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AGENDA ITEM
For Meeting of: 08-21-08

August 20, 2008

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch for*
General Counsel

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Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

David Adkins *DA*
Attorney

Subject: Draft AO 2008-06

We have been asked to circulate the attached proposed draft of the subject advisory opinion. Please place this draft on the agenda for August 21, 2008.

Attachment

1 ADVISORY OPINION 2008-06

2

3 Marc E. Elias, Esq.

DRAFT

4 Caroline P. Goodson, Esq.

5 Counsel to the Democratic Party of Virginia

6 607 Fourteenth Street, NW

7 Washington, D.C. 20005-2011

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9 Dear Mr. Elias and Ms. Goodson:

10 We are responding to your advisory opinion request on behalf of the Democratic
11 Party of Virginia (the "Committee"), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. 431 et seq., and Commission
13 regulations to the preparation and distribution of publications by the Committee in
14 connection with the 2008 general election. The Commission concludes that the
15 determination of whether the Committee's publications are exempt from the definitions
16 of "contribution" and "expenditure" turns on whether they are distributed by Committee
17 employees or volunteers. Restrictions on the manner in which the publications are
18 distributed are similarly contingent upon who distributes them.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 June 6, 2008, your telephone conversation with Commission attorneys on June 17, 2008,
22 and your email received on July 1, 2008.

23 The Committee is a State party that is registered as a political committee with the
24 Commission. In connection with the 2008 general election, the Committee plans to
25 prepare and distribute publications featuring Democratic Party candidates running for
26 State and federal office in Virginia. The publications will include information about the

1 general election, including the date and time of the election and how and where to cast a
2 ballot. To make the publications “more visually compelling,” the Committee also plans
3 to include abstract designs and colors in the backgrounds or on the borders of the
4 publications. In addition, the Committee plans to include in the publications any, or all,
5 of the following images: (1) an American flag; (2) scenery from the Commonwealth of
6 Virginia (*e.g.*, the Shenandoah Mountains, Skyline Drive, or Virginia Beach); and (3)
7 photographs of diverse groups of Virginians. Finally, the Committee plans to include in
8 the publications candidate photographs – both traditional candidate “headshots” as well
9 as photographs of the candidates in informal settings and poses. These informal
10 photographs will show the candidates with the above-mentioned images; for example, the
11 Committee may use a photograph of a candidate (1) in a crowd of diverse Virginians, (2)
12 next to an American flag, or (3) with the Shenandoah Mountains serving as a backdrop.

13 The Committee will distribute the publications by mail and by hand. Hand
14 delivery will be effected by Committee employees and volunteers, who will take the
15 publications door-to-door, or hand them out at locations where many potential voters are
16 readily accessible, like, for example, Metro, train, and bus stops; parks; parking lots; and
17 shopping centers. Those distributing the publications will be encouraged to converse
18 with recipients of the publications, but the Committee has not yet determined what, if
19 any, substantive guidance it will provide to employees and volunteers on how to engage
20 these persons or what to say to them. All costs associated with the publications will be
21 paid for by the Committee with funds subject to the prohibitions, limitations, and
22 reporting requirements of the Act.

1 ***Questions Presented***

2 *(1) Will the Committee's publications, with the images described above, qualify as*
3 *exempt from the definitions of "contribution" and "expenditure" under either the*
4 *"slate card exemption" or "volunteer activity exemption?"*

5 *(2) If yes, what restrictions, if any, exist on the manner in which the Committee may*
6 *distribute the publications discussed in Question 1?*

7 ***Legal Analysis and Conclusions***

8

9 *Question 1. Will the Committee's publications, with the images described above, qualify*
10 *as exempt from the definitions of "contribution" and "expenditure" under either the*
11 *"slate card exemption" or "volunteer activity exemption?"*

12 The publications with the images described above will qualify as exempt from the
13 definitions of "contribution" and "expenditure" under the "slate card exemption,"
14 provided their content is consistent with the limited nature of the exemption. These
15 publications would come within the "volunteer activity exemption" if they are distributed
16 by volunteers. Both exemptions are addressed below.

17

18 **Slate Card Exemption**

19 As noted in the request, the Act exempts from the definitions of "contribution"
20 and "expenditure" the payment by State and local political party committees of the costs
21 incurred to prepare, display, mail or otherwise distribute a printed slate card, sample
22 ballot or "other printed listing(s)" of three or more candidates for any public office who
23 are to be elected in the relevant State. *See* 2 U.S.C. 431(8)(B)(v) and 431(9)(B)(iv); *see*

1 *also* 11 CFR 100.80 and 100.140. This provision is commonly known as the “slate card
2 exemption.”

