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FEDERAL ELECTION
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AOR 2004-37

September 27, 2004

VIA FACSIMILE AND OVERNIGHT DELIVERY
Lawrence Norton, Esq.
Federal Election Commission
Office of the General Counsel
999 E Street, NW
Washington, DC 20463

RE: Advisory Opinion Request - For Expedited Consideration

Dear Mr. Norton:

Through the undersigned counsel, Congresswoman Maxine Waters, Citizens for Waters (her principal campaign committee), and People Helping People (her leadership PAC) (hereinafter "the requestors"), jointly submit this letter pursuant to 2 U.S.C. § 437(f) to request an Advisory Opinion from the Commission. Since this request is submitted by a candidate and the authorized committee of that candidate within 60 days of an election involving those requestors, we hereby request expedited consideration under 2 U.S.C. § 437f(a)(2).

Congresswoman Waters, via either her principal campaign committee or her leadership PAC, intends to produce and distribute a sample ballot. The sample ballot will expressly advocate the election of only those federal and non-federal candidates who have received the Congresswoman's endorsement for the upcoming November general election. The sample ballot will consequently feature Congresswoman Waters herself, both by quoting her opinions and endorsements of the included candidates and by promoting the ballot as the "official" sample ballot of Congresswoman Waters. The ballot will also include a prominent picture or likeness of Congresswoman Waters on the front page.[1] Since the ballots will be paid for and distributed by either the Congresswoman's principal campaign committee or her leadership PAC, in no event will any costs of the sample ballot be paid with non-federal funds.

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[1]The requestors have not yet completed any kind of draft or galley copy of the sample ballot in preparation for printing, due to their uncertainty as to the legal questions posed in this request. Aside from the details described here, no decisions have been made as to the actual content of the proposed sample ballot.

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The requestors generally foresee two types of listings of endorsed candidates: paid and unpaid. Candidates listed in the ballot generally will be billed for their inclusion, and reimbursement will be expected. However, some candidates who do not pay will still be included on the basis of their political significance and the judgment of Congresswoman Waters that excluding these candidates would dilute the political effectiveness of the sample ballot.

Questions:

Inclusion of other federal candidates

If produced by Citizens for Waters, would the inclusion of other federal candidates on the sample ballot constitute "support" of those candidates for purposes of 2 U.S.C. § 432(e)(3)(B)? If so, should the "time and space" valuation method provided in 11 C.F.R. § 106.1 be used to calculate the value of this support? If Citizens for Waters collected reimbursement from these other federal candidates for their inclusion in the ballot, would their inclusion still constitute such "support"? Would those reimbursements themselves be subject to the $1,000 limit of 432(e)(3)(B), the $2,000 per election limit on contributions from non-multicandidate committees, or would they instead be treated and reported as offsets not subject to limitation?

If produced instead by People Helping People, would the PAC be able to collect reimbursement from Citizens for Waters for the value of the sample ballot attributable to her campaign? If so, what method should be used to calculate that reimbursement? Would reimbursements from Congresswoman Waters or other federal candidates included in the ballot be treated as contributions received by People Helping People, or as offsets?

Inclusion of federal candidates who do not make reimbursement

Since the sample ballot will expressly advocate the election of the candidates who are included on it, the requestors have concluded that any unreimbursed costs of the ballot that are allocable to any particular federal candidate will either be independent expenditures or in-kind contributions. Would communication between the requestors and any potentially included candidate (or his or her agents) that is limited to describing the sample ballot itself, describing the candidate's potential inclusion on the ballot, and explaining and seeking the appropriate reimbursement without indicating whether the candidate will be included regardless of payment satisfy the conduct prong of the coordination test?[2]

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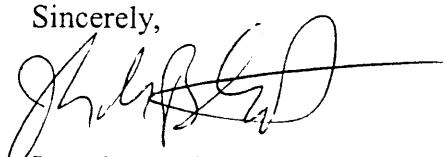
[2]If for any reason the Commission's extant coordination regulations are not to be enforced under Shays v. FEC, Civ. No. 02-1984(CKK), mem. op. (D.D.C., Sept. 18, 2004) (holding the bulk of the Commission's BCRA regulations to be invalid but declining to enjoin their enforcement), the requestors wish to pose this question more

