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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 8-10-00

SUBMITTED LATE

MEMORANDUM

August 9, 2000

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

At the Open Session of July 27, 2000, the Commission considered several drafts for Advisory Opinion 2000-16 in response to a request from Third Millennium concerning a project that would display Internet ads of presidential candidates as part of a research study on young voter participation. After consideration of the drafts, the Commission decided to carry over the opinion to agenda for August 10, assuming that it would receive further information from the requester as to the study's design and methodology and the peer review of that study. This office received that information on August 4 and has circulated it to the Commission.

This office has written the attached alternative draft reflecting, in both the factual presentation and the legal analysis, the new information submitted by the requester. As in its first alternative draft (Agenda Document #00-71-A), this 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.

We request that this alternative be placed on the August 10 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

DRAFT

10 Dear Ms. Schadler:

11 This responds to your letters dated June 8, July 5, July 14 and August 4, 2000, on
12 behalf of Third Millennium: Advocates for the Future, Inc. ("Third Millennium"),
13 requesting an advisory opinion concerning the application of the Federal Election
14 Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a project
15 examining young 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, Third
5 Millennium now seeks to measure whether repeated exposure to positive Internet
6 advertisements from presidential candidates affects voter participation among young
7 adults.³ Third Millennium also believes that the Internet, with its disproportionately
8 younger audience and relatively lower cost of communication, offers the opportunity to
9 correct the imbalance wherein campaigns focus disproportionately on older voters.⁴

10 Toward this end, Third Millennium proposes to retain the services of Juno, an
11 established Internet service provider ("ISP") that requires subscribers, as a condition of
12 receiving Juno's free Internet access service, to provide extensive demographic
13 information and to review paid advertising⁵ In late August, Third Millennium will send
14 a survey questionnaire to a random universe of 250,000 subscribers, aged 18 years old or
15 over, to see whether they intend to vote, for whom they would vote, and the political

³ Third Millennium poses three hypotheses for its research objective: 1) Among adults surveyed around Labor Day 2000 who indicate they are "not likely" or only "somewhat likely" to vote, those individuals who subsequently view repeated presidential candidate Internet ads will end up voting in higher numbers than those who do not see any ads at all; 2) Adults ages 18-34 comprise the age cohort most likely to be persuaded to vote after viewing repeated presidential candidate Internet ads; 3) While exposure to presidential candidate Internet advertisements will increase turnout, this will not be dependent upon whether a viewer sees ads from one candidate or multiple candidates.

⁴ 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.

⁵ Juno's demographic information from its subscribers enables Third Millennium to create a detailed aggregate portrait of the subscribers' interests and behavior. However, Third Millennium has no access to and no interest in specific subscribers' demographic and psychographic information. Additionally, although Juno has access to the subscribers' phone numbers and home addresses, Third Millennium will not conduct a telephone or U.S. mail survey of these subscribers. Rather, demographic and geographic information will be used generically (i.e., suburban subscribers voted more than urban voters), not "Jane Doe from 123 Main Street in Anytown, USA" voted, and Harry Jones did not.

1 party, if any, to which they belong. Those subscribers will be informed that they will be
2 part of a research project about viewing political advertisements on the Internet and the
3 Internet's influence on political participation.⁶

4 Third Millennium anticipates that approximately 40,000 subscribers will respond
5 to the survey. This group of individuals will be the subjects for the second stage of the
6 project (described below); the other 210,000 will not be contacted again and will not
7 participate further in Third Millennium's project. This pool of 40,000 enables Third
8 Millennium to identify statistically significant relationships among specific sub-groups.
9 For example, this research design allows for comparisons across gender, region and
10 income. Responses to the survey will have no effect on which ads are viewed by those
11 who participate in the study. For example, a Juno subscriber who indicates that he is
12 "somewhat likely" to vote, and is inclined to vote for Candidate A, has an equal chance of
13 seeing an ad for Candidate A as he does for any other candidate. Thus, in the aggregate,
14 no candidate will enjoy a competitive advantage.

