

October 27, 2015

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Dear Commissioners:

We are writing with regard to Agenda Document No. 15-54-A, which is on the agenda for the Commission's meeting on October 29, 2015. The Agenda Document is a proposal from Commissioner Goodman that seeks to initiate a rulemaking to provide "regulatory relief for political parties."

In substance, the proposed rulemaking would seek to (i) exempt certain categories of party spending from the definition of a "party coordinated communication" and exempt certain activities from triggering the "conduct" prong of the party coordinated spending rules, (ii) liberalize rules related to party volunteer activities, and (iii) narrow the scope of the "federal election activities" that trigger BCRA hard money rules for spending by state parties.

The most alarming suggestion in this proposal is to exempt from the definition of "coordinated" spending any public communication that refers to a candidate unless the communication contains express advocacy or republished campaign materials. Agenda Doc. at 1. While this proposal is made in the limited context of spending that would tally against the party coordinated spending limits, it is an approach to the concept of "coordination" that is invalid and discredited. *See, e.g., Shays v. FEC*, 414 F.3d 76, 97-102 (D.C. Cir. 2005); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 88 (D.D.C. 1999). As the Supreme Court has said, "the

line between express advocacy and other types of election-influencing expression is, for Congress' purposes, functionally meaningless." *McConnell v. FEC*, 540 U.S. 93, 217 (2003). By using a "functionally meaningless" standard to draw the line between coordinated spending and independent spending (even if, in the first instance, just for parties), the Commission would be opening the door to the general evisceration of the coordination standard of the law.

While we also oppose on substantive grounds various of the other proposals made by Commissioner Goodman, particularly those intended to undermine the BCRA state party rules, we will not further debate the merits of those proposals here. But we do strongly object to any decision by the Commission to initiate a rulemaking on these matters now, in light of other, far more pressing, rulemaking obligations the Commission has failed to fulfill.

For instance, as we note in other comments we have filed today (with regard to REG 2015-04), the Commission has been derelict in failing to revise its rules for disclosure of electioneering communications and independent expenditures, a failure that has resulted in the lack of disclosure of the source of hundreds of millions of dollars that is being spent to influence federal elections. This is a major and growing problem, for which the Commission's inability to muster a majority to even begin a rulemaking is a national scandal.

So too, the Commission's failure to even begin a rulemaking on the agency's inadequate and overwhelmed coordination rules is an equal dereliction of duty. While some Commissioners may believe that the many blatant and direct dealings between candidates, their aides, their agents, their former aides, their Super PACs and their Super PAC donors do not technically trigger the existing, flawed coordination rules, few people in this country take seriously the claim that the individual candidate Super PACs established by virtually every presidential candidate are really independent of the candidates who established them. Although this is now the second presidential cycle in which this problem has been utterly apparent—and which results in the spectacle of presidential candidates raising and benefiting from multi-million dollar contributions—the Commission has yet to undertake a rulemaking to investigate the problem or to consider a solution. Again, the Commission's passivity in the face of an obvious crisis at the heart of its jurisdictional responsibility is a national scandal.

Against this backdrop, the proposal for the Commission to now initiate a rulemaking on political party spending, without first doing so on these other, more urgent matters, is a suggestion for the agency to turn its priorities upside down. While a rulemaking on political party spending may well be a worthwhile endeavor for the Commission to undertake someday, the agency's time and resources in the immediate future should be devoted to dealing with the immediate crises before it.

Sincerely,

/s/ J. Gerald Hebert

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