

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

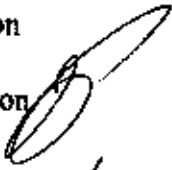
2000 JUL 20 P 3:51


July 20, 2000


AGENDA ITEM
For Meeting of: 7-27-00


MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

Jonathan M. Levin 
Senior Attorney

Subject: Draft AO 2000-16

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 27, 2000.

Attachment

1 ADVISORY OPINION 2000-16

2
3 B. Holly Schadler
4 Brian G. Svoboda
5 Perkins Coie LLP
6 607 14th Street, N.W.
7 Suite 800
8 Washington, D.C. 20005-2011
9

DRAFT

10 Dear Ms. Schadler:

11 This responds to your letters dated June 8, and July 5 and 14, 2000, on behalf of
12 Third Millennium: Advocates for the Future, Inc. ("Third Millennium"), requesting an
13 advisory opinion concerning the application of the Federal Election Campaign Act of
14 1971, as amended ("the Act"), and Commission regulations to a project examining young
15 voter disengagement from the political process.

16 ***Background***

17 Third Millennium is a nonprofit corporation organized in 1993 under the laws of
18 New York and exempt from tax under 26 U.S.C. §501(c)(3). You state that Third
19 Millennium is "[n]onpartisan in both its structure and activities" and note that, under
20 section 501(c)(3), it is prohibited from participating or intervening in any political
21 campaign on behalf of or in opposition to any candidate for public office. You explain
22 that Third Millennium's purpose is, among other things, to encourage participation in the
23 electoral and legislative processes by younger Americans.¹ The organization is now
24 engaged in a project called "Neglection 2000," in which it seeks to examine and address
25 the problem of young voter disengagement from the political process and the threat this
26 disengagement poses to democracy at large.²

27 Third Millennium tracked the problem of young voter apathy during the 2000
28 Presidential primaries. It recently issued a report entitled, "Don't Ask, Don't Vote,"

¹ The request materials indicate that Third Millennium is "a Generation X organization that undertakes research and analysis to promote the civic involvement of young people and to redirect the country's attention from the next election cycle to the next generational cycle. They further state that "Third Millennium does not endorse or oppose any candidate for public office or otherwise engage in partisan activity."

² You note that, in an era of steady decline in voter turnout, the voting rate for young adults is the lowest of all adult age groups, with only 32% of 18-to-24-year-olds having voted in the 1996 general election.

1 which is briefly described in footnote 3 below. Third Millennium believes that the
2 problem reflects a downward spiral of mutual neglect: young people vote in low numbers
3 because campaigns do not target them, and campaigns do not target them because they
4 vote in low numbers. Having assessed the causes and extent of young voter apathy, it
5 now seeks to test the efficacy of Internet advertising as a way to increase young voter
6 participation. Third Millennium also believes that the Internet, with its
7 disproportionately younger audience and relatively lower cost of communication, offers
8 the opportunity to correct the imbalance wherein campaigns focus disproportionately on
9 older voters.³

10 Toward this end, Third Millennium proposes to retain the services of an
11 established Internet service provider ("ISP") that requires subscribers to provide
12 extensive demographic information and to review paid advertising before retrieving and
13 sending their e-mail.⁴ In late summer, Third Millennium would survey a random universe
14 of subscribers to see whether they intend to vote, for whom they would vote, and the
15 political party, if any, to which they belong. Those to be surveyed would be selected as
16 follows: The ISP categorizes a pool of its users as "most active users," meaning that they
17 have checked their e-mail at least once per week for the previous four weeks. The survey
18 will go to the first 250,000 "most active users" who, after Third Millennium elects to
19 commence the survey, log on to send or receive e-mail and who will be 18 years old or
20 over as of November 2000.

21 Third Millennium anticipates that approximately 40,000 subscribers will respond
22 to the survey. These subscribers will be randomly divided into groups to view

³ The request includes a copy of the report, a *USA Today* article on the project by the president of Third Millennium and a brief article in *The New York Times* on the report. The report contains: (1) an analysis of advertising in the 2000 presidential primaries in terms of age group targeting; (2) a discussion of young primary voter turnout percentages as compared to turnout by other age groups; (3) an analysis of data from a survey of potential voters to discern generational attitudes toward voting and campaigns and use of the Internet; (4) anecdotal impressions of young adults' attitudes toward the campaign process; (5) ten categories of recommendations on how campaigns may more effectively convey their messages to young adults, including use of the Internet for advertising; (6) short essays on how best to encourage young adult voting authored by the advisory board of Neglection 2000, which consists of persons from other organizations that analyze the electoral process, media consultants, pollsters, and academicians; and (7) an appendix containing data that serves as a basis for the report.

⁴ The ISP in question requests demographic information from its subscribers on a regular basis for a variety of purposes and as a service to its advertisers.

