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FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20461

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AGENDA ITEM

For Meeting of: 7-27-00

SUBMITTED LATE

MEMORANDUM TO THE COMMISSION SECRETARY

FROM: COMMISSIONER DAVID MASON

A handwritten signature in dark ink, appearing to read "DM", written over the printed name "COMMISSIONER DAVID MASON".

SUBJECT: ADVISORY OPINION 2000-16

DATE: JULY 26, 2000

I would ask that this alternative draft of Advisory Opinion 2000-16 be considered at the July 27 Open Session of the Commission.

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," which
29 is briefly described in footnote 3 below. Third Millennium believes that the problem

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

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

19 Third Millennium anticipates that approximately 40,000 subscribers will respond
20 to the survey. These subscribers will be randomly divided into groups to view
21 advertisements for the major party Presidential candidates on space purchased for a fee by
22 Third Millennium from the ISP. One group will see an equal number of ads for each
23 candidate. One group would see ads for one of the candidates and another would see ads

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.

1 for the other candidate. Finally, a control group would not see candidate ads. The same
2 candidate ads will be shown to all subscribers in a particular group, regardless of any
3 particular subscriber's age or other demographic characteristics. The ads will be viewed
4 over a ten week period just before the general election. They will contain language
5 indicating that they had been paid for by Third Millennium.⁵

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

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

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.

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

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

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

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

18 *Analysis*

19 The Act prohibits a corporation from making any "contribution or expenditure" in
20 connection with a Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). The core issue
21 presented in the request is whether the proposed activity by Third Millennium would
22 constitute a contribution or expenditure as defined by the Act and Commission
23 regulations. The term "contribution" is defined as any gift subscription, loan, advance, or
24 deposit of money or anything of value made by an person for the purpose of influencing
25 any election for Federal office, and the term "expenditure" is defined as any purchase,
26 payment, distribution, loan advance, deposit or gift of money or anything of value, made
27 by any person for the purpose of influencing any election for Federal office. 2 U.S.C.
28 §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.
29 §441b(b)(2) and 11 CFR 114.1(a)(1) which provide a similar definition for "contribution"

⁶ Since the ISP regularly surveys its subscribers as an integral part of its service, Third Millennium expects

1 and "expenditure" with respect to corporate activity. According to Commission
2 regulations, the phrase "anything of value" includes goods or services provided without
3 charge or at less than the usual and normal charge. 11 CFR 100.7(a)(1)(iii)(A) and
4 100.8(a)(1)(iv)(A). In addition, the Act and Commission Regulations define the
5 dissemination of campaign materials prepared by a candidate as expenditures. 2 USC
6 441a(a)(7)(B)(ii), 11 CFR 109.1(d)(1).

7 The Act also requires that communications expressly advocating the election or
8 defeat of a clearly identified candidate include a statement indicating who paid for and
9 authorized the communication. 2 USC 441d(a).

10 Your proposal entails the display of campaign advertisements on a continuous
11 basis to a selected audience of Internet subscribers. Third Millennium will pay the ISP
12 for space to display these advertisements. These advertisements will expressly advocate
13 the election of presidential candidates, and they will be obtained from the candidates'
14 campaigns or will be copies of candidate-prepared material. It is assumed, as part of the
15 study, that these advertisements may very well have an influence on the voting behavior
16 of the viewer, including influence as to whom viewers will support or vote for. The
17 purpose of the study is to measure and document this influence. Despite the fact that you
18 intend to use the results of the study for non-partisan purposes, the content of the ads
19 themselves, their identity or near-identity to the candidate's own materials and the
20 contemplated effect on viewers, lead to the conclusion that the ads would be
21 contributions or expenditures under the Act. In addition, because they contain express
22 advocacy, the ads would require an appropriate disclaimer, including a truthful statement
23 as to whether the ads were authorized by any candidate.

24 **The Commission has recently examined a number of activities by entities**
25 **producing web sites in which the viewer had access to messages that supported**
26 **candidates for Federal offices. See Advisory Opinions 1999-25, 1999-24, and 1999-7.**
27 **The web sites were established for the purpose of promoting voter participation on a**
28 **nonpartisan basis. These activities entailed statements from the candidates about**
29 **themselves and campaign issues and links from the web site to the candidates' web**

that the surveys for this study will not have the effect of notifying the participants.

1 sites. In each situation, the Commission concluded that, even if specific content on
2 these web sites could be viewed as for the purpose of influencing, or in connection
3 with, a Federal election, the activities fell within an exception in the Act to the
4 definition of "expenditure," and were therefore permissible under the Act. This
5 provision exempts "nonpartisan activity designed to encourage individuals to vote
6 or to register to vote." 2 U.S.C. §431(9)(B)(ii).

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

23 In contrast to the situations presented in previous advisory opinions, the
24 viewers of the ads posted in connection with Third Millennium's project will not see
25 the ads in a format that indicates that they are viewing a web site designed to
26 present campaign material on a nonpartisan basis; instead, they will see ads in a
27 manner similar to any other ads (whether political or not) that are viewed prior to
28 accessing their e-mail services. Viewers of the Third Millennium ads will not enjoy
29 equal and simultaneous access to the views of or material from all candidates. In

1 contrast, some viewers of the Third Millennium ads would see the views of only one
2 candidate, and the project as described in the request would encompass only the major
3 party candidates for President. Thus, your proposal differs materially from a non-
4 partisan web site designed to present potential viewers with a range of information about
5 numerous candidates simultaneously. For these reasons, the proposed activity would not
6 fall within the exemption from the definition of expenditure for non-partisan activity at 2
7 U.S.C. §431(9)(B)(ii).

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

11 Sincerely,

12
13 Darryl R. Wold
14 Chairman
15

16 Enclosures (AOs 1999-25, 1999-24, and 1999-7)
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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.