MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan, General Counsel
       Rosemary C. Smith, Associate General Counsel
       Amy L. Rothstein, Assistant General Counsel
       David C. Adkins, Attorney

Subject: Draft AO 2010-01 (Nevada State Democratic Party)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 25, 2010.

Attachment
Dear Messrs. Elias and Wilson:

We are responding to your advisory opinion request on behalf of the Nevada State Democratic Party (the “State Party”) concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to disbursements by the State Party for campaign materials to be used in connection with volunteer activities on behalf of candidates for Federal office before the 2010 Nevada primary election. The Commission concludes that such payments by the State Party would be exempt from the definitions of “contribution” and “expenditure” if the Federal candidates on whose behalf the volunteers distribute the campaign materials are the State Party’s presumptive nominees, as described further below.

Background

The facts presented in this advisory opinion are based on your letter received on January 4, 2010, and on publicly available information regarding Nevada election law and the State Party’s registration with the Commission.

The State Party is registered with the Commission as a political committee and as a State committee of the Democratic party. Beginning “immediately,” the State Party plans to purchase campaign materials, such as pins, bumper stickers, handbills, brochures, posters, party newsletters, and yard signs, to be used in connection with volunteer activities on behalf of Federal candidates seeking to become the State Party’s
nominee for the general election. Specifically, the State Party plans to have volunteers
distribute campaign materials on behalf of Federal candidates whom the State Party
believes will either run unopposed in the June 8, 2010 State primary election, or whom
the State Party believes are “assured of winning the nomination.”

The State Party will coordinate with its preferred candidates regarding the
proposed campaign materials, which may expressly advocate for the election of the
preferred candidates. The State Party plans to pay for all of the proposed campaign
materials with funds subject to the limitations and prohibitions of the Act.

In Nevada, candidates for partisan office of a major political party must be
nominated at the primary election.\(^1\) The primary election must be held on the second
Tuesday of June in each even-numbered year; in 2010, the primary will be held on June
8.\(^2\) Persons wishing to run in the primary election must file a declaration of candidacy or
acceptance of candidacy.\(^3\) For Nevada’s 2010 primary election, this filing period begins
on March 1, 2010 and ends on March 12, 2010.\(^4\)

**Question Presented**

> Will the cost of the State Party’s proposed campaign materials be exempt from
> the Act’s definitions of “contribution” and “expenditure,” if the materials are used in
> connection with volunteer activities on behalf of the State Party’s preferred candidates
> before the State primary election?

\(^1\) *NEV. REV. STAT. ANN.* §§ 293.167 and 293.175 (2010).
\(^3\) *NEV. REV. STAT. ANN.* § 293.177 (2010). Write-in candidates are not permitted. Request at 1; see *NEV. REV. STAT. ANN.* § 293.270 (2010).
\(^4\) *Id.*; 2010 Nevada Election Calendar.
Legal Analysis and Conclusions

Yes, the costs of the State Party’s proposed campaign materials will be exempt from the definitions of “contribution” and “expenditure” if the Federal candidates on whose behalf the volunteers distribute the materials are the State Party’s presumptive nominees, as described below.

The Act limits to $5,000 per election the amount that a multicandidate committee, including a State party committee, may contribute to a Federal candidate. 2 U.S.C. 441a(a)(2)(A). In addition to this $5,000 per election limit, State party committees may make coordinated expenditures that are in connection with the general election campaign of candidates for Federal office. 2 U.S.C. 441a(d).

Under the Act and Commission regulations, a “contribution” includes “any gift, subscription, loan, advance ... or anything of value made by a person for the purpose of influencing any election for Federal office.” Id. at 431(8)(A)(i); 11 CFR 100.52. An “expenditure” is similarly defined as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing an election for Federal office.” 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111

Both the definitions of “contribution” and “expenditure” exempt certain payments by a State or local committee of a political party in connection with volunteer activities. 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); see also 11 CFR 100.87 and 100.147. This “volunteer materials exemption” is limited in several respects. For example, the campaign materials must be distributed by volunteers and not by commercial or for-profit operations. See 11 CFR 100.87(d) and 100.147(d). For purposes of the instant inquiry, the most important limitation is that the campaign materials purchased by the State or
local party committee must be used in connection with volunteer activities "on behalf of
nominees of such party." 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87 and
100.147.