1 advertisements for the major party Presidential candidates on space purchased for a fee by
2 Third Millennium from the ISP. One group will see an equal number of ads for each
3 candidate. One group would see ads for one of the candidates and another would see ads
4 for the other candidate. Finally, a control group would not see candidate ads. The same
5 candidate ads will be shown to all subscribers in a particular group, regardless of any
6 particular subscriber's age or other demographic characteristics. The ads will be viewed
7 over a ten week period just before the general election. They will contain language
8 indicating that they had been paid for by Third Millennium.⁵

9 Each group, other than the control group, would view one advertisement, or
10 possibly a few different ones, that would appear as a single picture on their screens during
11 the ten-week period of the study. You also state that there would be links to the
12 candidate's web sites in advertisements viewed by a subset of the participants, e.g., 50
13 percent of a candidate's advertisements would have such a link. The candidates would be
14 treated equally in this regard. This approach is intended to provide data regarding the
15 effect of access to additional information on the participant's engagement in the political
16 process.

17 You state that Third Millennium would treat each candidate equally as it procured
18 the advertisements, giving none a qualitative or quantitative advantage. It proposes two
19 alternative means for developing the advertisements in question. Under the first
20 alternative, it would send a letter to each campaign requesting an Internet advertisement
21 in a specified format. You state that the contact with the campaign would be limited to
22 this request. The campaigns will not otherwise be permitted to direct, control, or provide
23 any input as to the dissemination of the ad, and Third Millennium will exercise sole
24 discretion as to which ads to use and how they are distributed. Under the second
25 alternative, Third Millennium would prepare the advertisements itself, imitating as
26 closely as possible actual advertisements or campaign web site content that had been
27 produced by the campaigns in question, while not coordinating with the campaigns in any

⁵ You state that the ability to extend the research beyond the two major party candidates depends entirely on the funding Third Millennium attracts to the study because, in order to include more candidates, the group would have to purchase more ad space. If the organization succeeds in raising sufficient resources, it

1 respect. Under either alternative, the campaigns will not be paid or compensated in any
2 manner by Third Millennium.

3 After the election, Third Millennium proposes to survey the respondents again
4 and ask for whom, if anyone, they voted. The survey results would then be compiled and
5 disseminated through conferences and reports that would be made available to the public
6 at large, including the major political parties. You state that Third Millennium intends to
7 make every effort to ensure that the subscribers are not aware of their participation in the
8 study because it believes that the study will have more integrity that way.⁶

9 You explain that, in conducting this survey, Third Millennium has no interest in
10 promoting any party or candidate. Instead, it seeks simply to determine whether
11 emerging technologies provide an effective means of motivating non-voters to participate
12 and whether they influence the behavior of likely voters. It believes that campaigns
13 would be unlikely to engage in such an effort themselves because of their
14 disproportionate focus on older voters. It expects that its study will constitute an
15 important contribution to the public's knowledge about the democratic process and hopes
16 that the study ultimately will play a significant role in encouraging young voter
17 participation, regardless of their ideology or political party.

18 You ask whether the Act and Commission regulations permit the implementation
19 of Third Millennium's proposal.

20 *Analysis*

21 The Act prohibits a corporation from making any "contribution or expenditure" in
22 connection with a Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). The core issue
23 presented in the request is whether the proposed activity by Third Millennium would
24 constitute a contribution or expenditure as defined by the Act and Commission
25 regulations. The term "contribution" is defined as any gift subscription, loan, advance, or
26 deposit of money or anything of value made by an person for the purpose of influencing
27 any election for Federal office, and the term "expenditure" is defined as any purchase,

would include other presidential candidates "selected on the basis of pre-established objective criteria in accordance with previous Commission guidance."

⁶ Since the ISP regularly surveys its subscribers as an integral part of its service, Third Millennium expects that the surveys for this study will not have the effect of notifying the participants.

1 payment, distribution, loan advance, deposit or gift of money or anything of value, made
2 by any person for the purpose of influencing any election for Federal office. 2 U.S.C.
3 §431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1); see also 2 U.S.C.
4 §441b(b)(2) and 11 CFR 114.1(a)(1) which provide a similar definition for "contribution"
5 and "expenditure" with respect to corporate activity. According to Commission
6 regulations, the phrase "anything of value" includes goods or services provided without
7 charge or at less than the usual and normal charge. 11 CFR 100.7(a)(1)(iii)(A) and
8 100.8(a)(1)(iv)(A).

9 Your proposal entails the display of campaign advertisements on a continuous
10 basis to a selected audience of Internet subscribers. Third Millennium will pay the ISP
11 for space to display these advertisements. It is assumed, as part of the study, that these
12 advertisements may very well have an influence on the voting behavior of the viewer,
13 including influence as to whom viewers will support or vote for. Despite the content of
14 the ads themselves and the contemplated effect on some of the viewers, the nature of
15 Third Millennium and of the project itself calls for an analysis that does not rely simply
16 on those two circumstances to determine whether Third Millennium's disbursements for
17 the project will be "for the purpose of influencing" a Federal election.