3 The Committee’s publications meet the threshold requirements of the slate card
4 exemption. The Committee will include on its publications a reference to at least three
5 clearly identified candidates running for election in Virginia, including at least one
6 clearly identified federal candidate, and will pay for all costs associated with the
7 publications with funds subject to the prohibitions, limitations, and reporting
8 requirements of the Act. A closer question arises, though, with respect to the content of
9 the Committee’s publications and whether it satisfies the exemption.

10 The legislative history of the slate card exemption is unequivocal; it is not
11 intended as a device for party committees to circumvent the limitations on contributions
12 and expenditures of the Act by undertaking extensive campaigning on behalf of
13 candidates.¹ Rather, the exemption is designed to allow State and local parties “to
14 educate the general public as to the identity of the candidates of the party”² and
15 “encourage straight party voting.”³ Indeed, it was Congress’s intent that this exemption
16 apply only to “lists containing the names of all candidates of a party within the State,
17 displayed with equal prominence.”⁴

18 The Commission has previously addressed the scope of this exemption and has
19 repeatedly advised that in order to satisfy the slate card exemption a publication may

¹ See statement of Congressman Frenzel, 120 Cong. Record, H10334 (daily ed. October 10, 1974).

² H. Conf. Rept. 1438, 93d Congress, 2d Sess., p. 65 (1974).

³ H.R. Rep. No. 1239, 93d Congress, 2d Sess., p. 142 (1974).

⁴ H. Conf. Rept. 1438, 93d Congress, 2d Sess., p. 65 (1974).

1 include only the following: (1) information identifying candidates by name or by means
2 of a picture; (2) the office or position currently held by the candidates; (3) the elective
3 office being sought by the candidates; (4) party affiliation; and (5) voting information,
4 such as the time and place of an election and instructions on the method for voting a
5 straight party ticket. Publications that go beyond these informational limitations and
6 provide addition biographical information, descriptions of candidates' positions on the
7 issues, or statements of party philosophy, do not qualify under the slate card exemption.⁵

8 In Advisory Opinion 1978-09 (Republican State Central Committee of Iowa), for
9 example, the Commission determined that the slate card exemption did not apply to
10 brochures and flyers created and distributed by state and county party committees
11 because they contained excess biographical data on the candidates, material on the
12 candidates' positions, and statements of party philosophy. Similarly, in Advisory
13 Opinion 1978-89 (Withers), the Commission determined that neither a pamphlet nor a
14 letter sent by two local party committees fell within the slate card exemption because
15 together they contained excess biographical information about the candidates, outlined
16 candidate positions on government spending, the death penalty and jobs, criticized
17 incumbent officials, and included statements of party philosophy. More recently, in
18 Advisory Opinion 2004-37 (Waters), the Commission determined that a publication did
19 not qualify as a "sample ballot" because "certain candidates [would] be featured more
20 prominently [on the document] and because the document [would include] a brief

⁵ Though slate cards, by their very essence, are one type of express advocacy, the legislative history makes clear that the slate card exemption is not intended to encompass additional express advocacy. See statement of Congressman Frenzel, 120 Cong. Record, H10334 (daily ed. October 10, 1974).

1 commentary . . . about the candidates listed.” See Advisory Opinion 2004-37 (Waters), at

2 Footnote 1.

3 As noted above, the Committee plans to include in its publications content which
4 has been previously approved by the Commission for use on slate cards (*e.g.*, candidate
5 headshots and informational text), as well as eye-catching borders and backgrounds,
6 images, and pictures of candidates in informal settings and poses. On its face, the
7 Committee’s plan is consistent with the slate card exemption. The inclusion of designs,
8 images and photographs on the Committee’s publications neither provides excess
9 biographical information about candidates, nor expresses candidate positions or
10 statements of party philosophy which fall outside the exemption.⁶

11 The Commission recognizes, however, that the manner and frequency with which
12 these types of designs, images and photographs are placed on a publication could
13 potentially undermine its status under the slate card exemption. If a publication features
14 multiple informal candidate photographs, it goes beyond simply “educat[ing] the general
15 public as to the identity of the candidates of the party”⁷ and instead serves to campaign
16 on behalf of the featured candidates. A publication that features photographs of one
17 candidate more prominently than others would similarly be treated as campaign material.
18 In neither of these instances would the publication qualify under the slate card exemption.

