Campaign Committee & Democratic Congressional Campaign Committee