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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
General Counsel

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Rosemary C. Smith
Associate General Counsel

RC

Amy L. Rothstein
Assistant General Counsel

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David C. Adkins
Attorney

DA

Subject: Draft AO 2008-06

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

Attachment

1 ADVISORY OPINION 2008-06

2

3 Marc E. Elias, Esq.

DRAFT B

4 Caroline P. Goodson, Esq.

5 Counsel to the Democratic Party of Virginia

6 607 Fourteenth Street, NW

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 Democratic
11 Party of Virginia (the "Committee"), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the
13 preparation and distribution of publications by the Committee in connection with the
14 2008 general election. The Commission concludes that publications distributed by
15 Committee employees will satisfy the "slate card exemption," provided the content of the
16 publications is consistent with the nature of this exception. Publications distributed by
17 volunteers will satisfy both the "slate card exemption" and the "volunteer activity
18 exemption."

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 “fresh-faced” Virginians. Finally, the Committee plans
8 to include in the publications candidate photographs – both traditional candidate
9 “headshots” as well as photographs of the candidates in informal settings and poses.
10 These informal photographs will show the candidates with the above-mentioned images;
11 for example, the Committee may use a photograph of a candidate (1) in a crowd of
12 diverse Virginians, (2) next to an American flag, or (3) with the Shenandoah Mountains
13 serving as a backdrop.

14 The Committee will distribute the publications by mail and by hand. Hand
15 delivery will be effected by Committee employees and volunteers, who will take the
16 publications door-to-door, or hand them out at locations where many potential voters are
17 readily accessible, like, for example, Metro, train, and bus stops; parks; parking lots; and
18 shopping centers. Those distributing the publications will be encouraged to converse
19 with recipients of the publications, but the Committee has not yet determined what, if
20 any, substantive guidance it will provide to employees and volunteers on how to engage
21 these persons or what to say to them. All costs associated with the publications will be
22 paid for by the Committee with funds subject to the prohibitions, limitations, and
23 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 Yes, the publications with the images described above will qualify as exempt
13 from the definitions of "contribution" and "expenditure" under the "slate card
14 exemption," provided their content is consistent with the 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
24 also 11 CFR 100.80 and 100.140. Properly understood, the exemption permits state and

1 local parties “to educate the general public as to the identity of the candidates of the
2 party.”¹ This provision is commonly known as the “slate card 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.

9 The Commission has previously addressed the scope of this exemption and has
10 repeatedly advised that materials subject to the slate card exemption may include the
11 following information: (1) information identifying candidates by name or by means of a
12 picture; (2) the office or position currently held by the candidates; (3) the elective office
13 being sought by the candidates; (4) party affiliation; and (5) voting information, such as
14 the time and place of an election and instructions on the method for voting a straight
15 party ticket. Publications that go beyond these informational limitations and provide
16 additional biographical information, descriptions of candidates’ positions on the issues, or
17 statements of party philosophy, do not qualify under the slate card exemption. *See*
18 *Advisory Opinions 1978-09 (Republican State Central Committee of Iowa) and 1978-89*
19 *(Withers)*.

20 In *Advisory Opinion 1978-09 (Republican State Central Committee of Iowa)*, for
21 example, the Commission determined that the slate card exemption did not apply to
22 brochures and flyers created and distributed by state and county party committees

¹ H. Conf. Rept. 1438, 93d Congress, 2d Sess., p. 65 (1974).

1 because they contained excess biographical data on the candidates, material on the
2 candidates' positions, and statements of party philosophy. Similarly, in Advisory
3 Opinion 1978-89 (Withers), the Commission determined that neither a pamphlet nor a
4 letter sent by two local party committees fell within the slate card exemption because
5 together they contained excess biographical information about the candidates, outlined
6 candidate positions on government spending, the death penalty and jobs, criticized
7 incumbent officials, and included statements of party philosophy.

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

16 In addition, it has long been the Commission's practice to "interpret the Act and
17 its regulations in a manner consistent with contemporary technological innovations . . .
18 where the use of the technology would not compromise the intent of the Act or
19 regulations." Advisory Opinion 1999-09 (Bradley for President) (approving Federal
20 matching funds for contributions received over the Internet through the use of a credit
21 card). In the thirty years since the Commission last issued an Advisory Opinion directly
22 addressing the permissible scope of content under the slate card exemption, innovations
23 in the field of graphic design have made it easier to enhance publications with color,

1 designs, graphics and photographs, making them more eye-catching and, possibly, more
2 effective.

