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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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April 13, 2006

AGENDA ITEM

For Meeting of: 4-20-06

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *RC*
Acting Staff Director

FROM: Lawrence H. Norton *LH*
General Counsel

Rosemary C. Smith *RCS by BCD*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Jonathan M. Levin *JL by BCD*
Senior Attorney

Subject: Draft AO 2006-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 20, 2006.

Attachment

1 ADVISORY OPINION 2006-11

2
3 Marc E. Elias, Esquire
4 Caroline P. Goodson, Esquire
5 Perkins Coie
6 607 14th Street, N.W.
7 Washington, D.C. 20005-2011

DRAFT

8
9 Dear Mr. Elias and Ms. Goodson:

10 We are responding to your advisory opinion request on behalf of the Washington
11 Democratic State Central Committee (the “State Party Committee”), concerning the application
12 of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission
13 regulations to the allocation of payments for mass mailings that expressly advocate the election
14 of one clearly identified Federal candidate, as well as the elections of other candidates of the
15 Democratic party who are referred to only generically.¹ You ask whether, under the Act and
16 Commission regulations, a permissible attribution of the costs of the mass mailing would entail
17 payment of 50 percent by the State Party Committee and 50 percent by the clearly identified
18 Federal candidate’s principal campaign committee (“PCC”).

19 The Commission concludes that at least 50 percent of the cost of the mailing must be
20 attributed to the clearly identified Federal candidate. However, if the space of the mailing
21 devoted to the clearly identified Federal candidate exceeds the space devoted to the generically
22 referenced candidates of the State Party Committee, then the costs attributed to the clearly
23 identified candidate must exceed 50 percent and reflect at least the relative proportion of the
24 space devoted to that candidate.

25

¹ One example of such a message would be: “Vote for John Doe and our great Democratic team.”

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on February
3 27, 2006.

4 The State Party Committee is the State committee of the Democratic Party of Washington
5 and is registered as a political committee with the Commission. In connection with the 2006
6 general election, the State Party Committee proposes to prepare and distribute one or more mass
7 mailings, each of which will refer to only one clearly identified candidate for either the U.S.
8 House of Representatives or U.S. Senate, and will also generically refer to other candidates of the
9 party who are not clearly identified. The State Party Committee will coordinate each mailing
10 with the clearly identified Federal candidate. Each mailing will expressly advocate the election
11 of both the clearly identified Federal candidate and the other generically referenced candidates of
12 the State Party Committee. None of the mailings will contain any solicitations for a contribution
13 or donation to the State Party Committee, to any candidate, or to any other person. You stipulate
14 that only Federal funds will be used to pay for each mailing.²

15 ***Question Presented***

16 *With respect to a mass mailing that refers to only one clearly identified candidate for*
17 *either the U.S. House of Representatives or U.S. Senate and refers generically to other*
18 *candidates of the party who are not clearly identified, and that expressly advocates the election*

² Under the Act and Commission regulations, a “mass mailing” is a form of “public communication.” 2 U.S.C. 431(22) and (23); 11 CFR 100.26 and 100.27. When a State party committee makes a public communication that “promotes, supports, attacks, or opposes” a clearly identified Federal candidate, the communication is “Federal election activity” (regardless of whether it expressly advocates the candidate’s election or defeat or refers also to non-Federal candidates) and must be paid for only with Federal funds. 2 U.S.C. 431(20)(A)(iii), 441i(b)(1) and (2); 11 CFR 100.24(b)(3), 300.32(a)(2) and (b)(2). Similarly, a Federal candidate, his agents, or entities directly or indirectly established, financed, maintained or controlled by him may spend only Federal funds in connection with an election for Federal office, including funds for any Federal election activity. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. “Federal funds” are funds that comply with the limitations, prohibitions, and reporting requirements of the Act. 11 CFR 300.2(g).

1 *of the clearly identified candidate and the generically referenced candidates, but does not solicit*
2 *funds, may the State Party Committee pay 50 percent of the cost of the mass mailing, and may*
3 *the PCC of the clearly identified Federal candidate pay the remaining 50 percent?*

4 ***Legal Analysis and Conclusion***

5 Yes, the State Party Committee and the PCC of the clearly identified Federal candidate
6 may each pay 50 percent of the cost of the mailing so long as the space devoted to the candidate
7 in the mailing does not exceed the space in the mailing devoted to the generically referenced
8 candidates of the State Party Committee. If the space of the mailing devoted to the clearly
9 identified Federal candidate *exceeds* the space devoted to the generically referenced candidates of
10 the State Party Committee, then the costs attributed to the clearly identified candidate must
11 exceed 50 percent and reflect at least the relative proportion of the space devoted to that
12 candidate. For example, if the space devoted to the clearly identified Federal candidate is twice
13 that devoted to the generically referenced candidates of the State Party Committee, then the costs
14 attributed to the clearly identified Federal candidate is two-thirds of the total cost, and the PCC
15 must pay at least that amount in order to avoid a contribution by the State Party Committee to the
16 candidate or a coordinated expenditure by the State Party Committee on behalf of the candidate.
17 *See 2 U.S.C. 441a(a)(2)(A) and 441a(d)(3).*

18 Neither the Act nor Commission regulations definitively address the appropriate
19 allocation of payments for the type of mass mailings described in your request. Commission
20 regulations at 11 CFR part 106 include both general allocation rules and rules for allocating
21 specific types of expenses in particular circumstances. Section 106.1(a) provides the general rule
22 that expenditures made on behalf of *more than one* clearly identified candidate “shall be
23 attributed to each such candidate according to the benefit reasonably expected to be derived.”

