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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA ITEM

For Meeting of: 8-10-00

SUBMITTED LATE

MEMORANDUM TO THE COMMISSION SECRETARY

FROM: COMMISSIONER BRADLEY SMITH *BAS*
SUBJECT: ADVISORY OPINION 2000-16
DATE: AUGUST 7, 2000

I would ask that the attached alternative draft of Advisory Opinion 2000-16 be considered at the August 10 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). **Further, Commission Regulations require that corporate**
5 **registration and get-out-the-vote communications to the general public are allowed**
6 **"provided that the communications do not expressly advocate the election or defeat**
7 **of any clearly identified candidate(s) . . ."** 11 CFR 114.4(c)(2).

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 "for the purpose of influencing" a Federal election.

17 In *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976), the Supreme Court held that
18 definition of "expenditure" included in FECA could withstand a constitutional
19 challenge for vagueness only by interpreting it to apply solely to communications
20 "that include explicit words of advocacy of election or defeat of a candidate" and to
21 "expenditures for communications that in express terms advocate the election or
22 defeat of a clearly identified candidate for federal office." *See also Federal Election*
23 *Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). The Court held
24 that this was necessary to avoid a chilling effect on speech about political issues,
25 noting that a less bright line "offers no security for free discussion." 424 U.S. at 43
26 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). While the holdings in *Buckley*
27 and *Massachusetts Citizens For Life* preclude the application of the Act to
28 uncoordinated communications which do not contain "express advocacy," and
29 thereby establish a constitutionally mandated safe harbor for much political speech,

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

1 they do not hold that all communications including express advocacy are
2 automatically subject to regulation under the FECA. The Act is constitutionally
3 limited in its coverage to communications including express advocacy, but nothing
4 mandates that all such communications be covered by the Act. In fact, the Act, by
5 it's own terms, only applies to those contributions and expenditures "made . . . for
6 the purpose of influencing any election for Federal office." 2 U.S.C. 431 (8)(A)(i)
7 and 2 U.S.C. 431 (9)(A)(i). Thus, regulations which purport to limit all express
8 advocacy communications, including those not made "for the purpose of influencing
9 any election for Federal office," are invalid, as they are inconsistent with the limits
10 in the statutory mandate. *FEC v. Democratic Senatorial Campaign Committee*, 454
11 U.S. 27, 32 (1984); *Fireman v. United States*, 44 Fed. Cl. 528, 538 (1999).

12 Given this, the regulations at 11 CFR 114.4(c)(2) can be saved only if
13 interpreted as a safe harbor for corporations wishing to engage in registration and
14 get-out-the-vote communications. That is to say, the activities listed in 11 CFR
15 114.4(c)(2) are clearly protected communications because they do not include
16 express advocacy - however, other corporate communications which include express
17 advocacy, such as those proposed by Third Millenium, might also be exempt from
18 regulation, if they are not made "for the purpose of influencing any election for
19 federal office." Such a construction is consistent with the Commission's recent
20 Advisory Opinions 1999-25 and 1999-24, which allowed a 501(c)(3) organization,
21 and a limited liability company (LLC), respectively, to engage in web-based
22 activities that involved the transmittal of communications including express
23 advocacy.

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

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

22 The Commission acknowledges that, as the project is presently planned, viewers
23 will see advertisements featuring either the two major party presidential candidates, only
24 one of those candidates, or neither of them. The viewers will not see ads from a wider
25 range of candidates such as the range provided for in the voter guide regulations where
26 there is some minimal contact between the guide issuer and the candidate, i.e., candidates
27 who are on enough State ballots to win an Electoral College majority. *See* 11 CFR
28 114.4(c)(5)(ii)(B)(2). Nevertheless, since it is generally anticipated that the vast majority
29 of the electorate that does vote will support one of the two major party presidential

1 candidates, the research needs of the project would be met, and the absence of ads for the
2 other candidates does not change the nature of Third Millennium's activity.

3 Based on the foregoing discussion as to the nature of Third Millennium and the
4 nature of Neglection 2000, including the activity to be conducted, the Commission does
5 not consider the proposal as entailing activity for the purpose of influencing an election,
6 and thus the proposal would not result in contributions or expenditures by Third
7 Millennium.

8 You have suggested that your proposal would be permissible under the Act's
9 exception to the definition of "expenditure," at 2 U.S.C. §431(9)(B)(ii), for "nonpartisan
10 activity designed to encourage individuals to vote or to register to vote." ~~You note that
11 this exception has been applied in recent opinions to permit the operation by certain
12 organizations, including 501(c)(3) corporations, of web sites that were established for the
13 purpose of promoting voter participation on a nonpartisan basis. Advisory Opinion 1999-
14 25, 1999-24, and 1999-7. The web sites provided Federal candidate related information
15 on a nonpartisan basis (e.g., in non-presidential elections, all ballot-qualified candidates
16 are invited to participate; equal space availability to each participating candidate) and
17 included such features as issue statements by candidates, candidate responses to questions
18 from the public and opposing candidates, biographies and endorsements provided by the
19 candidates, and links to candidate web sites.⁷~~

20 Third Millennium's project differs from the situations in those opinions in that
21 ~~viewers will see ads presenting no more than the two major party presidential candidates
22 and the viewers will not see ads in a format that indicates that they are viewing a web site
23 designed to present campaign material on a nonpartisan basis; instead they will see ads in
24 a manner similar to any other ad (whether political or not) that they would view on their
25 computer before using their e-mail function, and the participants may not know that they
26 are part of a study. Nevertheless~~ Nevertheless, as explained in the analysis above, the ads
27 are being used by a 501(c)(3) organization that was established, and operates, for the
28 purpose of encouraging civic participation by young adults, the organization; the purpose
29 of the use of such ads is not to influence the election of any of the presidential candidates

1 ~~but to test a method for increasing young voter participation; and the actual conduct of the~~
2 ~~activities is not for the purpose of influencing the election of any candidate, as evidenced~~
3 ~~by the first part of Neglection 2000, the proposed equal treatment of the candidates, the~~
4 ~~minimal nature of communications with and involvement by the campaigns whose ads~~
5 ~~are used, and the fact that subscribers are not being targeted to increase the support of one~~
6 ~~candidate or another.~~ Since the proposed activity is thus not for the purpose of
7 influencing the election of a Federal candidate, the Commission need not reach the
8 question of whether it is also nonpartisan activity designed to encourage individuals to
9 vote or to register to vote. ~~Thus, despite the differences between your proposal and the~~
10 ~~proposals presented in the three advisory opinions as to the range of candidates and the~~
11 ~~perception by the viewer,~~ The Commission concludes that Third Millennium's proposed
12 project is permissible under the Act and Commission regulations because it is not
13 intended to influence the result of an election.

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

17 Sincerely,

18
19 Darryl R. Wold
20 Chairman

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

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.