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MEMORANDUM

**AGENDA ITEM**

For Meeting of: 4-20-06

To: The Commission  
General Counsel  
Staff Director  
Office of the Commission Secretary

**SUBMITTED LATE**

From: Chairman Michael E. Toner *MT*

Date: April 20, 2006

Re: Draft AO 2006-11 (The Washington State Democratic Central Committee)

Attached please find Chairman Toner's proposed revisions to AO 2006-11 that he plans to offer at the Commission's Open Session on Thursday, April 20, 2006.

Thank you.

1 ADVISORY OPINION 2006-11

2

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

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.<sup>1</sup> 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.

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<sup>1</sup> 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 Federal candidate, and will also  
8 generically refer to other candidates of the party who are not clearly identified. The State Party  
9 Committee will coordinate each mailing with the clearly identified Federal candidate. Each  
10 mailing will expressly advocate the election of both the clearly identified Federal candidate and  
11 the other generically referenced candidates of the State Party Committee. None of the mailings  
12 will contain any solicitations for a contribution or donation to the State Party Committee, to any  
13 candidate, or to any other person. You stipulate that only Federal funds will be used to pay for  
14 each mailing.<sup>2</sup>

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Representatives or U.S. Senate,

15 **Question Presented**

16 *With respect to a mass mailing that refers to only one clearly identified Federal*  
17 *candidate and refers generically to other candidates of the party who are not clearly identified,*  
18 *and that expressly advocates the election of the clearly identified candidate and the generically*

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Representatives or U.S. Senate

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<sup>2</sup> 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 *referenced candidates, but does not solicit funds, may the State Party Committee pay 50 percent*  
2 *of the cost of the mass mailing, and may the PCC of the clearly identified Federal candidate pay*  
3 *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 whether a House, Senate, or Presidential candidate -- may each pay 50 percent of the cost of the  
7 mailing so long as the space devoted to the candidate in the mailing does not exceed the space in  
8 the mailing devoted to the generically referenced candidates of the State Party Committee. If the  
9 space of the mailing devoted to the clearly identified Federal candidate *exceeds* the space devoted  
10 to the generically referenced candidates of the State Party Committee, then the costs attributed to  
11 the clearly identified candidate must exceed 50 percent and reflect at least the relative proportion  
12 of the space devoted to that candidate. For example, if the space devoted to the clearly identified  
13 Federal candidate is twice that devoted to the generically referenced candidates of the State Party  
14 Committee, then the costs attributed to the clearly identified Federal candidate is two-thirds of  
15 the total cost, and the PCC must pay at least that amount in order to avoid a contribution by the  
16 State Party Committee to the candidate or a coordinated expenditure by the State Party  
17 Committee on behalf of the candidate. *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, benefits the clearly identified Federal candidate  
3 and generic party candidates in a roughly equal degree. Under these circumstances, “the benefit  
4 reasonably expected to be derived” by the clearly identified candidate from the mass mailing is  
5 sufficient to require no less than a 50 percent attribution of costs to him, even if the space  
6 attributable to him is less than that attributable to the generically referenced candidates. See 11  
7 CFR 106.1(a).

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**Deleted:** , no matter how much of the space in the mailing is devoted to that candidate. See 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Advocacy related to the election of the clearly identified candidate is the most salient feature of such a communication, as compared to the generic reference to the party's candidates, which does not single out any particular candidate to the reader. Cf. 11 CFR 106.6(f).<sup>5</sup> Although the Commission recognizes that such a communication also encourages support for all of the party's other candidates, and hence the State Party Committee itself derives some benefit from the mailing,<sup>4</sup>

8 Where the space in the mailing devoted to the clearly identified Federal candidate exceeds the space  
9 devoted to the generically referenced party candidates, the Commission concludes that it is appropriate to apply  
10 analogous “space or time” principles set out in 11 CFR 106.1(a). In this situation, “the benefit reasonably expected  
11 to be derived” by the clearly identified candidate should be measured by determining the amount of space devoted to  
12 the clearly identified candidate as compared to the amount of space devoted to the generically referenced party  
13 candidates. Because no part of the cost of the mass mailing may be left unattributed to either the clearly identified  
14 Federal candidate or the State Party Committee, the percentage of the cost of the mailing to be attributed to the  
15 clearly identified candidate is equal to the amount of space devoted to the candidate as compared to the total space  
16 devoted to both that candidate and the generically referenced party candidates. No contribution or coordinated  
17 expenditure would be made by the State Party Committee so long as the PCC pays at least its proportionate share of  
18 the cost of the mass mailing.<sup>6</sup> The portion of a mass mailing that is attributable to the clearly  
19 identified Federal candidate can be: (1) an in-kind contribution, subject to the limitations set

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<sup>6</sup> The Commission emphasizes that this advisory opinion response is limited to mass mailings containing a reference to a clearly identified Federal candidate, and does not address what rules govern mass mailings containing references to one or more non-federal Candidates.

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1 forth in 11 CFR 110.2; (2) a coordinated expenditure, subject to the limitations, restrictions and  
2 requirements of 11 CFR 109.32 and 109.33; or (3) reimbursed by the clearly identified Federal  
3 candidate or his or her authorized committee. *See* 11 CFR 106.8 (b)(2).

4  
5 This response constitutes an advisory opinion concerning the application of the Act and  
6 Commission regulations to the specific transaction or activity set forth in your request. *See* 2  
7 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or  
8 assumptions presented, and such facts or assumptions are material to a conclusion presented in  
9 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
10 proposed activity.

11 Sincerely,

12  
13 Michael E. Toner  
14 Chairman  
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**Deleted:** In determining whether space is "devoted" to the clearly identified candidate, the State Party Committee should include both content that explicitly refers to, or provides pictures of, the candidate, and other portions of the communication containing issue discussion that is for the purpose of influencing the clearly identified candidate's election and, hence, provides a benefit to the clearly identified candidate. *See* 11 CFR 106.1(a).