

SECRETARIAT

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 14, 2010

AGENDA ITEM
For Meeting of 07-15-10

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Heather R. Abraham *H.A.*
Law Clerk

Subject: Draft AO 2010-10 (National Right to Life PAC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 15, 2010.

Attachment

1 ADVISORY OPINION 2010-10

2

3 Barry A. Bostrom, Esq.

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James Bopp, Jr., Esq.

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Zachary S. Kester, Esq.

DRAFT

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Bopp, Coleson & Bostrom

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The National Building

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1 South Sixth Street

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Terre Haute, IN 47807-3510

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11 Dear Messrs. Bostrom, Bopp and Kester:

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This responds to your advisory opinion request dated June 10, 2010 on behalf of

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the National Right to Life Political Action Committee (NRL PAC), concerning the

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application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and

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Commission regulations, to the attribution of independent expenditures for reporting

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purposes to candidates identified in several different advertisements.

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The Commission concludes that:

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(1) independent expenditures for communications that expressly advocate the election

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of a clearly identified Federal candidate and that do not identify any other

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candidate may be reported as having been made in support of the candidate

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identified in the communication;

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(2) independent expenditures for communications that expressly advocate the election

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of a clearly identified Federal candidate and that identify the opposing candidate

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in the same race may be reported as having been made in support of the advocated

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candidate;

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(3) independent expenditures for communications that expressly advocate the election

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of more than one clearly identified Federal candidate and that identify those

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candidates’ respective opponents may be reported as having been made in support

1 of the advocated candidates, and are allocated among the different elections based
2 on a time or space analysis;

3 (4) independent expenditures for communications that expressly advocate the defeat
4 of one clearly identified candidate and that do not identify any other candidate
5 may be reported as having been made in opposition to the candidate identified in
6 the communication; and

7 (5) independent expenditures for communications that expressly advocate the election
8 of a presidential-vice presidential ticket and expressly advocate the defeat of a
9 senatorial candidate are allocated among the different elections based on a time or
10 space analysis and may be reported as having been made in support of the
11 presidential-vice presidential ticket and in opposition to the senatorial candidate.

12 ***Background***

13 The facts presented in this advisory opinion are based on your letter received
14 June 10, 2010, and on publicly available information on the Commission's website
15 regarding NRL PAC's status as a separate segregated fund.¹

16 NRL PAC is a separate segregated fund of the National Right to Life Committee,
17 Inc. and is registered with the Commission as a political committee. NRL PAC intends
18 to make independent expenditures for communications that expressly advocate the
19 election or defeat of one or more Federal candidates in one or more elections.

20 The request presents five scenarios illustrated by twelve exhibits. Four of the five
21 scenarios involve advertisements expressly advocating the election of at least one clearly

¹ See NRL PAC's most recently amended Statement of Organization, available at <http://images.nictusa.com/pdf/898/29933986898/29933986898.pdf>.

1 identified Federal candidate. With respect to those scenarios, NRL PAC proposes to
2 attribute the full amount of the independent expenditures to the candidate or candidates
3 supported, on its FEC Form 3X, Schedule E. With respect to the remaining scenario,
4 involving an advertisement expressly advocating the defeat of a clearly identified Federal
5 candidate and not mentioning any other candidate, NRL PAC proposes to report the full
6 amount of the independent expenditure to that candidate.

7 ***Questions Presented***

8 *How should NRL PAC attribute its independent expenditures on FEC Form 3X,*
9 *Schedule E² in the following scenarios:*

- 10 *(1) advertisements expressly advocating the election of one clearly identified candidate*
11 *that do not identify any other candidate;*
12 *(2) advertisements expressly advocating the election of one clearly identified candidate*
13 *and identifying, and comparing the positions of, that candidate's opponent;*
14 *(3) advertisements expressly advocating the election of several clearly identified*
15 *candidates in different races and identifying, and comparing the positions of, those*
16 *candidates' respective opponents;*
17 *(4) advertisements expressly advocating the defeat of one clearly identified candidate*
18 *that do not identify any other candidate; and*
19 *(5) advertisements expressly advocating the election of a presidential-vice presidential*
20 *ticket, and expressly advocating the defeat of a candidate for U.S. Senate.³*

² NRL PAC also asks about attribution on FEC Form 5, Schedule E. However, NRL PAC is a political committee and FEC Form 5 is for the reporting of independent expenditures by all persons other than political committees. See 11 CFR 104.4(a), 109.10; see also Instructions for FEC Form 5 and Related Schedules, available at <http://www.fec.gov/pdf/forms/fecfrm5i.pdf>. Therefore, the question of how independent expenditures should be reported on FEC Form 5, Schedule E is hypothetical and does not qualify for an advisory opinion. See 11 CFR 112.1(b).