15 The second stage of the project involves randomly dividing the pool of 40,000
16 into equal subgroups of 4,000 each. Nine of these ten groups will view Internet
17 advertisements for Presidential candidates on space purchased for a fee by Third

⁶ The questionnaire [actual wording not yet finalized] will ask the following questions:

1. If the election were held today, how likely are you to vote in the 2000 presidential campaign? [Rotate answers]
 - a) Not likely
 - b) Somewhat likely
 - c) Most likely
2. If you are somewhat likely or very likely to vote, for whom do you plan to vote? [Rotate answers]
Governor George W. Bush
Vice President Gore
Ralph Nader
Patrick Buchanan
Harry Browne
Other
3. Did you vote in the 1996 presidential campaign?
Yes No
4. How would you describe your party affiliation?
Strong Democrat
Weak Democrat
Independent
Weak Republican
Strong Republican

1 Millennium from Juno. One group will view no Internet political advertising at all
2 throughout the campaign season that commences on Labor Day and ends on Election
3 Day; this group will be the control group. A second group (n= 4,000) will view
4 advertisements only for Democratic presidential nominee Vice President Al Gore. A
5 third group (n=4,000) will view Internet advertisements only for Governor George W.
6 Bush. Other groups of 4,000 will see ads for specific ballot-qualified third-party
7 candidates. The last group (n=4,000) will view a random mix of an equal number of ads
8 from all the ballot-qualified candidates. There will be only one ad text for each
9 candidate, and exposure to advertisements will be identical across each group. Each
10 group of 4,000 will view the same number of advertisements, and each individual in a
11 group will view the same ads as others in the group. During the period between Labor
12 Day and Election Day 2000, each participant in the study (excluding the control group)
13 will be exposed to a total of 15 to 20 advertisements.

14 The Internet advertisements will be of the "pop-up" variety, meaning that in order
15 to receive or send e-mail through Juno, one must view a full-screen ad and then actively
16 (using a mouse) click the advertisement off one's screen in order to continue using Juno.
17 Users of this service are aware that pop-up ads are part of the environment and accept
18 these ads as a condition for receiving Juno's free services. You also state that there
19 would be links to the candidate's web sites in advertisements viewed by a subset of the
20 participants, e.g., 50 percent of a candidate's advertisements would have such a link. The
21 candidates would be treated equally in this regard. This approach is intended to provide
22 data regarding the effect of access to additional information on the participant's
23 engagement in the political process.

24 You indicate that Third Millennium will treat each candidate equally as it obtains
25 or develops the ads, giving none a qualitative or quantitative advantage. The ads will be
26 created in one of two ways. Option One is to have each respective presidential campaign
27 provide content and design that may be used for the experiment. If this option were
28 chosen, letters to each campaign will be sent on August 11th, in the hopes of receiving a
29 response by August 21st. Juno will reserve the right to reject a campaign-generated ad
30 that does not meet the criteria of the project. Specifically, no ad for a particular candidate

1 will mention or allude to his/her opponents. Instead, each candidate's ad must put forth a
2 positive message about that particular candidate. Option Two entails having Juno create
3 ads for the project based upon publicly available information from the candidates (such as
4 from their websites). Whichever option is used, the campaigns will not be paid or
5 compensated in any manner by Juno or Third Millennium.

6 After the election, Third Millennium proposes to survey the 40,000 respondents
7 and ask for whom, if anyone, they voted. The survey data will then be sorted, and Third
8 Millennium will attempt to address the three key hypotheses set forth above. If those
9 subscribers who view Internet ads voted at statistically significantly higher rates than the
10 control group that was not exposed to Internet advertising, then one can conclude that:
11 (a)there is a strong correlation between viewing these ads and voting behavior, and (b)
12 perhaps, *ceteris paribus*, the advertising caused the increase in turnout. More
13 importantly, if the study demonstrates that young adults are receptive to advertising
14 through this medium, Third Millennium believes it will have discovered a cost-effective
15 outlet for reaching this demographic in subsequent elections. The results will be
16 presented to professionals of all ideologies at a major conference to be hosted by Third
17 Millennium in December 2000.⁷

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,
28 payment, distribution, loan advance, deposit or gift of money or anything of value, made

⁷ You also describe the extensive academic scrutiny already given to Neglection 2000 and the peer review of project design, methodology, and accuracy that will occur at the completion of the project.

