



FEDERAL ELECTION COMMISSION
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2012 MAY 23 P 1:20

May 23, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman
General Counsel *AH*

Kevin Deeley *KD*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2012-20 (Mullin)

For Meeting of 5/24/12

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for May 24, 2012.

Attachment

1 ADVISORY OPINION 2012-20

2

3 Jason Torchinsky, Esq.

4 Shawn Sheehy, Esq.

5 Holtzman Vogel Josefiak PLLC

6 45 North Hill Drive, Suite 100

7 Warrenton, VA 20186

8

9 Dear Messrs. Torchinsky and Sheehy:

~~DR 2012~~ MAY 23 P 1: 20

10 We are responding to your advisory opinion request concerning the application of
11 the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission
12 regulations to communications by Mr. Markwayne Mullin for Mullin Plumbing, Inc. and
13 Mullin Plumbing West Division, Inc. (collectively, the “Mullin Companies”). The
14 Commission concludes that the television and radio advertisements and radio program
15 paid for by the Mullin Companies are electioneering communications. The Commission
16 further concludes that when Mr. Mullin files electioneering communication reports for
17 the Mullin Companies, he does not have to disclose the names of the Mullin Companies’
18 customers who paid \$1000 or more for services rendered.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 May 2, 2012, including audio and audio/visual exhibits, and your emails received on May
22 4 and 7, 2012.

23 Mr. Mullin is a candidate in the Republican primary for the U.S. House of
24 Representatives from the 2nd Congressional District of Oklahoma. Mr. Mullin is also the
25 President, CEO, and sole shareholder of the Mullin Companies. Mullin Plumbing, Inc.
26 and Mullin Plumbing West Division, Inc. have been providing services in Oklahoma
27 since 1981 and 2002, respectively.

1 For the past decade, Mr. Mullin has appeared in nearly all of the Mullin
2 Companies' television and radio advertisements. The sample television and radio
3 advertisements provided to the Commission all begin with Mr. Mullin saying, "Hi. I'm
4 Markwayne Mullin with Mullin Plumbing."¹ In the case of the television advertisement,
5 Mr. Mullin makes this statement while appearing on the screen. For the past nine years,
6 the Mullin Companies have also paid for a weekly Saturday morning radio program in
7 which Mr. Mullin discusses home-improvement techniques. The sample radio program
8 provided to the Commission also begins with Mr. Mullin saying, "Hi. I'm Markwayne
9 Mullin with Mullin Plumbing."² During the hour-long radio program, advertisements by
10 individuals and businesses other than the Mullin Companies are aired. The individuals
11 and businesses that purchase advertising time during the Mullin Companies' paid radio
12 program pay Mullin Plumbing, Inc. for that advertising time. The Mullin Companies'
13 radio show and television and radio advertisements reach more than 50,000 persons in the
14 targeted electorate under 11 CFR 100.29(b)(5). Mr. Mullin has allocated approximately
15 5% of the Mullin Companies' annual revenue for television and radio advertising; the
16 Mullin Companies spend approximately \$40,000 per month on television and radio
17 advertising.

¹ See <http://www.ktul.com/category/229161/mullin-plumbing>,
http://www.fec.gov/audio/2012/Mullin_Winter_Tulsa_60.mp3, and
http://www.fec.gov/audio/2012/Mullin_Spring_12_TUL.mp3.

² See http://www.fec.gov/audio/2012/Deck4_2012_04_21_07_00_00_093.mp3.

1 ***Questions Presented***

2 1. *Under 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29, do the current*
3 *television and radio advertisements and Saturday morning radio show for Mullin*
4 *Plumbing’s two incorporated entities constitute electioneering communications when*
5 *aired during the upcoming pre-primary period?*

6 2. *If the television and radio advertisements and radio appearances will*
7 *constitute electioneering communications, under Judge Jackson’s opinion in Van Hollen*
8 *v. FEC, No. 11-0776, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), when Mr. Mullin files*
9 *electioneering communication reports for his two plumbing companies, will he be*
10 *required to disclose the names of Mullin Plumbing and Mullin Plumbing West customers*
11 *who paid \$1,000 or more for services since January 1 of 2011?*

12 ***Legal Analysis and Conclusions***

13 1. *Under 2 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29, do the current*
14 *television and radio advertisements and Saturday morning radio show for Mullin*
15 *Plumbing’s two incorporated entities constitute electioneering communications when*
16 *aired during the upcoming pre-primary period?*

17 Yes, the sample television and radio advertisements and Saturday morning radio
18 show for the Mullin Companies constitute “electioneering communications” under 2
19 U.S.C. 434(f)(3)(A)(i) and 11 CFR 100.29 when aired within 30 days before the primary
20 election.

21 The Act and Commission regulations define “electioneering communication” as
22 any broadcast, cable, or satellite communication that (1) refers to a clearly identified
23 candidate for Federal office; (2) is publicly distributed within 60 days before a general

1 election or 30 days before a primary election; and (3) in the case of a candidate for the
2 House of Representatives, is targeted to the relevant electorate. *See* 2 U.S.C.
3 434(f)(3)(A)(i); 11 CFR 100.29(a). In the case of a candidate for the House of
4 Representatives, “targeted to the relevant electorate” means that the communication can
5 be received by 50,000 or more persons in the district the candidate seeks to represent.
6 *See* 11 CFR 100.29(b)(5)(i).

