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AGENDA ITEM

For Meeting of: 10-08-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Draft AO 2009-23 (Virginia Chapter of the Sierra Club)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 8, 2009.

Attachment

2
3 **DRAFT**

4 Ms. B. Holly Schadler, Esq.
5 Mr. Michael B. Trister, Esq.
6 Lichtman, Trister & Ross, PLLC
7 1666 Connecticut Avenue, NW, Fifth Floor
8 Washington, D.C. 20009

9 Dear Ms. Schadler and Mr. Trister:

10 We are responding to your advisory opinion request on behalf of the Virginia
11 Chapter of the Sierra Club (“VA Chapter”) and the Sierra Club Voter Education Fund
12 (“SC-VEF”), concerning the application of the Federal Election Campaign Act of 1971,
13 as amended (the “Act”), and Commission regulations to certain activities in which the
14 state political action committee of VA Chapter (“State PAC”) wishes to engage, and for
15 which SC-VEF wishes to provide funds, in connection with upcoming Virginia elections.

16 The Commission concludes that, given certain representations that VA Chapter
17 and SC-VEF have made, both with respect to their status and with respect to the activities
18 in which they wish to engage, neither the State PAC nor SC-VEF is subject to the
19 provisions of 11 CFR 106.6.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letters dated July 8
22 and July 31, 2009, an e-mail received on August 14, 2009, telephone conversations with
23 Commission attorneys, and information on file with the Internal Revenue Service.

24 *The State PAC and SC-VEF*

25 VA Chapter is a state chapter of the Sierra Club, which is a non-profit corporation
26 established under California law and pursuant to section 501(c)(4) of the Internal
27 Revenue Code. 26 U.S.C. 501(c)(4). State chapters of the Sierra Club, such as VA

1 Chapter, are not separately incorporated and operate as part of the Sierra Club. State
2 chapters have the authority to form State PACs for the exclusive purpose of engaging in
3 state and local political campaign activities. VA Chapter formed the State PAC pursuant
4 to this authority in 1985. The State PAC is registered as a political action committee with
5 Virginia's State Board of Elections. It maintains a bank account separate from that of
6 VA Chapter. VA Chapter raises funds for the State PAC's account in accordance with
7 Virginia law from its members, corporations, labor organizations and other individuals.
8 The State PAC has made contributions to state and local candidates from its account and
9 has also used its account to finance activities supporting or opposing state and local
10 candidates. It has not used its account to make any contributions or expenditures in
11 connection with Federal elections. *See* 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i). Since
12 July 31, 2000, the State PAC has been organized under section 527 of the Internal
13 Revenue Code. 26 U.S.C. 527. According to its registration statement, the State PAC's
14 purpose is "[p]olitical activities on state and local levels, including endorsing and making
15 financial contributions to individual candidates."¹

16 SC-VEF is organized under section 527 of the Internal Revenue Code. The Sierra
17 Club established SC-VEF as a non-federal political organization, the purpose of which,
18 according to its registration statement, is "[t]o educate people about public official's
19 environmental records, voting records and position of candidates for election to
20 Congress, the Presidency, and state and local offices. Based on this information, the
21 public can make judgments about the environmental positions

¹ *See* <http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formID=7284&formType=E71> (last visited Sept. 8, 2009) for a copy of the most recently amended version of Internal Revenue Service (IRS) Form 8871 filed by the State PAC.

1 and qualifications of their elected officials and candidates during an election season.”²

2 Both VA Chapter and SC-VEF represent that neither the State PAC nor SC-VEF is a

3 “political committee” as that term is defined in 2 U.S.C. 431(4)(A) and (B) and in 11

4 CFR 100.5.

5 *The Proposed Activities*

6 The State PAC intends to conduct three categories of activities in connection with

7 the 2009 Virginia and 2010 Federal general elections. SC-VEF intends to assist by

8 providing partial funding for these activities. First, the State PAC intends to conduct

9 voter drives, including voter identification efforts asking potential voters for their views

10 on certain environmental issues and how those views will affect their voting behavior in

11 the upcoming elections. The voter drives will also involve voter registration and GOTV

12 activity urging the public to register to vote and to elect candidates who support

13 government actions to protect the environment. None of these voter drive activities will

14 involve references to any clearly identified Federal, state, or local candidates or political

15 parties.

16 Second, the State PAC intends to disseminate public communications expressly

17 advocating the election or defeat of clearly identified state and local (but not Federal)

18 candidates in connection with the 2009 Virginia general election. Some of these public

19 communications will feature Federal officeholders who are also candidates for re-election

20 in the 2010 Federal general election endorsing state and local candidates. These public

² See <http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formId=35606&formType=E71> (last visited Aug. 27, 2009) for a copy of the most recently amended version of IRS Form 8871 filed by SC-VEF.

1 communications will not mention that the officeholders are Federal candidates, and will
2 not reference the 2010 Federal election.