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

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

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

29 In applying the nonpartisan activity exception in such instances, the Commission
30 focused on both the nature of the producing entity and the nature of the activity. The

1 entities included non-profit corporations that were tax exempt under 26 U.S.C. §501(c)(3)
2 and were created for providing information about government and the electoral process
3 on a nonpartisan basis; a for-profit limited liability company that was formed for the
4 purpose of expanding democracy by serving as a channel between voters and candidates
5 on a nonpartisan basis and that was not affiliated with, nor accepted advertising or other
6 sponsoring support from, any candidates, party, PAC, or advocacy group; and the
7 Minnesota Secretary of State. Advisory Opinions 1999-25, 1999-24, and 1999-7.
8 Although the web sites included such features as issue statements by candidates,
9 candidate responses to questions from the public and opposing candidates, biographies
10 and endorsements provided by the candidates, and links to candidate web sites,⁸ they
11 displayed this information on a nonpartisan basis. For example, all ballot qualified
12 candidates in a non-presidential race were invited to participate and equal space and time
13 were made available to each participating candidate.

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

25 In addition, the purpose of the Neglection 2000 project itself is not to further the
26 election of any candidate or the candidates of any party. It is instead to research, the
27 extent of, and reasons for, young adult apathy toward the political process and to test a
28 method for reducing this apathy and increasing young voter participation, regardless of

⁸ 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 party or ideology. This is being done on an objective, social science basis. Factual
2 circumstances surrounding the conduct of the project reinforce this assessment of the
3 purpose and the methods used to achieve this purpose. The examination of young adult
4 voting participation in the primaries was a research study that was not aimed at, or
5 conducted for, the promotion of any candidacy either in the survey questions asked or, as
6 reflected in the report already issued ("Don't Ask, Don't Vote"), in the resulting analysis.
7 With respect to the proposed activity, the effect of the ads on the viewers will not be
8 known until after the second survey of the viewers is taken, so no information on the
9 effect of the display of the ads will be available to the public (including the candidates)
10 until after the election. Moreover, the facts indicate that the individuals surveyed would
11 be a random universe of subscribers, that they would be divided randomly, and that each
12 individual within a group would see the same ads as the others of that group. Thus, it
13 appears that Third Millennium will not target the distribution of the ads so as to increase
14 or diminish support for any candidate. Communications with the campaigns, if any, will
15 be kept to the minimum necessary to obtain advertisements for display, Third Millennium
16 will have the final control over the choice of the ads, and Third Millennium, not the
17 campaigns, will have discretion as to how the ads will be distributed. This is consistent
18 with the concept of the study as research for nonpartisan purposes, rather than an
19 opportunity for the candidates to refine, target, or otherwise convey their messages to the
20 electorate.

21 Finally, it is significant that the proposed project will include a range of
22 candidates beyond the major party candidates and will treat all the candidates equally in
23 obtaining the ads and in their exposure to viewers. In the cited opinions concerning
24 nonpartisan web sites, viewers would have the opportunity to see materials from
25 candidates for a particular Federal office in addition to the two major party candidates
26 (assuming those candidates chose to participate). In the case of non-presidential
27 candidates, all ballot-qualified candidates were invited, and in the case of presidential
28 candidates, two of the advisory opinions indicated that the web site would include all
29 general election candidates who were on the ballot in enough States to win a majority in
30 the Electoral College. Advisory Opinions 1999-25 and 1999-24. As noted with approval

1 in those two opinions, this standard for presidential candidates was consistent with the
2 range prescribed in the voter guide regulations where there is some minimal contact
3 between the guide issuer and the candidate. 11 CFR 114.4(c)(5)(ii)(B)(2). Moreover, as
4 noted above, candidates were provided with equal space availability and time access. The
5 Commission assumes that the range of candidates for whom ads will be shown will
6 include all the general election presidential candidates who appear on enough State
7 ballots to win an Electoral College majority.

8 Based on the foregoing discussion, the Commission concludes that Third
9 Millennium's proposed activity would fall within the exemption to the definition of
10 expenditure at 2 U.S.C. §431(B)(9)(ii) and therefore would be permissible under the Act.

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

14 Sincerely,

15
16 Darryl R. Wold
17 Chairman
18

19 Enclosures (AOs 1999-25, 1999-24, and 1999-7)
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21
22
23