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October 13, 2005

MEMORANDUM

**AGENDA ITEM**

For Meeting of: 10-19-05

TO: The Commission

THROUGH: Robert J. Costa *RC*  
Acting Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

J. Duane Pugh Jr. *JDP*  
Senior Attorney

Subject: Draft AO 2005-13

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 19, 2005.

Attachment

1 ADVISORY OPINION 2005-13

2 Robert F. Bauer, Esq.  
3 Judith L. Corley, Esq.  
4 Perkins Coie  
5 607 Fourteenth Street, N.W.  
6 Washington, D.C. 20005-2011

**DRAFT**

7 Dear Mr. Bauer and Ms. Corley:

8 We are responding to your advisory opinion request on behalf of EMILY's List,  
9 concerning the application of the Federal Election Campaign Act of 1971, as amended (the  
10 "Act"), and Commission regulations to the treatment of proceeds generated by various  
11 fundraising communications, the type of funds that may be used to pay the costs of those  
12 communications, and the allocation of administrative and generic voter drive expenses.

13 The Commission concludes that EMILY's List, a nonconnected Federal political  
14 committee, must pay for communications that refer to a clearly identified Federal candidate  
15 with 100 percent Federal funds. 11 CFR 106.6. EMILY's List must pay for communications  
16 that refer to a political party, as well as administrative and generic voter drive expenses, with a  
17 minimum of 50 percent Federal funds. *Id.* Finally, EMILY's List must treat as contributions  
18 the proceeds of any communication that indicates a portion of the proceeds will be used to  
19 support the election of a clearly identified Federal candidate. 11 CFR 100.57.

20 ***Background***

21 The facts of this request are presented in your letter received August 18, 2005, and in  
22 your e-mails received August 26 and September 7, 2005.

23 EMILY's List is a nonconnected political committee active in both Federal and  
24 nonfederal elections. For the period from now up to the November 2006 Federal elections,  
25 EMILY's List is considering devoting 65% of its "candidate budget" to spending on behalf of

1 non-Federal candidates. EMILY's List anticipates that this portion of its budget will be used to  
2 make donations, including in-kind donations, to non-Federal candidates, and to make  
3 disbursements for activities such as research, polling, get-out-the-vote programs, fundraising,  
4 staffing, mailing, phone messaging and broadcast communications.

5 EMILY's List also contemplates making two types of public communications. One  
6 public communication, in support of EMILY's List's efforts on behalf of state legislative  
7 candidates, will refer to Senator Debbie Stabenow, who represents Michigan in the United  
8 States Senate. Senator Stabenow is also a candidate for re-election in 2006 and a holder of  
9 Federal office under the Act and Commission regulations. *See* 2 U.S.C. 431(2) and (3); 11  
10 CFR 100.3, 100.4, and 300.2(o). EMILY's List's other type of public communication, which  
11 supports state legislative initiatives and referenda, will refer to "Democrats." This second type  
12 of communication will not refer to any Federal or non-Federal candidates. None of the public  
13 communications will be broadcast on television or radio.

#### 14 ***Questions Presented***

- 15 1. *Must EMILY's List pay at least half of its administrative expenses and generic voter*  
16 *drive expenses with Federal funds?*
- 17 2. *Must EMILY's List pay the costs of a public communication that refers to a clearly*  
18 *identified Federal candidate with entirely Federal funds?*
- 19 3. *Must EMILY's List pay at least half of the costs of public communications that refer to*  
20 *"Democrats" with Federal funds?*
- 21 4. *Do three specific public communications indicate that the funds received in response*  
22 *will be used to support the election of a clearly identified Federal candidate?*

1 ***Legal Analysis and Conclusions***

2 1. *Must EMILY's List pay at least half of its administrative expenses and generic voter*  
3 *drive expenses with Federal funds?*

4 Yes, because EMILY's List is a nonconnected Federal political committee, it must pay  
5 its administrative and generic voter drive expenses with a minimum of 50 percent Federal funds  
6 in accordance with 11 CFR 106.6(b)(1)(i), (b)(1)(iii), and (c).<sup>1</sup> The Commission's regulations  
7 require a minimum allocation of 50 percent Federal funds without regard to how much a  
8 Federal political committee may choose to spend on non-Federal elections.<sup>2</sup> As the  
9 Commission noted in the *Explanation and Justification* for the new allocation rules at  
10 11 CFR 106.6:

11 Neither FECA nor any court decision dictates how the Commission should  
12 determine appropriate allocation ratios. In fact, at least one court has recognized  
13 that the Commission has the discretion to establish the Federal funds percentage it  
14 deems best for administrative and generic voter drive expenses. *See Common*  
15 *Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987).