7 The only element of this definition about which Mr. Mullin asks in his request is
8 whether the commercials refer to a clearly identified candidate for Federal office,
9 specifically, Mr. Mullin. *See* 11 CFR 100.29(a)(1), (b)(2). A communication “refers to a
10 clearly identified candidate” when, among other identifications, “the candidate’s name
11 [or] photograph . . . appears.” 11 CFR 100.29(b)(2); *see also* 2 U.S.C. 431(18); 11 CFR
12 100.17. Mr. Mullin, a candidate, identifies himself personally by name (“Hi. I’m
13 Markwayne Mullin”) in the Mullin Companies’ advertisements. Additionally, in the
14 television advertisement, Mr. Mullin appears by image. Accordingly, the Commission
15 concludes that the sample radio and television commercials and paid radio program “refer
16 to a clearly identified candidate.” *See* 2 U.S.C. 434(f)(3); 11 CFR 100.29.

17 The Mullin Companies’ advertisements are materially different from business
18 advertisements that, in a prior advisory opinion, the Commission determined did not refer
19 to a clearly identified candidate. *See* Advisory Opinion 2004-31 (Darrow). In that
20 advisory opinion, the Commission determined that advertisements for a company’s car
21 dealerships (including Russ Darrow Toyota, Russ Darrow Kia, and Russ Darrow
22 Cadillac) did not refer to the candidate “Russ Darrow, Jr.” but to the dealerships
23 themselves or to “Russ Darrow III,” the candidate’s son. Russ Darrow III was the

1 company's president and face of the company in its advertisements, speaking and
2 appearing on screen. The candidate, Russ Darrow, Jr., did not appear in the company's
3 advertisements (and had not appeared in the company's advertisements "for more than a
4 decade").

5 In contrast, here, Mr. Mullin does not ask whether the identification of "Mullin
6 Plumbing" constitutes a reference to "Markwayne Mullin" the candidate. Nor does Mr.
7 Mullin ask whether the reference to another "Markwayne Mullin" constitutes a reference
8 to "Markwayne Mullin" the candidate. Instead, Mr. Mullin asks whether, when he
9 identifies himself personally by name ("Hi. I'm Markwayne Mullin") and, in the
10 television advertisement, by image, the communications refer to a clearly identified
11 candidate. The Commission concludes that they do.

12 Mr. Mullin also asks the Commission to exempt the Mullin Companies'
13 advertisements from the electioneering communications definition because they are
14 business communications consistent with the business's prior communications. Congress
15 provided the Commission with authority to exempt communications from the definition
16 of "electioneering communications" but imposed several significant limitations on this
17 authority: the Commission may do so through regulations and such regulations may
18 exempt only communications that do not promote, support, attack, or oppose a Federal
19 candidate. Explanation and Justification for Final Rules on Electioneering
20 Communications, 67 FR 65190, 65196, 65198 (Oct. 23, 2002). In its regulations,
21 however, the Commission has considered and rejected including an exemption for
22 communications that refer to a clearly identified candidate in the context of promoting a
23 candidate's business. The Commission determined that such an exemption is not

1 “consistent with the limited authority provided to the Commission by the statute.” *Id.* at
2 65200, 65202. Moreover, the Supreme Court, in *Citizens United v. FEC* concluded that
3 “even if the ads only pertain to a commercial transaction, the public has an interest in
4 knowing who is speaking about a candidate shortly before an election.” 558 U.S. ___, 130
5 S. Ct. 876, 915-16 (2010).

6 Accordingly, the Mullin Companies’ radio and television commercials and paid
7 radio program meet the definition of “electioneering communication” when aired within
8 30 days before the primary election. *See* 2 U.S.C. 434(f)(3); 11 CFR 100.29.

9 2. *If the television and radio advertisements and radio appearances will*
10 *constitute electioneering communications, under Judge Jackson’s opinion in Van Hollen*
11 *v. FEC, No. 11-0776, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), when Mr. Mullin files*
12 *electioneering communication reports for his two plumbing companies, will he be*
13 *required to disclose the names of Mullin Plumbing and Mullin Plumbing West customers*
14 *who paid \$1,000 or more for services since January 1 of 2011?*

15 No, when Mr. Mullin files electioneering communication reports for the Mullin
16 Companies, he will not be required to disclose the names of the Mullin Companies’
17 customers who paid \$1,000 or more for services rendered since January 1, 2011.

18 Certain disclaimer and disclosure requirements apply to electioneering
19 communications. *See generally* 2 U.S.C. 434(f), 441d; 11 CFR 104.20, 110.11. Every
20 person who has made an electioneering communication, as defined in 11 CFR 100.29,
21 aggregating in excess of \$10,000 during any calendar year must file reports required

1 under 11 CFR 104.20.³ 11 CFR 104.20(b). The reports must include the name and
2 address of “all contributors who contributed an aggregate amount of \$1,000 or more to
3 the person making the disbursement [for the electioneering communication] during the
4 period beginning on the first day of the preceding calendar year and ending on the
5 disclosure date.” 2 U.S.C. 434(f)(2)(F).