1 ***Legal Analysis and Conclusions***

2 The Act and Commission regulations require political committees to report any
3 independent expenditures that they make.⁴ *See* 2 U.S.C. 434(b)(4)(H)(iii),
4 434(b)(6)(B)(iii) and 434 (g)(1) and (2); 11 CFR 104.3(b)(1)(vii), 104.3(b)(3)(vii)(B),
5 104.4(b) and (c). Political committees must also report whether an independent
6 expenditure is “in support of, or in opposition to” a particular candidate. 2 U.S.C.
7 434(b)(6)(B)(iii); 11 CFR 104.3(b)(3)(vii)(B), 104.4(b)(2), 104.4(c).

8 Separate segregated funds making expenditures on behalf of more than one
9 clearly identified candidate for Federal office must allocate the expenditure among
10 candidates pursuant to 11 CFR part 106. 11 CFR 104.10(a). Part 106 provides that
11 independent expenditures made on behalf of more than one clearly identified Federal
12 candidate shall be attributed to each such candidate “according to the benefit reasonably
13 expected to be derived.” 11 CFR 106.1(a)(1). The expenditure for a broadcast
14 communication or publication shall be attributed to each candidate according to the
15 “proportion of space or time devoted to each candidate [in the broadcast communication
16 or publication] as compared to the total space or time devoted to all candidates.” *Id.*
17 Commission regulations do not explicitly address the allocation of independent

³ NRL PAC asks a sixth question concerning the attribution of independent expenditures for a communication that identifies two opposing candidates, and that expressly advocates the election of one of the candidates but does not expressly advocate the defeat of the opponent. The Commission concludes that this is essentially the same fact pattern described in Questions 2 and 3. The Commission addresses the sixth question in its responses to those questions.

⁴ Political committees must report their independent expenditures on their regularly scheduled disclosure reports and on special reports for independent expenditures made in excess of specific thresholds and during certain time frames before an election (that is, on “48-hour Reports” and “24-hour Reports”). *See* 2 U.S.C. 434(b)(6)(B)(iii), 434 (g)(1)-(2); 11 CFR 104.3(b)(3)(vii)(B), 104.4(b)(2), 104.4(c). The requirements for filing these special reports are described in “Instructions for FEC Form 3X and Related Schedules,” available at <http://www.fec.gov/pdf/forms/fecfrm3xi.pdf>.

1 expenditures among candidates when a communication is made on behalf of a candidate,
2 and that candidate's opponent is also identified in the same communication.

3 *1. Advertisements Expressly Advocating the Election of One Clearly Identified*
4 *Candidate That Do Not Identify Any Other Candidate*

5 The Commission concludes that no allocation is necessary for advertisements
6 expressly advocating the election of one clearly identified Federal candidate that do not
7 identify any other candidate. Commission regulations provide for allocation of
8 independent expenditures made "on behalf of *more than one* clearly identified Federal
9 candidate." *See* 11 CFR 106.1(a)(1), 104.10(a) (emphasis added). Thus, the entire
10 independent expenditure may be reported as having been made in support of the
11 candidate identified in the communication.

12 *2. Advertisements Expressly Advocating the Election of One Clearly Identified*
13 *Candidate and Identifying, and Comparing the Positions of, That Candidate's Opponent*

14 The Commission concludes that no allocation is necessary for advertisements
15 expressly advocating the election of one clearly identified Federal candidate and
16 identifying, and comparing the positions of, that candidate's opponent. Commission
17 regulations provide for allocation of independent expenditures made "on behalf of more
18 than one clearly identified Federal candidate." *See* 11 CFR 106.1(a)(1), 104.10(a).
19 Where, as here, an independent expenditure is made on behalf of only one candidate, the
20 entire expenditure may be reported as having been made in support of that candidate. *See*
21 11 CFR 104.3(b)(3)(vii)(B).

1 3. *Advertisements Expressly Advocating the Election of Several Candidates in*
2 *Different Elections and Identifying, and Comparing the Positions of, Those Candidates'*
3 *Respective Opponents*

4 For advertisements expressly advocating the election of several Federal
5 candidates in different races and identifying, and comparing the positions of, those
6 candidates' respective opponents, the Commission concludes that NRL PAC should
7 allocate the independent expenditure among the different races, based on a time or space
8 analysis. NRL PAC may report the corresponding portions of the independent
9 expenditure as having been made in support of the candidates whose elections will be
10 expressly advocated.

11 Question 3 presents a communication involving several different races. To
12 allocate the expenditure for the communication among the races, the first step is to
13 determine the proportion of the space or time devoted to each race in the communication,
14 as compared to the total space or time devoted to all races in the communication. *See* 11
15 CFR 106.1(a)(1). As in the scenario presented in Question 2, the expenditure pertaining
16 to each race is made in support of or opposition to one or more candidates. Thus, the
17 proportion of the expenditure attributed to that race may be reported as having been made
18 in support of the candidate advocated.⁵ *See* 11 CFR 104.3(b)(3)(vii)(B).