16 A flat 50% allocation minimum recognizes that SSFs and nonconnected  
17 committees can be "dual purpose" in that they engage in both Federal and non-  
18 Federal election activities. These committees have registered as *Federal* political  
19 committees with the FEC; consistent with that status, political committees should  
20 not be permitted to pay for administrative expenses, generic voter drives and  
21 public communications that refer to a political party with a greater amount of non-  
22 Federal funds than Federal funds.

23  
24  
25 *Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated*  
26 *Funds and Nonconnected Committees, Final Rules*, 69 Fed. Reg. 68056, 68062 (Nov. 23,

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<sup>1</sup> Generic voter drives include voter identification, voter registration, and get-out-the-vote drives or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. 11 CFR 106.6(b)(1)(iii). Administrative expenses are also defined in 11 CFR 106.6(b)(1)(i).

<sup>2</sup> "Federal funds" are funds subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g). "Non-Federal funds" are funds not subject to the limitations and prohibitions of the Act. *See* 11 CFR 300.2(k).

1 2004) (“*Final Rules*”). Thus, as a political committee that makes expenditures and  
2 disbursements in connection with both Federal and non-Federal elections, the particular budget  
3 that EMILY’s List adopts for expenses focusing on specific Federal and non-Federal candidates  
4 does not affect the required minimum Federal allocation it must use for administrative and  
5 generic voter drive expenses.

6 2. *Must EMILY’s List pay the costs of a public communication that refers to a clearly*  
7 *identified Federal candidate with entirely Federal funds?*

8 Yes, because EMILY’s List is a nonconnected Federal political committee, it must pay  
9 the costs of a public communication that refers to a clearly identified Federal candidate, but  
10 does not refer to any clearly identified non-Federal candidates, with 100 percent Federal funds,  
11 regardless of whether the communication refers to a political party, in accordance with 11 CFR  
12 106.6(b)(2)(iii) and (f)(1)(i).

13 Your advisory opinion request describes a public communication in support of efforts  
14 on behalf of state legislative candidates that will refer to United States Senator Debbie  
15 Stabenow, but will not refer to any clearly identified non-Federal candidates. Reflecting  
16 EMILY’s List’s purpose of stressing the importance of successes for women in State elective  
17 office, the communication will feature a discussion of Senator Stabenow’s experiences, earlier  
18 in her career, as a candidate for State office. The communication will not be distributed in the  
19 Senator’s home state of Michigan, will not reference the Senator’s candidacy for re-election,  
20 and will not solicit funds for her campaign. Regardless of its context, the reference to Senator  
21 Stabenow in EMILY’s List’s public communication is a reference to a clearly identified Federal

1 candidate in a Federal political committee's public communication.<sup>3</sup> Section 106.6(b)(2)(iii)  
2 and (f)(1)(i) apply to nonconnected Federal political committee's public communications that  
3 refer to a clearly identified Federal candidate, and require the Federal political committee to pay  
4 the costs of such communication with 100 percent Federal funds. Therefore, EMILY's List  
5 must pay for the public communication that clearly identifies Senator Stabenow with 100  
6 percent Federal funds.

7 This analysis does not change if a candidate for election in a year other than 2006 were  
8 to be substituted for Senator Stabenow in EMILY's List's public communication, as your  
9 request asks. Under the Act, the term "candidate" means an individual who seeks nomination  
10 for election, or election, to Federal office. 2 U.S.C. 431(2). An individual is deemed to seek  
11 nomination for election, or election, if he or she has received contributions aggregating in  
12 excess of \$5,000 or has made expenditures aggregating in excess of \$5,000.  
13 2 U.S.C. 431(2)(A); 11 CFR 100.3(a)(1). Neither the Act nor Commission regulations  
14 distinguish between candidates based on election date.