6 On March 30, 2012, the United States District Court for the District of Columbia
7 issued its opinion and order granting summary judgment to the Plaintiff in *Van Hollen v.*
8 *FEC*, No. 11-0766, ___ F. Supp. 2d. ___, 2012 WL 1066717 (D.D.C. Mar. 30, 2012).
9 Representative Van Hollen had challenged the Commission’s regulation at 11 CFR
10 104.20(c)(9), which was adopted to implement 2 U.S.C. 434(f)(2)(F), on the grounds that
11 it impermissibly narrowed the scope of electioneering communication reporting to donors
12 who made donations for the purpose of furthering electioneering communications.
13 Compl. ¶ 3, *Van Hollen*, No. 11-0766 (D.D.C. April 21, 2011). The court held that the
14 Commission had improperly narrowed the regulation because the meaning of the term
15 “contribute” in the statute was plain and did not include a purpose or intent element. *Van*
16 *Hollen* (No. 11-0766), 2012 WL 1066717, at *14-16 (D.D.C. Mar. 30, 2012). The
17 Commission has not appealed this decision, but defendant-intervenors have filed a notice
18 of appeal.

19 In the court’s subsequent opinion denying defendant-intervenors’ motion for a
20 stay pending appeal, the district court clarified that it had vacated the Commission’s 2007
21 regulation and held that the Commission’s 2003 regulation “now governs the disclosures

³ The Commission assumes, for purposes of this advisory opinion, that the Mullin Companies’ electioneering communications would aggregate in excess of \$10,000.

1 required under the BCRA.” *Van Hollen v. FEC*, No. 11-0766, slip op. at 3 (D.D.C. Apr.
2 27, 2012).⁴ That 2003 regulation provides that persons who make disbursements for
3 electioneering communications, not from a segregated bank account, must report “the
4 name and address of each donor who donated an amount aggregating \$1,000 or more to
5 the person making the disbursement, aggregating since the first day of the preceding
6 calendar year.” 11 CFR 104.20(c)(8) (2003).

7 A “contributor,” the court found, “means a person who gives money *without*
8 *expectation of service or property or legal right in return.*” *Van Hollen*, 2012 WL
9 1066717, at *15 (internal citations omitted) (emphasis added). By substituting “donor”
10 for “contributor,” according to the court, the 2003 regulation “narrowed the universe” of
11 the statute in a way that did not impermissibly add an intent element or contravene the
12 statute:

13 [T]he words ‘donor’ and ‘donation,’ with their clear connotation of providing
14 something for nothing, *see* <http://www.merriam-webster.com/dictionary/donation>
15 (defining ‘donation’ as ‘the making of a gift, especially to a charity or public
16 institution’ or ‘a free contribution’), seems to ameliorate the concerns supposedly
17 raised by the expansion of the statute’s reach to include corporations and unions.
18 Is it really difficult to determine if dues paid in return for the benefits of
19 membership are ‘donations,’ or if investors who pay for shares of stock and
20 customers who pay for goods and services are a corporation’s ‘donors?’

21
22 *Id.* at *14 n.8.

23 Consistent with the district court’s decision in *Van Hollen*, “donors who donated
24 an amount aggregating \$1,000 or more” to the person making an electioneering
25 communication do not include customers paying \$1,000 or more to a company, such as

⁴ The Court of Appeals for the District of Columbia Circuit has also denied defendant-intervenors’ motion for a stay pending appeal on the grounds that they are unlikely to succeed on the merits. *Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, at *2-*3 (D.C. Cir. May 14, 2012). The Court has scheduled briefing on the appeal to be completed in August 2012 and oral argument to take place in September 2012. *Id.* at *1.

1 the Mullin Companies, for the company's services. Thus, customers do not become
2 "donors" by virtue of purchasing the Mullin Companies' services under the
3 Commission's 2003 regulation, which is now in effect, pursuant to *Van Hollen*. See also
4 Explanation and Justification for Final Rules on Bipartisan Campaign Reform Act of
5 2002 Reporting, 68 FR 404, 420 (Jan. 3, 2003). The customers did not give something
6 for nothing; they gave money in exchange for plumbing services.

7 This response constitutes an advisory opinion concerning the application of the
8 Act and Commission regulations to the specific transaction or activity set forth in your
9 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
10 of the facts or assumptions presented, and such facts or assumptions are material to a
11 conclusion presented in this advisory opinion, then the requestor may not rely on that
12 conclusion as support for its proposed activity. Any person involved in any specific
13 transaction or activity which is indistinguishable in all its material aspects from the
14 transaction or activity with respect to which this advisory opinion is rendered may rely on
15 this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
16 conclusions in this advisory opinion may be affected by subsequent developments in the
17 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
18 The cited advisory opinions are available on the Commission's website, or directly from
19 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

20

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On behalf of the Commission,

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23

Caroline C. Hunter

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Chair