18 As indicated above, Third Millennium is prohibited by the Federal tax code from
19 participation or intervention in political campaigns. Moreover, the purposes and
20 activities of the organization are not aimed at influencing the election to political office of
21 any specific candidates or the candidates of any one political party. Its purpose instead is
22 to enhance the civic involvement of young adults, including increased voter participation,
23 and to focus the nation's attention on issues affecting young adults.

24 In addition, the purpose of the Neglection 2000 project itself is not to further the
25 election of any candidate or the candidates of any party. It is, instead, to research the
26 extent of, and reasons for, young adult apathy toward the political process and to test a
27 method for reducing this apathy. Factual circumstances surrounding the conduct of the
28 project reinforce this assessment of the purpose and the methods used to achieve this
29 purpose. The first part of the project was a research study that was not aimed at, or
30 conducted for, the promotion of any candidacy either in the survey questions asked or, as

1 reflected in the report already issued ("Don't Ask, Don't Vote"), in the resulting analysis.
2 With respect to the second part of the project, the effect of the ads on the viewers will not
3 be known until after the second survey of the viewers is taken, so no information on the
4 effect of the display of the ads will be available to the public (including the candidates)
5 until after the election. Moreover, you state that the individuals surveyed would be a
6 random universe of subscribers, that they would be divided randomly, and that each
7 individual within a group would see the same ads as the others of that group, regardless
8 of demographic characteristics. Thus, it appears that Third Millennium will not engage in
9 targeting so as to increase support for one candidate or the other. Finally,
10 communications with the campaigns, if any, will be kept to the minimum necessary to
11 obtain advertisements for display, and the choice of ads and how they will be distributed
12 will be under Third Millennium's sole control. This is consistent with the concept of the
13 study as research for nonpartisan purposes, rather than an opportunity for the candidates
14 to refine, target, or otherwise convey their messages to the electorate.

15 The Commission acknowledges that, as the project is presently planned, viewers
16 will see advertisements featuring either the two major party presidential candidates, only
17 one of those candidates, or neither of them. The viewers will not see ads from a wider
18 range of candidates such as the range provided for in the voter guide regulations where
19 there is some minimal contact between the guide issuer and the candidate, i.e., candidates
20 who are on enough State ballots to win an Electoral College majority. *See* 11 CFR
21 114.4(c)(5)(ii)(B)(2). Nevertheless, since it is generally anticipated that the vast majority
22 of the electorate that does vote will support one of the two major party presidential
23 candidates, the research needs of the project would be met, and the absence of ads for the
24 other candidates does not change the nature of Third Millennium's activity.

25 Based on the foregoing discussion as to the nature of Third Millennium and the
26 nature of Neglection 2000, including the activity to be conducted, the Commission does
27 not consider the proposal as entailing activity for the purpose of influencing an election,
28 and thus the proposal would not result in contributions or expenditures by Third
29 Millennium.

1 You have suggested that your proposal would be permissible under the Act's
2 exception to the definition of "expenditure," at 2 U.S.C. §431(9)(B)(ii), for "nonpartisan
3 activity designed to encourage individuals to vote or to register to vote." You note that
4 this exception has been applied in recent opinions to permit the operation by certain
5 organizations, including 501(c)(3) corporations, of web sites that were established for the
6 purpose of promoting voter participation on a nonpartisan basis. Advisory Opinion 1999-
7 25, 1999-24, and 1999-7. The web sites provided Federal candidate-related information
8 on a nonpartisan basis (e.g., in non-presidential elections, all ballot-qualified candidates
9 are invited to participate; equal space availability to each participating candidate) and
10 included such features as issue statements by candidates, candidate responses to questions
11 from the public and opposing candidates, biographies and endorsements provided by the
12 candidates, and links to candidate web sites.⁷

13 Third Millennium's project differs from the situations in those opinions in that
14 viewers will see ads presenting no more than the two major party presidential candidates,
15 and the viewers will not see ads in a format that indicates that they are viewing a web site
16 designed to present campaign material on a nonpartisan basis. Instead, they will see ads
17 in a manner similar to any other ad (whether political or not) that they would view on
18 their computer monitor before using their e-mail function, and the participants may not
19 know that they are part of a study. Nevertheless, the ads will be used by a tax exempt
20 non-political organization that was established, and operates, for the purpose of
21 encouraging civic participation by young adults, and the organization will use such ads in
22 a research methodology context to increase young voter participation. Since the proposed
23 activity is thus not for the purpose of influencing the election of a Federal candidate, the
24 Commission need not reach the question of whether it is also nonpartisan activity
25 designed to encourage individuals to vote or to register to vote. Thus, despite the
26 differences between this proposal and the facts presented in the three cited advisory
27 opinions, the Commission concludes that Third Millennium's proposed project is
28 permissible under the Act and Commission regulations.

⁷ This is a brief summary of the features referred to in the three opinions. The web sites varied in the quantity and details of the features they provided.