1 For “publications” (which includes mass mailings), the attribution is determined by “the
2 proportion of space or time devoted to each candidate as compared to the total space or time
3 devoted to all candidates.” 11 CFR 106.1(a). This regulation only addresses communications
4 involving more than one clearly identified candidate, and does not directly address how
5 attribution applies to a communication involving only one clearly identified candidate in
6 combination with a generic reference to other candidates of a political party.

7 Commission regulations at 11 CFR 106.8 (which apply only to *phone banks* conducted by
8 a party committee) do address the attribution required for a communication that possesses the
9 same attributes as the mass mailings described in your request (*i.e.*, reference to only one clearly
10 identified Federal candidate along with a generic reference to other party candidates; and no
11 solicitation of funds). *See* 11 CFR 106.8(a). Under 11 CFR 106.8, a flat 50 percent of the costs
12 of a phone bank communication must be attributed to the clearly identified candidate, and the
13 other 50 percent must be attributed to the party committee, regardless of the amount of time
14 devoted to each. 11 CFR 106.8(b). However, the Commission’s Explanation and Justification of
15 this regulation specifically noted that the Commission had considered whether to include other
16 forms of communications, such as mailings, within the regulation’s coverage but “decided to
17 limit the scope of new section 106.8 to phone banks . . . because each type of communication
18 presents different issues that need to be considered in further detail before establishing new
19 rules.” *Party Committee Telephone Banks, Final Rules*, 68 FR 64517, 64518 (November 14,
20 2003).

21 Although neither 11 CFR 106.1 nor 106.8 is directly applicable for reasons discussed
22 above, the Commission concludes that there is nonetheless an appropriate method for allocating
23 the costs of the mailings described in your request. A mass mailing that expressly advocates the

1 election of only one clearly identified Federal candidate, as well as the election of generically
2 referenced, but not clearly identified, candidates, serves in large measure the purpose of
3 influencing the election of the clearly identified Federal candidate, no matter how much of the
4 space in the mailing is devoted to that candidate. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11
5 CFR 100.52(a) and 100.111(a). Advocacy related to the election of the clearly identified
6 candidate is the most salient feature of such a communication, as compared to the generic
7 reference to the party's candidates, which does not single out any particular candidate to the
8 reader. *Cf.* 11 CFR 106.6(f).³ Although the Commission recognizes that such a communication
9 also encourages support for all of the party's other candidates, and hence the State Party
10 Committee itself derives some benefit from the mailing,⁴ "the benefit reasonably expected to be
11 derived" by the clearly identified candidate from the mass mailing is sufficient to require no less
12 than a 50 percent attribution of costs to him, even if the space attributable to him is less than that
13 attributable to the generically referenced candidates. *See* 11 CFR 106.1(a).

14 Where the space in the mailing devoted to the clearly identified Federal candidate
15 exceeds the space devoted to the generically referenced party candidates, the Commission
16 concludes that it is appropriate to apply analogous "space or time" principles set out in 11 CFR
17 106.1(a). In this situation, "the benefit reasonably expected to be derived" by the clearly
18 identified candidate should be measured by determining the amount of space devoted to the

19 _____
³ In a recent revision to the allocation rules for separate segregated funds and nonconnected committees at 11 CFR 106.6(f), the Commission viewed voter drives and public communications "that refer to a political party and either Federal or non-Federal candidates, but not both, as candidate-driven." *See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, Final Rules*, 69 FR 68,056, 68,063.

⁴ *Cf.* 11 CFR 106.8.

1 clearly identified candidate as compared to the amount of space devoted to the generically
2 referenced party candidates. Because no part of the cost of the mass mailing may be left
3 unattributed to either the clearly identified Federal candidate or the State Party Committee, the
4 percentage of the cost of the mailing to be attributed to the clearly identified candidate is equal to
5 the amount of space devoted to the candidate as compared to the combined space devoted to both
6 that candidate and the generically referenced party candidates. No contribution or coordinated
7 expenditure would be made by the State Party Committee so long as the PCC pays at least its
8 proportionate share of the cost of the mass mailing.⁵

9 In determining whether space is “devoted” to the clearly identified candidate, the State
10 Party Committee should include both content that explicitly refers to, or provides pictures of, the
11 candidate, and other portions of the communication containing issue discussion that is for the
12 purpose of influencing the clearly identified candidate’s election and, hence, provides a benefit to
13 the clearly identified candidate. *See* 11 CFR 106.1(a).

14 This response constitutes an advisory opinion concerning the application of the Act and
15 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
16 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
17 assumptions presented, and such facts or assumptions are material to a conclusion presented in

⁵ The Commission notes that this advisory opinion is limited to the facts presented in the request and that none of the communications described in the request would contain a reference to a presidential candidate. *Cf. Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 611-612 (1996) (in addressing a statutory provision that only concerned congressional races, the United States Supreme Court specifically noted that it was not addressing any issues that might grow out of the public funding of presidential campaigns).

1 this advisory opinion, then the requestor may not rely on that conclusion as support for its
2 proposed activity.

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Sincerely,

Michael E. Toner
Chairman