15 3. *Must EMILY's List pay at least half of the costs of public communications that refer to*  
16 *"Democrats" with Federal funds?*

17 Yes, EMILY's List must pay the costs of public communications that refer to  
18 "Democrats," but do not refer to any clearly identified Federal or non-Federal candidates, with  
19 at least 50 percent Federal funds under 11 CFR 106.6(b)(1)(iv) and (c). EMILY's List asks  
20 about public communications in support of its efforts related to state legislative initiatives and  
21 referenda. These communications will not refer to any Federal or non-Federal candidates, but

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<sup>3</sup> Communications that expressly advocate the election or defeat of a clearly identified Federal candidate have long been considered for the purpose of influencing Federal elections, without regard to any targeting requirement. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976).

1 will refer to “Democrats,” which constitutes a reference to a political party in a Federal political  
2 committee’s public communication. Section 106.6(b)(1)(iv) and (c) apply to nonconnected  
3 Federal political committee’s public communications that refer to a political party, but do not  
4 refer to any candidates, and require Federal political committees to pay the costs of such  
5 communications with at least 50 percent Federal funds. As the Commission noted in the

6 *Explanation and Justification* for these regulations:

7 Like the administrative expenses and generic voter drives (which may refer to a  
8 political party), which are also allocated under section 106.6(c), these references  
9 solely to a political party inherently influence both Federal and non-Federal  
10 elections. Therefore, the 50% Federal funds requirement reflects the dual nature  
11 of the communication.

12  
13 *Final Rules*, 69 Fed. Reg. at 68062. A discussion of a State legislative initiative or referendum  
14 does not alter the application of these rules. Thus, EMILY’s List must pay for these public  
15 communications with at least 50 percent Federal funds. The Commission notes that if the  
16 references to “Democrats” were to be removed from the public communications, EMILY’s List  
17 would be permitted to pay for the revised communications with 100 percent non-Federal funds,  
18 because they would not refer to any clearly identified Federal candidates or political parties.

19 Your request also asks if the answer depends on whether EMILY’s List otherwise  
20 supports only non-Federal candidates in that State during the current election cycle. The  
21 analysis that EMILY’s List must pay the costs of public communications that refer to a political  
22 party with at least 50 percent Federal funds does not change based on the activities of EMILY’s  
23 List in the particular State. Commission regulations at 11 CFR 106.6(b)(1)(iv) and (c) apply to  
24 public communications based on the content of the communications, without regard to other  
25 activities of the person making the communications.

1 4. *Do three specific public communications indicate that the funds received in response*  
2 *will be used to support the election of a clearly identified Federal candidate?*

3 A gift of money made by any person for the purpose of influencing any election for  
4 Federal office is a “contribution” under the Act. 2 U.S.C. 431(8)(A)(i). Commission  
5 regulations specify one way in which the definition of “contribution” is met. 11 CFR 100.57.  
6 This regulation provides that a gift of money made by any person in response to any  
7 communication is a contribution to the person making the communication if the communication  
8 indicates that any portion of the funds received will be used to support or oppose the election of  
9 a clearly identified Federal candidate. 11 CFR 100.57(a)(1). Thus, in these circumstances,  
10 whether EMILY’s List must treat receipts in response to a communication as Federal  
11 contributions depends on whether its communication indicates that any of the funds received in  
12 response will be used to support or oppose the election of a clearly identified Federal  
13 candidate.<sup>4</sup>

14 Your advisory opinion request sets out three examples of portions of letters in which a  
15 Federal candidate, Senator Stabenow, would raise funds for EMILY’s List. The Commission  
16 notes that a draft of the entire communication is not yet prepared, so the conclusions in this  
17 Advisory Opinion about the application of 11 CFR 100.57 are limited to the text of the  
18 following three examples. The Commission emphasizes that any additional content in the  
19 communication could affect the analysis of whether the communication indicates that any of the  
20 funds received in response will be used to support or oppose the election of a clearly identified  
21 Federal candidate.