3 Though it has not yet finalized its slate cards, the Committee is considering a
4 layout in which the additional images and candidate photographs would be used to
5 supplement – rather than supplant – the candidate pictures and text found on traditional
6 slate cards. The Committee has specifically mentioned the possibility of designing a door
7 hanger that would feature a traditional slate card on one side and the above-described
8 images and candidate photos on the reverse side. Because including extra pictures does
9 not cause the publication to include any additional prohibited information², the
10 publication is consistent with the exemption. Accordingly, the Committee’s plan to
11 create a publication that features a traditional slate card on one side of a publication and a
12 spread of candidate photographs on the reverse side does qualify for the slate card
13 exemption.

14

15 Volunteer Activity Exemption

16 If Committee volunteers distribute the Committee’s publications, the slate card
17 exemption’s limit on content would be unnecessary. The Act and Commission
18 regulations include a “volunteer activity exemption,” which exempts from the definitions
19 of “contribution” and “expenditure” the costs to create, purchase and distribute campaign
20 materials, including pins, bumper stickers, handbills, brochures, posters, party tabloids,
21 and yard signs, that are used by state and local political party committees *in connection*

² For example, a photograph of a candidate in a group of people who were wearing t-shirts featuring campaign slogans or holding placards adorned with campaign slogans could disqualify a publication for treatment under the slate card exemption.

1 *with volunteer activities* on behalf of that party's nominees.³ See 2 U.S.C. 431(8)(B)(ix)
2 and 431(9)(B)(viii); *see also* 11 CFR 100.87 and 100.147 (including "newsletters" in the
3 list of campaign materials covered by the exemption). The purpose of this exemption is
4 to encourage volunteer participation in the activities of state and local political party
5 committees. See 11 CFR 100.87(d) and 11 CFR 100.147(d).

6 Importantly, the content of campaign materials is not restricted under this
7 exemption; indeed, the application of this exemption is almost entirely contingent upon
8 *who* distributes the materials, not what those materials say. The types of campaign
9 materials covered by this exemption include all manner of publications, including the
10 publications proposed by the Committee. See 11 CFR 100.87 and 100.147 (providing
11 non-exclusive list of the types of campaign materials covered under the exemption).
12 Accordingly, the Committee's publications would satisfy this exemption, provided they
13 are distributed in a manner consistent with applicable Commission regulations.⁴

14
15 *Question 2. What restrictions, if any, exist on the manner in which the Committee may*
16 *distribute the publications discussed in Question 1?*

17 The slate card exemption specifically includes the cost of distribution. See 2 USC
18 431(8)(A)(v) and 431 (9)(A)(iv) ("the payment by a state or local committee of a political
19 party of the costs of preparation, display, or mailing or *other distribution* incurred by
20 such committee . . .") (emphasis added). However, the exemption does not allow for

³ Costs associated with the distribution of campaign materials on behalf of candidates running in the primary election are not covered under this exemption.

⁴ 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 distribution *via* “broadcasting stations . . . newspapers, magazines, or similar types of
2 general public political advertising.” *Id.* Because this statutory provision includes a
3 series of specific prohibitions, methods of distribution not included were excluded by
4 choice, and are permitted.⁵ Thus, the Committee’s workers are permitted to distribute
5 slate cards door-to-door or in other locations where potential voters might be found, as
6 suggested by the request. With respect to restrictions on, as the requestor asks, “the
7 political speech⁶ in which the Committee’s workers, both paid and volunteer, may
8 engage in while distributing the party slate cards,” the slate card exemption itself does not
9 restrict such speech.⁷

10 This response constitutes an advisory opinion concerning the application of the
11 Act and Commission regulations to the specific transaction or activity set forth in your
12 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
13 of the facts or assumptions presented, and such facts or assumptions are material to a
14 conclusion presented in this advisory opinion, then the requestor may not rely on that
15 conclusion as support for its proposed activity. Any person involved in any specific
16 transaction or activity which is indistinguishable in all its material aspects from the
17 transaction or activity with respect to which this advisory opinion is rendered may rely on
18 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions

⁵ The Commission interprets this statute under the doctrine *expressio unius est exclusio alterius*: “[T]he action is not prohibited when it is not included in a statute and] when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

⁶ As the Supreme Court recognized, “[t]he distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs,” all of which are “indispensable instruments of effective political speech.” *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). More recently, the Commission has been instructed to “err on the side of protecting political speech rather than suppressing it.” *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2659 (2007).

⁷ *See Alaska Democratic Party*, Matter Under Review 5564, Statement of Reasons of Chairman Robert D. Lenhard (F.E.C. Dec. 31, 2007).

1 in this advisory opinion may be affected by subsequent developments in the law
2 including, but not limited to, statutes, regulations, advisory opinions and case law. All
3 cited advisory opinions are available on the Commission's website at
4 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Donald F. McGahn II
Chairman