19 Though it has not yet finalized its slate cards, the Committee is considering a
20 layout in which the additional images and candidate photographs would be used to

⁶ However, a photograph of a candidate amongst a group of persons who were, for example, wearing t-shirts featuring campaign slogans or holding placards adorned with campaign slogans would disqualify a publication for treatment under the slate card exemption.

⁷ H. Conf. Rept. 1438, 93d Congress, 2d Sess., p. 65 (1974).

1 supplement – rather than supplant – the candidate pictures and text found on traditional
2 slate cards. The Committee has specifically mentioned the possibility of designing a door
3 hanger that would feature a traditional slate card on one side and the above-described
4 images and candidate photos on the reverse side. While the Committee may, within the
5 bounds of the slate card exemption, use photographs of candidates as described above to
6 *supplant* the candidate headshots usually featured on traditional slate cards, it may not
7 use such candidate photographs to *supplement* a traditional slate card layout. Such
8 overuse of candidate photographs, for example, transforms exempt slate cards into
9 campaign materials not covered by the slate card exemption. Accordingly, the
10 Committee’s plan to create a publication that features a traditional slate card on one side
11 of a publication and a spread of candidate photographs on the reverse side does not
12 qualify for the slate card exemption.

13

14 Volunteer Activity Exemption

15 If Committee volunteers distribute the Committee’s publications, the slate card
16 exemption’s limitation on content would be inapplicable. The Act and Commission
17 regulations include a “volunteer activity exemption,” which exempts from the definitions
18 of “contribution” and “expenditure” the costs to create, purchase and distribute campaign
19 materials, including pins, bumper stickers, handbills, brochures, posters, party tabloids,
20 and yard signs, that are used by State and local political party committees *in connection*
21 *with volunteer activities* on behalf of that party’s nominees.⁸ See 2 U.S.C. 431(8)(B)(ix)

⁸ Costs associated with the distribution of campaign materials on behalf of candidates running in the primary election are not covered under this exemption.

1 and 431(9)(B)(viii); *see also* 11 CFR 100.87 and 100.147 (including “newsletters” in the
2 list of campaign materials covered by the exemption).

3 The purpose of this exemption is to encourage volunteer participation in the
4 activities of State and local political party committees.⁹ As such, its application is
5 contingent upon campaign materials being distributed by “volunteers,” a term which
6 includes individuals who receive token payments from the party committee for their
7 assistance.¹⁰ *See* 11 CFR 100.87(d) and 11 CFR 100.147(d).

8 Importantly, the content of campaign materials is not restricted under this
9 exemption; indeed, the application of this exemption is almost entirely contingent upon
10 *who* distributes the materials, not what those materials say. The types of campaign
11 materials covered by this exemption include all manner of publications, including the
12 publications proposed by the Committee. *See* 11 CFR 100.87 and 100.147 (providing
13 non-exclusive list of the types of campaign materials covered under the exemption); *see*
14 *also* statement of Congressman Thompson, 125 Cong. Record, H23813 (daily ed.
15 September 10, 1979) (explaining that the exemption allowed a political party committee
16 to purchase campaign materials used in connection with volunteer activities “without
17 limit”). Accordingly, the Committee’s publications would satisfy this exemption,
18 provided they are distributed by volunteers.¹¹

⁹ *See* H.R. Rep. No. 96-422, at 9 (1979).

¹⁰ Accordingly, for the purposes of this opinion the term “volunteer” includes a person who is paid a one-time, incidental stipend to distribute campaign materials. By contrast, a worker who receives hourly or salary pay from the Committee would not be considered a volunteer.

¹¹ For this exemption to apply, the Committee must also comply with the additional restrictions set forth in 11 CFR 100.87 and 11 CFR 100.147, which address issues outside the scope of this advisory opinion request.

1

2 *Question 2. What restrictions, if any, exist on the manner in which the Committee may*
3 *distribute the publications discussed in Question 1?*

4 Publications must be distributed by Committee employees in a manner consistent
5 with the “slate card exemption.” By contrast, there are no restrictions on the manner in
6 which volunteers may distribute the Committee’s publications under the “volunteer
7 activity exemption.”