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<sup>4</sup> If the communication satisfies section 100.57, a disclaimer that Federal contributions are not being solicited would not negate the application of section 100.57. *See Final Rules*, 69 Fed. Reg. at 68057; *see also FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

- 1 (a) “We are asking for your support, so that EMILY’s List can support  
2 candidates, who, like me, could never succeed as women in politics  
3 without the combined commitment of all [of] us.”
- 4 (b) “EMILY’s List’s support over the years for candidates like me has made  
5 an enormous difference to the progress of women toward equality in the  
6 pursuit of political office. But we have a long way to go. That’s why I  
7 need your help.”
- 8 (c) “EMILY’s List has always supported me [Senator Stabenow] when I most  
9 needed it. And that is why I am asking you to support EMILY’s List  
10 today, so that it can continue the work on behalf of women who, by  
11 seeking state office today, will be ready to claim national leadership  
12 tomorrow.”

13 All three communications indicate that the funds EMILY’s List receives in response will be  
14 used to support candidates and implicitly to support their election to office. The only question  
15 is whether these communications indicate that Senator Stabenow is among those candidates.

16 Example (a) states that EMILY’s List will use funds received in response to the  
17 communications to “support candidates who, like me, could never succeed as women in  
18 politics.” Senator Stabenow is a candidate for re-election to Federal office, and this statement  
19 indicates that she is among the candidates EMILY’s List will support. In this way, the  
20 communication in example (a) indicates that a portion of the funds received in response would  
21 be used to support Senator Stabenow’s re-election, which satisfies 11 CFR 100.57(a)(1).<sup>5</sup>  
22 Consequently, all of the funds received in response to the communication would be  
23 contributions under 11 CFR 100.57. These funds must comply with the amount limitations,  
24 source prohibitions, and reporting requirements of the Act. *See* 11 CFR 103.3.

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<sup>5</sup> Because the communications will not refer to any non-Federal candidates, they will not satisfy 11 CFR 100.57(b)(2), which would have permitted EMILY’s List to consider up to 50 percent of the proceeds to be donations to its non-Federal account.

1           Like example (a), example (b) also emphasizes “EMILY’s List’s support over the years  
2 for candidates like me.” Additionally, with the language, “I [Senator Stabenow] need your  
3 help,” Senator Stabenow is also appealing on her own behalf. With these words, example (b)  
4 indicates that some of the funds raised will be used to support Senator Stabenow’s re-election,  
5 which satisfies 11 CFR 100.57(a)(1). As with example (a), all of the funds received in  
6 response to the communication would be contributions that must comply with the Act, as  
7 described above.

8           In contrast, example (c) also features a clearly identified Federal candidate raising funds  
9 for EMILY’s List, but it indicates those funds will be used on behalf of women seeking State  
10 office. Example (c) makes this clear when Senator Stabenow states that she seeks funds for  
11 EMILY’s List to use to “continue the work on behalf of women who, by *seeking state office*  
12 *today*, will be ready to claim national leadership tomorrow” (emphasis added). Even though  
13 Senator Stabenow is a clearly identified Federal candidate, the communication does not indicate  
14 that any portion of the funds received will be used to support her re-election. Therefore,  
15 example (c) does not trigger section 100.57, and EMILY’s List may consider any funds  
16 received in response to be donations to its non-Federal account.<sup>6</sup> The Commission emphasizes  
17 that this conclusion is limited to the text of example (c). Any additional text in the  
18 communication, including particularly any references to a clearly identified Federal candidate,  
19 could affect the analysis of whether section 100.57 is satisfied if the communication, considered

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<sup>6</sup> As a Federal candidate and officeholder, Senator Stabenow is subject to 2 U.S.C. 441i(e). Accordingly, she may not solicit funds in connection with an election other than an election for Federal office, unless the funds do not exceed the amounts permitted with respect to contributions to candidates and political committees under 2 U.S.C. 441a(a)(1), (2), and (3), and do not come from sources prohibited under the Act. *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

