



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Concurring Opinion of

**Chairman Scott E. Thomas
Vice Chairman Michael Toner
Commissioner David M. Mason
Commissioner Danny Lee McDonald
Commissioner Ellen Weintraub**

Re Advisory Opinion 2005-18

The opinion approved herein involved a radio program paid for by the campaign committee of Congressman Reyes that will include participation of other Members of Congress who are federal candidates. While the opinion's conclusion regarding a potential in-kind contribution by Congressman Reyes' committee to the other candidates is adequately addressed by noting that the program will not reach the congressional districts of the other candidates,¹ there is a separate legal basis that could similarly resolve the in-kind contribution issue. This legal basis turns on whether the communication at issue runs within 120 days of a federal candidate's election. Because we are aware of some confusion in the regulated community on the latter issue, we wish to further clarify application of the Commission's coordinated communication regulations—by specifying that the 'refers to a candidate within 120 days of an election' content prong of the regulations is triggered only by a communication run within 120 days of the election of *the referenced candidate*.

The provision in question is one of the regulations adopted by the Commission following passage of the Bipartisan Campaign Reform Act of 2002. In an effort to clarify which communications the Commission wished to treat as in-kind contributions by virtue of coordination with a candidate, the agency adopted the content prongs at 11 CFR 109.21(c). Of relevance here, the Commission included:

A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

¹ The opinion focuses on the 'content prongs' of the Commission's coordinated communication regulations at 11 CFR 109.21(c), particularly the language at (c)(4)(iii) that reaches communications "directed to voters in the jurisdiction of the clearly identified candidate."

- (i) The communication refers to a political party or to a clearly identified candidate for Federal office;**
- (ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and**
- (iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.**

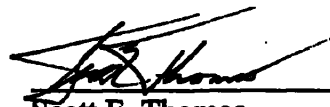
Apparently, this regulation has generated some confusion in circumstances where a federal candidate is paying for a communication that includes a reference to one or more other federal candidates and the communication reaches voters in the jurisdictions of all the candidates involved. For example, in the recent October 4, 2005 special election in California for the 48th Congressional District, there was some concern that Democratic candidates paying for ads including an endorsement by Sen. Feinstein might have to treat some portion of the cost of such ads as an in-kind contribution to Sen. Feinstein—even though Sen. Feinstein’s June 6, 2006 primary would not be within 120 days of the special House election. Using what we view to be a strained construction, some apparently interpreted the regulation’s 120-day provision to be triggered by the date of the paying candidate’s election, rather than by the date of the election of the endorsing candidate who is not paying for any portion of the communication (such as Senator Feinstein). We hope by this concurring opinion to clarify that the regulation should be construed instead in the common sense manner intended: Where someone is paying for a communication that makes reference to a federal candidate, the potential in-kind contribution arises under the 120 day prong of the coordinated communication regulation only where the election of the referenced candidate falls within 120 days of the communication.²

In the circumstances presented by the requestor, had any of the other candidates who were referenced in the radio program had primary elections more than 120 days removed from the airing of the program, the 120 day prong of the coordinated

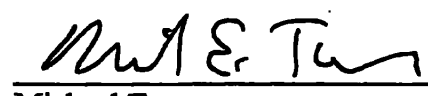
² We thought this legal conclusion was clear from the advice issued to Alice Forgy-Kerr for Congress in Advisory Opinion 2004-1, available at www.fec.gov. There, the House candidate’s campaign committee wished to pay for and run ads that would contain an endorsement by President Bush during a timeframe that would straddle the date 120 days before the Kentucky presidential primary. (Forgy-Kerr’s primary was on February 17, 2004, while the presidential primary was on May 18, 2004.) The Commission concluded that ads run more than 120 days before *the President’s primary election* would fall outside the reach of the 120 day provision at 11 C.F.R. 109.21(c)(4).

communication regulation would not have applied as a matter of law—regardless of whether the ads reached the congressional district of those other candidates. Though this separate legal analysis was not needed to reach a conclusion in this particular advisory opinion, it may prove determinative in other circumstances, and we hope to reduce any unnecessary doubt on the underlying question.³

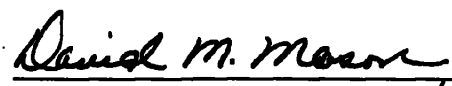
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Date


Scott E. Thomas
Chairman

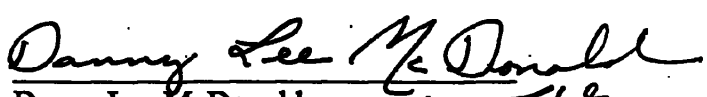
12/2/05
Date


Michael Toner
Vice Chairman

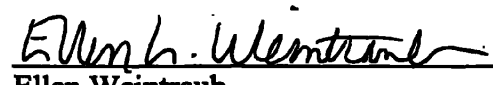
12/02/05
Date


David M. Mason *kte*
Commissioner

12-02-05
Date


Danny Lee McDonald *by [Signature]*
Commissioner

12/2/05
Date


Ellen Weintraub
Commissioner

³ The Commission will have an opportunity to further address this very issue soon in a Notice of Proposed Rulemaking on Coordinated Communications (11 C.F.R. 109.21)