8

9 Restrictions on Distribution by Committee Employees¹²

10 The text of the slate card exemption states that “costs associated with the . . .
11 display of listings made on broadcast stations, or in newspapers, magazines, and similar
12 types of general public political advertising such as billboards” are not exempt from the
13 definition of “contribution” or “expenditure.” 11 CFR 100.80 and 100.140. Aside from
14 these restrictions, though, the slate card exemption is silent on the manner in which State
15 and local party committees may distribute slate cards by hand. The legislative history of
16 the exemption is similarly quiet on this point.

17 Notwithstanding the lack of specific guidance, if costs associated with the
18 *distribution* of the slate cards are to qualify for the slate card exemption, Committee
19 employees must limit the verbal message delivered with the slate card. The slate card
20 exemption is not designed to be a device for State and local party committees to
21 circumvent the limitations on contributions and expenditures of the Act by undertaking

¹² The limitations of the slate card exemption would also apply if the Committee contracted with a vendor to distribute the publications.

1 extensive campaigning on behalf of candidates. As discussed above, State party
2 committees are limited in the information they can include on their slate cards. Thus,
3 statements that go beyond the informational limitations discussed in Question 1, such as
4 excess biographical information, statements regarding party philosophy and candidates'
5 positions on particular issues, will remove the costs associated with the *distribution* of the
6 slate cards from the slate card exemption.

7 Committee employees are, in the course of distributing slate cards, free to *say*
8 what the party committee may not otherwise *print* on the slate card itself, but under such
9 circumstances, the salary costs associated with communications that occur during the
10 *distribution* of slate cards would not qualify for the slate card exemption, and the
11 Committee must pay for such salary costs in a manner consistent with the Act and
12 Commission regulations. The Commission notes, however, that nothing said by a
13 Committee employee while distributing an exempt slate card serves to remove the costs
14 associated with the *production* of that slate card from the exemption.

15

16 Restrictions on Distribution by Committee Volunteers

17 As noted above the volunteer activity exemption requires distribution of campaign
18 materials by *volunteers*. Accordingly, mailings that are done by a commercial vendor or
19 done using a commercial list are not permitted under the exemption. *See* 11 CFR
20 100.87(d) and 11 CFR 100.147(d). Similarly, the exemption does not cover general
21 public advertisements or political advertisements, including newspaper advertisements, or
22 billboard postings. *See* 2 U.S.C. 431 (8)(B)(ix)(1) and 431(9)(B)(viii)(1); *see also* 11
23 CFR 100.87(a) and 11 CFR 100.147(a). Short of this requirement, however, there are no

1 restrictions on the manner in which campaign materials may be distributed under the
2 volunteer activity exception.¹³

3 Indeed, volunteers may be used to effect a mailing of campaign materials and the
4 costs associated with that mailing (*e.g.*, stamps and envelopes) would be exempt from the
5 definition of “contribution” and “expenditure.” For door-to-door or in-person
6 distributions volunteers may, for example, engage the recipients of the Committee’s
7 publications in conversation, discuss the candidates’ positions on certain issues, and
8 answer questions about party philosophy. The Committee may also supply volunteers
9 with talking points or a script to guide them in dialogue with recipients of the
10 publications, without jeopardizing the application of the exemptions.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a
15 conclusion presented in this advisory opinion, then the requestor may not rely on that
16 conclusion as support for its proposed activity. Any person involved in any specific
17 transaction or activity which is indistinguishable in all its material aspects from the
18 transaction or activity with respect to which this advisory opinion is rendered may rely on

¹³ As noted in footnote 11, *supra*, however, for the volunteer activity exemption to apply, the Committee must also comply with the additional restrictions set forth in 11 CFR 100.87 and 11 CFR 100.147, which address issues outside the scope of this advisory opinion request. For example, consistent with the Commission’s statements in previous MURs, the Committee must ensure that its volunteers are substantially involved in the distribution of the campaign materials, including, but not limited to, sorting, bundling, and stamping campaign materials and are responsible for transporting those materials to the post office or mailing facility. *See, e.g.*, MUR 5837 (Missouri State Democratic Committee), MUR 4851 (Michigan Republican State Committee), MUR 4471 (Montana State Democratic Central Committee), and MUR 2288 (Utah Republican Party).

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions
2 in this advisory opinion may be affected by subsequent developments in the law
3 including, but not limited to, statutes, regulations, advisory opinions and case law. All
4 cited advisory opinions are available on the Commission's website at
5 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Donald F. McGahn II
Chairman