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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 7-27-00

MEMORANDUM

SUBMITTED LATE

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: Alternative "Blue" Draft AO 2000-16

The attached draft is an alternative to Agenda Document No. 00-71. It responds to the request from Third Millennium concerning a project that would display Internet ads of presidential candidates as part of a research survey on young voter participation. The alternative draft concludes that the proposed activity would fit within the exception for nonpartisan activity designed to encourage individuals to vote or to register to vote. In addition, the alternative draft requires the use of ads for all presidential candidates who appear on enough State ballots to win an Electoral College majority, not just the two major party candidates. Changed language is marked in bold font.

We request that this alternative also be placed on the July 27 agenda.

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

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. **These advertisements will expressly**
12 **advocate the election of presidential candidates.** It is assumed, as part of the study,
13 that these advertisements may very well have an influence on the voting behavior of the
14 viewer, including influence as to whom viewers will support or vote for. Despite the
15 content of the ads themselves and the contemplated effect on some of the viewers, the
16 nature of Third Millennium and of the project itself calls for an analysis that does not rely
17 simply on those two circumstances to determine whether Third Millennium's
18 disbursements for the project will be **contributions or expenditures under the Act.**

19 **The Commission has recently examined a number of activities by entities**
20 **producing web sites in which the viewer had access to messages that supported**
21 **candidates for Federal offices. See Advisory Opinions 1999-25, 1999-24, and 1999-7.**
22 **The web sites were established for the purpose of promoting voter participation on a**
23 **nonpartisan basis. These activities entailed statements from the candidates about**
24 **themselves and campaign issues and links from the web site to the candidates' web**
25 **sites. In each situation, the Commission concluded that, even if specific content on**
26 **these web sites could be viewed as for the purpose of influencing, or in connection**
27 **with, a Federal election, the activities fell within an exception in the Act to the**
28 **definition of "expenditure," and were therefore permissible under the Act. This**
29 **provision exempts "nonpartisan activity designed to encourage individuals to vote**
30 **or to register to vote." 2 U.S.C. §431(9)(B)(ii).**

1 **In applying the nonpartisan activity exception in such instances, the**
2 **Commission focused on both the nature of the producing entity and the nature of**
3 **the activity. The entities included non-profit corporations that were tax exempt**
4 **under 26 U.S.C. §501(c)(3) and were created for providing information about**
5 **government and the electoral process on a nonpartisan basis; a for-profit limited**
6 **liability company that was formed for the purpose of expanding democracy by**
7 **servicing as a channel between voters and candidates on a nonpartisan basis and that**
8 **was not affiliated with, nor accepted advertising or other sponsoring support from,**
9 **any candidates, party, PAC, or advocacy group; and the Minnesota Secretary of**
10 **State. Advisory Opinions 1999-25, 1999-24, and 1999-7. The web sites themselves**
11 **provided Federal candidate-related information on a nonpartisan basis (e.g., in non-**
12 **presidential elections, all ballot-qualified candidates are invited to participate; equal**
13 **space availability to each participating candidate) and included such features as**
14 **issue statements by candidates, candidate responses to questions from the public**
15 **and opposing candidates, biographies and endorsements provided by the**
16 **candidates, and links to candidate web sites.⁷**

17 **The Commission acknowledges that the viewers of the ads posted in**
18 **connection with Third Millennium's project will not see the ads in a format that**
19 **indicates that they are viewing a web site designed to present campaign material on**
20 **a nonpartisan basis; instead, they will see ads in a manner similar to any other ads**
21 **(whether political or not) that are viewed prior to accessing their e-mail services. As**
22 **indicated above, however, Third Millennium is prohibited by the Federal tax code from**
23 **participation or intervention in political campaigns. Moreover, the purposes and**
24 **activities of the organization are not aimed at influencing the election to political office of**
25 **any specific candidates or the candidates of any one political party. Its purpose instead is**
26 **to enhance the civic involvement of young adults, including increased voter participation,**
27 **and to focus the nation's attention on issues affecting young adults.**

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.