Although neither the Act nor Commission regulations define the term "nominee,"
the Commission has previously determined that the volunteer materials exemption may,
in certain limited circumstances, apply even before a State party's nominee is formally
elected through the State primary process. In Matter Under Review ("MUR") 4471, the
Commission found that the volunteer materials exemption applied to the cost of materials
purchased by the Montana State Democratic Committee and mailed by volunteers on
behalf of Senator Max Baucus approximately five days before Montana’s primary
election. Statement of Reasons, MUR 4471 (Montana State Democratic Committee)
(Nov. 19, 1998) at 5. When the mailing occurred, Senator Baucus was the only
Democratic candidate for the U.S. Senate, and there could not be any other Democratic
candidate for that office under State law. Id. Accordingly, the Commission concluded
that, "as both a matter of fact and as a matter of state law," Senator Baucus was his
party's "presumptive nominee." Id. Given that Senator Baucus was "the only candidate
under Montana law who could receive the Democratic nomination," the volunteer
materials exemption applied. Id.

Accordingly, the relevant question for purposes of the instant inquiry is, at what
point will the State Party be able to identify its presumptive nominee "as both a matter of
fact and as a matter of State law"? See Statement of Reasons, MUR 4471 at 5. As noted
above, under Nevada law, a candidate of a major political party must be nominated in the
primary election, and persons wishing to run in the June 8, 2010 primary election must
file a declaration of candidacy or acceptance of candidacy between March 1 and March 12, 2010. The close of the filing period closes the ballot and establishes the field of candidates seeking major party nominations. Thus, March 12, 2010 is the earliest date on which the State Party will be able to identify its presumptive nominee. Any candidate of the State Party who, as of that date, is on the State ballot and has no primary opponent will be the State Party’s presumptive nominee; any candidate who does have a primary opponent will not be the State Party’s presumptive nominee.

Therefore, payments made by the State Party after March 12, 2010 for materials used in connection with volunteer activities on behalf of candidates not facing primary challengers will qualify for the volunteer materials exemption and will not count towards either the State Party’s contribution or expenditure limits. By contrast, payments made by the State Party before March 12, 2010 for materials used in connection with volunteer activities on behalf of candidates will not qualify for the volunteer materials exemption, nor will payments made after March 12, 2010 for materials used in connection with volunteer activities on behalf of candidates who have an opponent in the primary election. If the State Party pays for campaign materials in either of these two latter situations, then such payments will either count against the State Party’s $5,000 per candidate primary contribution limit under 2 U.S.C. 441a(a), or its coordinated party expenditure limit, if the expenditures are in connection with the general election, under 2 U.S.C. 441a(d).

5 Requestor represents that its planned activities will comply with all other aspects of the volunteer activity exemption listed in 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii) and 11 CFR 100.87 and 100.147
6 In Advisory Opinion 1984-15 (RNC), Commission considered whether, under 2 U.S.C. 441a(d), a party committee may make coordinated party expenditures prior to the formal selection of that party’s presidential nominee. In that Advisory Opinion, the Commission explicitly noted the differences between
The Commission’s conclusion is limited to the volunteer materials exemption in 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii), and implementing regulations. This conclusion does not apply to any other use or variation of the term “nominee” appearing in the Act or Commission regulations, such as 2 U.S.C. 432(e)(3)(A) (referring to the presidential candidate “nominated” by a political party).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the

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the language in 441a(d) and the section at issue here, 431. The Commission found it “[s]ignificant[]” that 2 U.S.C. 441a(d) “does not by its terms refer to candidates for Federal office as the party’s nominees; it refers to such candidates only as those who are ‘affiliated with’ the political party.” Advisory Opinion 1984-15 (RNC) n.4. The Commission noted, “[b]y contrast, in other contexts where Congress was concerned with the status of Federal office candidates as regards political party activity, it has explicitly referred to ‘nominees of’ the political party” and cited as an example the volunteer materials exemption provisions in 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii). Id. (emphasis added).
law including, but not limited to, statutes, regulations, advisory opinions, and case law.


On behalf of the Commission,

Matthew S. Petersen
Chairman