⁵ For example, if NRL PAC airs a 30-second advertisement in which 16 seconds is devoted to expressly advocating Senate Candidate A's election and contrasting the positions of Senate Candidate A and his opponent, 8 seconds is spent expressly advocating the election of House Candidate B and contrasting the positions of House Candidate B with her opponents, and 6 seconds is devoted to a disclaimer, then NRL PAC may report two-thirds of the total amount of the expenditure as having been made in support of Senate Candidate A, and one-third as having been made in support of House Candidate B. The transaction is reported as follows: (1) on FEC Form 3X, Schedule E, reporting a payment of the full amount to the vendor, listing the full amount of the expenditure in the amount line and indicating "See memo entries below" in the box entitled "Name of Federal Candidate Supported or Opposed by Expenditure;" and (2)

1 4. *Advertisements Expressly Advocating the Defeat of One Clearly Identified*
2 *Candidate That Do Not Identify Any Other Candidate*

3 The Commission concludes that no allocation is necessary for advertisements
4 expressly advocating the defeat of one clearly identified Federal candidate that do not
5 identify any other candidate. *See* 11 CFR 104.10(a). When an expenditure is made
6 solely to oppose a single candidate, the entire expenditure may be reported as having
7 been made in opposition to that candidate.

8 5. *Advertisements Expressly Advocating the Election of a Presidential-Vice*
9 *Presidential Ticket and Expressly Advocating the Defeat of a Senatorial Candidate*

10 Independent expenditures expressly advocating the election of a presidential-vice
11 presidential ticket and expressly advocating the defeat of a candidate for U.S. Senate are
12 allocated among the electoral races, based on a time or space analysis. For example,
13 NRL PAC may report the resulting portions of the independent expenditure as having
14 been made (1) in support of the presidential-vice presidential ticket, and (2) in opposition
15 to the senatorial candidate.⁶

16 As in the scenario presented in Question 3, this scenario involves different races.
17 Thus, NRL PAC first divides its expenditure for the communication between the two
18 races by determining the time or space devoted to each race compared to the time or
19 space devoted to both races. *See* 11 CFR 106.1(a)(1). The proportion of the expenditure
20 attributed to the presidential race is attributable to the presidential-vice presidential
21 election, and may be reported accordingly (see response to Question 1, above). *See*

following this entry, itemizing the amounts to be attributed to each race as separate entries disclosed as
“MEMO” entries.

⁶ For the purposes of this allocation, the presidential-vice presidential ticket is treated as a single Federal candidate because voters cannot vote separately for presidential and vice presidential nominees.

1 104.3(b)(3)(vii)(B). The proportion of the expenditure attributed to the Senate race may
2 be reported accordingly (see response to Question 4, above). *See id.* The proportion of
3 the expenditure attributed to the disclaimer is allocated between the presidential-vice
4 presidential election and the Senate race in the same proportion as the time or space
5 devoted to the races.⁷

6 This response constitutes an advisory opinion concerning the application of the
7 Act and Commission regulations to the five specific types of advertisements set forth in
8 your request and illustrated by your Exhibits. *See* 2 U.S.C. 437f. The Commission
9 emphasizes that if there is a change in any of the facts or assumptions presented, and such
10 facts or assumptions are material to a conclusion presented in this advisory opinion, then
11 the requestor may not rely on that conclusion as support for its proposed activity. Any
12 person involved in any specific transaction or activity which is indistinguishable in all its
13 material aspects from the transaction or activity with respect to which this advisory
14 opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
15 Please note that the analysis or conclusions in this advisory opinion may be affected by
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⁷ For example, if NRL PAC airs a 30-second advertisement in which 16 seconds is devoted to expressly advocating the election of Presidential-Vice Presidential Ticket A, 8 seconds is spent expressly advocating the defeat of Senate Candidate B, and 6 seconds is devoted to a disclaimer, then NRL PAC may report two-thirds of the total amount of the expenditure as having been made in support of Presidential-Vice Presidential Ticket A, and one-third as having been made in opposition to Senate Candidate B. The transaction is reported as follows: (1) on FEC Form 3X, Schedule E, reporting a payment of the full amount to the vendor, listing the full amount of the expenditure in the amount line and indicating "See memo entries below" in the box entitled "Name of Federal Candidate Supported or Opposed by Expenditure;" and (2) following this entry, itemizing the amounts to be attributed to each race as separate entries disclosed as "MEMO" entries.

1 subsequent developments in the law, including, but not limited to, statutes, regulations,
2 advisory opinions, and case law.

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On behalf of the Commission,

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Matthew S. Petersen

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Chairman