1 In addition, the purpose of the Neglection 2000 project itself is not to further the
2 election of any candidate or the candidates of any party. It is, instead, to research the
3 extent of, and reasons for, young adult apathy toward the political process and to test a
4 method for reducing this apathy and **increasing young voter participation, regardless**
5 **of party or ideology.** Factual circumstances surrounding the conduct of the project
6 reinforce this assessment of the purpose and the methods used to achieve this purpose.
7 The first part of the project was a research study that was not aimed at, or conducted for,
8 the promotion of any candidacy either in the survey questions asked or, as reflected in the
9 report already issued ("Don't Ask, Don't Vote"), in the resulting analysis. With respect
10 to the second part of the project, the effect of the ads on the viewers will not be known
11 until after the second survey of the viewers is taken, so no information on the effect of the
12 display of the ads will be available to the public (including the candidates) until after the
13 election. Moreover, you state that the individuals surveyed would be a random universe
14 of subscribers, that they would be divided randomly, and that each individual within a
15 group would see the same ads as the others of that group, regardless of demographic
16 characteristics. Thus, it appears that Third Millennium will not engage in targeting so as
17 to increase support for one candidate or the other. Finally, communications with the
18 campaigns, if any, will be kept to the minimum necessary to obtain advertisements for
19 display, and the choice of ads and how they will be distributed will be **within the total**
20 **discretion of Third Millennium.** This is consistent with the concept of the study as
21 research for nonpartisan purposes, rather than an opportunity for the candidates to refine,
22 target, or otherwise convey their messages to the electorate. **In view of these**
23 **circumstances, the fact that the ads will not be viewed in a nonpartisan web site**
24 **format similar to those discussed above does not preclude the application of the**
25 **exemption to the proposed activity.**

26 **The proposed range of candidates covered by this project, however, presents**
27 **an obstacle to the application of the nonpartisan exemption. As the project is**
28 **currently planned, viewers will see advertisements featuring either the two major**
29 **party presidential candidates, only one of those candidates, or neither of them. In**
30 **the cited opinions considering nonpartisan web sites, viewers would have the**

1 **opportunity to see materials from candidates for a particular Federal office in**
2 **addition to the two major party candidates (assuming those candidates chose to**
3 **participate). In the case of non-presidential candidates, all ballot-qualified**
4 **candidates were invited, and in the case of presidential candidates, two of the**
5 **advisory opinions indicated that the web site would include all general election**
6 **candidates who were on the ballot in enough States to win a majority in the**
7 **Electoral College. Advisory Opinions 1999-25 and 1999-24. As noted with approval**
8 **in those two opinions, this standard for presidential candidates was consistent with**
9 **the range prescribed in the voter guide regulations where there is some minimal**
10 **contact between the guide issuer and the candidate. 11 CFR 114.4(c)(5)(ii)(B)(2).**
11 **The range of candidates was important to the determinations that the activities fell**
12 **within the exemption.**

13 **In order to make the proposed activity permissible under the Act, Third**
14 **Millennium must therefore broaden its proposal to include advertisements for all**
15 **general election presidential candidates who appear on enough State ballots to win**
16 **an Electoral College majority. In the opinions discussed above, the Commission**
17 **also considered the equal participation and space opportunities and objective**
18 **criteria for placement with respect to each of the candidates in a particular race to**
19 **be important factors. In this respect, the Commission notes that Third Millennium**
20 **proposes to treat each candidate equally as it procures the advertisements. In**
21 **addition, to ensure the nonpartisan nature of this project, in a manner consistent**
22 **with the Commission's concerns in the cited opinions, Third Millennium must revise**
23 **its proposal to give equal exposure to all the candidates.**

24 **In order to accomplish this, all of the viewers who see ads for all the**
25 **candidates must see an equal number and variety of ads for each candidate on a**
26 **basis that gives no qualitative or quantitative advantage to one candidate over**
27 **another. Each group that sees ads for only candidate must see an equal number and**
28 **variety of ads for that candidate as the other groups would see for the candidate**
29 **whose ads are shown to their group, and there must be no qualitative or**

1 **quantitative advantage given to one candidate over another. The size of the groups**
2 **viewing the ads of only one candidate must be equal to each other.**

3 **Based on the foregoing discussion and subject to the foregoing conditions, the**
4 **Commission concludes that Third Millennium's proposed activity would be exempt**
5 **from the definition of "expenditure" at 2 U.S.C. §431(9)(B)(ii) and therefore would**
6 **be permissible under the Act.**

7 This response constitutes an advisory opinion concerning the application of the
8 Act and Commission regulations to the specific transaction or activity set forth in your
9 request. See 2 U.S.C. §437f.

10 Sincerely,

11
12 Darryl R. Wold
13 Chairman

14
15 Enclosures (AOs 1999-25, 1999-24, and 1999-7)

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19