Inclusion of non-federal candidates

If non-federal candidates pay to be included on the sample ballot, must they pay with federally-permissible funds under 11 C.F.R. § 300.71? If so, do those payments constitute contributions or expenditures under the Act so as to potentially trigger federal political committee status for the non-federal candidate or committee? If not, should the receipts of reimbursements from these non-federal candidates be reported by the appropriate committee requestor as offsets? Would the solicitation of potential non-federal endorsees constitute solicitation of non-federal disbursements, even if the non-federal candidates will be asked and expected to pay for their listing in the ballot with federally-permissible funds under § 300.71?

Given the proximity of the November 2nd election, we respectfully request that the Commission address these questions as fast as possible, ideally even sooner than the 20 calendar day deadline provided by 11 C.F.R. § 112.4(b). Toward that end, please contact me at your earliest possible convenience if you have any questions or need any further information.

Sincerely,



Joseph M. Birkenstock

cc:
The Honorable Brad Smith, Chairman
The Honorable Ellen Weintraub, Vice Chair
The Honorable David Mason
The Honorable Danny McDonald
The Honorable Scott Thomas
The Honorable Michael Toner

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broadly: does the degree and nature of the stated communication constitute coordination under the statute?

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FEDERAL ELECTION COMMISSION

Washington, DC 20463

October 1, 2004

Joseph M. Birkenstock, Esq.
Smith Kaufman, LLP
777 S. Figueroa Street
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Los Angeles, CA 90017-5864

Dear Mr. Birkenstock:

This refers to your letter dated September 27, 2004, on behalf of Representative Maxine Waters, Citizens for Waters (her principal campaign committee), and People Helping People (Representative Waters' "leadership" PAC), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the distribution of a sample ballot listing and expressly advocating the election of certain Federal and non-Federal candidates.

You ask specifically about the disbursement of funds by either Citizens for Waters or People Helping People ("the Waters Committees") for the sample ballot, including whether the disbursements would entail support for the candidates listed, how such support should be measured, the level of financial support that either of the Waters Committees could provide, the consequences of payment by the committees of the Federal and non-Federal candidates for the candidates' inclusion on the sample ballot, and whether unreimbursed amounts disbursed by either of the Waters Committees would be either in-kind contributions to the listed candidates or independent expenditures.

As you know, the Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. 437f(a). Such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). Commission regulations further explain that the Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. 11 CFR 112.1(d).

After reviewing your letter, this Office has determined that additional information is required in order to "complete" your advisory opinion request. As you know, Brad C. Deutsch and Jonathan M. Levin called you on September 29 to give you advance notice regarding the necessary additional information and to discuss certain aspects of your

request. As was discussed in that phone conversation, this Office requests additional information responsive to the following questions.

1. Please describe the distribution of the sample ballot, including (a) the method of distribution, *e.g.*, U.S. mail, hand-outs on the streets, door-to-door leafletting; (b) how many sample ballots will be distributed by each method; and (c) whether the sample ballot will be distributed outside Representative Waters' congressional district and, if so, the number of sample ballots that will be distributed in each of those districts.

2. What other Federal candidates will appear on the sample ballot (*e.g.*, John Kerry, Barbara Boxer, other U.S. House candidates)?

3. Is there going to be only one version of the sample ballot, or will there be different versions listing different candidates, depending upon the district or geographic area in which the sample ballot is distributed?

4. Please provide any additional details available after your last letter regarding the proposed content and graphic appearance of the sample ballot communication, including specific statements and graphics with respect to Representative Waters and whether any other candidate will be given more prominence than the remaining candidates.

5. Please clarify the nature of the communications between the Waters Committees and the candidates' committees, as well as the timing and nature of the payments by the candidates' committees. Your explanation should include responses to the following:

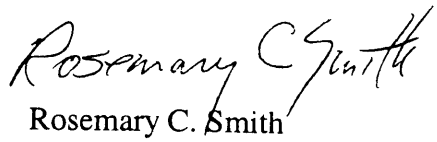
   (a) So that we may respond to your question regarding coordinated communications, please describe the content of the discussions that will occur between the Waters Committees and a candidate's committee. For example, will those discussions cover how, when, and where the sample ballots will be distributed, and how many will be distributed?