3 Finally, the State PAC will disseminate “issue advertisements” in connection with
4 both the 2009 Virginia and the 2010 Federal general elections. These public
5 communications will refer to positions on issues of public policy held by clearly
6 identified Federal officeholders from Virginia. Some or all of these Federal officeholders
7 will also be candidates for re-election in the 2010 Federal general election. The public
8 communications will not expressly advocate the election or defeat of any Federal
9 candidates, nor will they contain the functional equivalent of such express advocacy. The
10 public communications will not be coordinated with any Federal candidates.

11 ***Question Presented***

12 *Are the political activities of the State PAC and SC-VEF subject to 11 CFR*
13 *106.6?*

14 ***Legal Analysis and Conclusions***

15 No, 11 CFR 106.6 does not apply to the State PAC and SC-VEF because these
16 entities are not “political committees” under the Act and Commission regulations.³

17 The Act and Commission regulations establish three types of “political
18 committee”: (1) “any committee, club, association, or other group of persons which
19 receives contributions aggregating in excess of \$1,000 during a calendar year or which
20 makes expenditures aggregating in excess of \$1,000 during a calendar year”; (2) “any

³ The Commission notes that the Court of Appeals for the District of Columbia Circuit recently issued its opinion in *EMILY'S List v. FEC*, Civil Action No. 08-5422 (D.C. Cir. Sept. 18, 2009), regarding, *inter alia*, 11 CFR 106.6(c) and (f). That opinion does not change the Commission’s answer to the question presented by the requestor.

1 separate segregated fund established under the provisions of [2 U.S.C. 441b(b)]”; or (3)
2 “any local committee of a political party” that receives contributions or makes
3 expenditures or certain other kinds of payments exceeding certain threshold amounts
4 during a calendar year. 2 U.S.C. 431(4); 11 CFR 100.5(a)-(c). The Supreme Court has
5 held that only organizations under the control of candidates or whose major purpose is
6 federal campaign activity (i.e., the nomination or election of Federal candidates) can be
7 considered political committees under the Act. *See, e.g. Buckley v. Valeo*, 424 U.S. 1, 79
8 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Political*
9 *Committee Status: Supplemental Explanation and Justification*, 72 FR 5595, 5597, and
10 5601 (2007).

11 Commission regulations have required political committees of various types that
12 engage in certain kinds of activities in connection with both Federal and non-Federal
13 elections to allocate their expenses between Federal funds (i.e., those funds raised in
14 accordance with the amount limitations and source prohibitions on contributions imposed
15 by the Act, *see* 11 CFR 300.2(g)) and non-Federal funds (i.e., those funds not subject to
16 the limitations or prohibitions of the Act, *see* 11 CFR 300.2(k)). *See generally* 11 CFR
17 Part 106.

18 Specifically, section 106.6 requires separate segregated funds and nonconnected
19 committees that make disbursements in connection with both Federal and non-Federal
20 elections to allocate expenses in certain ways depending upon the nature of the activity
21 involved. 11 CFR 106.6. Under section 106.6(a), separate segregated funds and
22 nonconnected committees may make such disbursements in one of two ways: they may
23 make them entirely from funds raised subject to the source prohibitions and amount

1 limitations of the Act; or, if they have established separate Federal and non-Federal
2 accounts pursuant to 11 CFR 102.5, they may allocate them between these accounts.
3 By its express terms, 11 CFR 106.6 applies to “separate segregated funds” and
4 “nonconnected committees.” “Separate segregated fund” is a term of art used in the Act
5 to describe a type of political committee that is “established under 2 U.S.C.
6 441b(b)(2)(C).” 2 U.S.C. 431(4)(B); 11 CFR 100.5(b). “Nonconnected committee” is
7 defined, for the purposes of 11 CFR 106.6, to include “any committee which conducts
8 activities in connection with an election, but which is not a party committee, an
9 authorized committee of any candidate for [F]ederal election, or a separate segregated
10 fund.” 11 CFR 106.6(a).

11 An examination of the history of 11 CFR 106.6 indicates that the Commission has
12 consistently understood the term “nonconnected committees” to refer only to entities that
13 are “political committees” under the Act and Commission regulations.⁴

14 Accordingly, given the representation that the State PAC and SC-VEF are not
15 political committees under the Act and the representations made above pertaining to their
16 proposed activities, and assuming that neither entity engages in any activity that would
17 cause it to become a political committee under the Act, it follows that 11 CFR 106.6 does
18 not apply to their proposed activities.

⁴ For example, the Commission noted in a recent advisory opinion that “[s]ince 1977, Commission regulations have required *political committees* active in both Federal and non-Federal elections to allocate their administrative expenses between the committee’s Federal and non-Federal accounts ‘in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis.’” Advisory Opinion 2003-01 (NORPAC) (emphasis added), citing *Explanation and Justification to the Final Rules on Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting*, 55 FR 26058, 26059 (June 26, 1990).