   (b) If a committee of a candidate who is listed on the sample ballot declines to pay for the candidate's listing, will one of the Waters Committees cover that expense or will the expense be apportioned *pro rata* for payment by the committees of the other paying candidates? Please confirm that Representative Waters' principal campaign committee will cover the cost of the portion of the communication attributable to her.

   (c) Will the actual payments from each candidate's committee to one of the Waters Committees be made before the distribution of the sample ballots? If not, when will those payments be made?

If you have any questions about the advisory opinion process or this letter, please contact Jonathan Levin, a senior attorney in this Office, at 202-694-1542.

Sincerely,



Rosemary C. Smith
Associate General Counsel

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October 7, 2004

2004 OCT -8 A 9:56
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

VIA FACSIMILE, EMAIL, AND FIRST-CLASS MAIL
Rosemary C. Smith, Esq.
Jonathan Levin, Esq.
Federal Election Commission
Office of the General Counsel
999 E Street, NW
Washington, DC 20463

RE: Advisory Opinion Request - For Expedited Consideration

Dear Ms. Smith and Mr. Levin:

This letter is in response to your letter dated October 1, 2004, in which you request additional information to complete our Advisory Opinion Request. We appreciated the opportunity to discuss these issues with your office; those conversations have helped us solidify the factual circumstances of our request and consequently limit the legal issues involved.

In particular, the requestors have determined that federal candidates who do not pay a proportionate share of the expenses of the ballot under 11 C.F.R. § 106.1 will not be included in the ballot. To the extent our original letter asked about potential coordination resulting from communications with candidates who ultimately do not pay for their inclusion in the ballot, that portion of this Advisory Opinion Request is withdrawn.

Answer to question 1:

The sample ballot will be distributed exclusively via U.S. Mail. The committee expects a print run of approximately 200,000 pieces. As a consequence of the bulk printing process, there may be a few hundred extra copies of the ballot printed as an overrun. However, these additional copies will be destroyed since in practical terms it would not be possible to disseminate these ballots to relevant voters given the variety of ballot groupings. (See the answer to question 3.)

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Answer to question 2:

Citizens for Waters expects that the Democratic presidential ticket of Senator Kerry and Senator Edwards, Senator Boxer, Congresswoman Juanita Millender-McDonald, and Congresswoman Diane Watson will appear on the ballot. Other federal candidates may also be included, but only on the condition that they pay an appropriate share of the expenses under 106.1.

Answer to question 3:

There will be several different versions of the ballot, in order to accurately reflect the ballot grouping used in the recipient's voting precinct. Accordingly, all candidates other than Congresswoman Waters will only be depicted on sample ballots that are sent to precincts where they are on the ballot. Citizens for Waters will compute the "time and space" proportion of the costs attributable to any candidate, including Congresswoman Waters, on the basis of the number of ballots on which that candidate appears.

Answer to question 4:

Candidates will be given space and prominence on the ballot in rough proportion to their prominence on the Democratic ticket. In other words, the presidential and vice-presidential candidates will be portrayed very prominently, statewide candidates and Congressional candidates somewhat less so, and local candidates generally will only be listed on a ballot line resembling an actual voting ballot, sometimes accompanied by a short endorsement such as "Great leadership, Best qualified" or "Mayor Dorn has done a great job for business and economic development." These endorsements are printed in Congresswoman Waters' handwriting but are not otherwise identifiable to her.

Answer to question 5:

As noted above, because only federal candidates who pay a proportionate share under 106.1 to appear on the ballot will be included, the issues addressed in this question are moot. The portion of our advisory opinion request related to potential coordination is withdrawn.

We trust these answers will provide the Commission with the detail it needs to issue a formal opinion promptly. Again, we appreciate the cooperation your office has shown in discussing these issues with us; if you have any further questions or need more information, please do not hesitate to call.

Sincerely,

Joseph M. Birkenstock

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