FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 19, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Jonathan Levin
Senior Attorney

Ron Katwan
Attorney

Subject: Draft AO 2004-37

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 21, 2004.

Attachment

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-37 is available for public comments under this procedure. It was requested by counsel, Joseph M. Birkenstock on behalf of Representative Maxine Waters, Citizens for Waters, and People Helping People.

Proposed Advisory Opinion 2004-37 is scheduled to be on the Commission's agenda for its public meeting of Thursday, October 21, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 2:00 P.M. (Eastern Time) on October 20, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-37, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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ADVISORY OPINION 2004-37

Joseph M. Birkenstock, Esq.
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Los Angeles, CA 90017-5864

BLUE DRAFT

Dear Mr. Birkenstock:

This responds to your letters dated September 27 and October 7, 2004, on behalf of (1) Representative Maxine Waters, (2) Citizens for Waters (the "Waters Committee"), which is Representative Waters' principal campaign committee, and (3) People Helping People ("PHP"), which is Representative Waters' "leadership PAC" and is a multicandidate committee, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the production and distribution by either committee of a brochure[1] listing and expressly advocating the election of certain Federal and non-Federal candidates.

Your request raises two principal issues. The first is whether the proposed brochure would constitute support of, or be an in-kind contribution to, the authorized committees of the Federal candidates listed in the brochure, where each Federal candidate listed in the brochure will reimburse whichever committee produces and distributes the brochure for the full costs attributable to that candidate. The second issue is whether reimbursements by the Federal candidates constitute support of, or would be contributions to, the Waters Committee or PHP, subject to the Act's applicable contribution limits.

[1] Although you describe the document you plan to produce as a "sample ballot," because certain candidates will be featured more prominently than others and because the document will include brief commentary by Representative Waters about the candidates listed, the document is not simply a sample ballot. Accordingly, this advisory opinion will refer to the document as a "brochure."

The Commission concludes that the proposed brochure would not constitute support of, or be an in-kind contribution to, the Federal candidates listed in the brochure, provided that the Federal candidates provide reimbursements in the appropriate amount in a timely manner. The Commission also concludes that reimbursements by the Federal candidates for their attributable portion of the costs would not constitute support of, or be contributions to, the Waters Committee or PHP. Additionally, this advisory opinion discusses how the Waters Committee or PHP should determine the cost attributable to each candidate and should report both the initial payments for production and distribution of the brochure and the reimbursements by the Federal candidates. Finally, this advisory opinion sets forth the disclaimer requirements for the proposed brochure.

Background

Representative Waters is the U.S. Representative from the 35th Congressional District of California and a candidate for re-election to that office in the November 2, 2004, general election. You state that, through either the Waters Committee or PHP, Representative Waters intends to produce and distribute a brochure that will expressly advocate the election of clearly identified Federal and non-Federal candidates in the November 2, 2004, general election. The brochure will be distributed by U.S. Mail.

The brochure will feature a prominent picture or likeness of Representative Waters on the front page. It will be promoted as Representative Waters' "official sample ballot" and will contain brief quotes, which convey her opinions and endorsements of the Federal and non-Federal candidates listed.

You anticipate that the brochure will include Presidential candidate Senator John Kerry, Vice-Presidential candidate Senator John Edwards, U.S. Senator Barbara Boxer, U.S.

Representatives Juanita Millender-McDonald and Diane Watson, perhaps other U.S. House candidates, and candidates for various non-Federal offices. You represent that Federal candidates will be included in the brochure only if their principal campaign committees reimburse for the full production and distribution costs of the brochure attributable to them.

You state that candidates will be given space and prominence in the brochure in rough proportion to their prominence on the Democratic ticket. Senators Kerry and Edwards will be portrayed very prominently, statewide candidates and U.S. House candidates less so, and local candidates generally will only be listed on a ballot line resembling an actual voting ballot. The listings of the candidates will be accompanied by endorsements of varying lengths. All endorsements will be printed in Representative Waters' handwriting.

You indicate that several different versions of the brochure will be produced and distributed in order to reflect accurately the actual ballot within the recipient's voting precinct. Accordingly, any candidate other than Representative Waters will only be included in brochures that are mailed to precincts where he or she is on the actual ballot on November 2, 2004. More than 500 pieces of each version of the brochure will be mailed and the total distribution of all versions will be approximately 200,000 pieces.

Finally, you state that you are not requesting the Commission's opinion regarding the application of the Act and Commission regulations to any arrangements with, or payments by, non-Federal candidates or their committees, but instead you limit your advisory opinion request to the arrangements with, and payments by, any Federal candidates who will be included in the proposed brochure.

Legal Analysis and Conclusions

1. *Would the proposed brochure constitute support of, or be an in-kind contribution to, the authorized committees of the Federal candidates listed in the proposed brochure where all Federal candidates listed in the brochure will reimburse the Waters committee or PHP for their attributable portion of the brochure's production and distribution costs?*

Depending on which committee pays for the production and distribution of the proposed brochure, your request implicates two separate sections of the Act and Commission regulations. First, if the Waters Committee pays for the production and distribution of the proposed brochure it would implicate the limits that the Act and Commission regulations place on the *support* that a principal campaign committee or authorized committee of a Federal candidate may provide to other Federal candidates or their committees. *See* 2 U.S.C. 432(e)(3)(A) and (B); 11 CFR 102.12(c)(1) and (2); 11 CFR 102.13(c)(1) and (2). Second, if PHP (which has only a Federal account) pays for the brochure, it would implicate the limits that the Act and Commission regulations place on *contributions* to candidates by multicandidate committees. *See* U.S.C. 441a(a)(2)(A) and 110.2(b)(1). Both the limits on support by principal campaign committees and the contributions limits on multicandidate committees would be triggered if the proposed brochure were an in-kind contribution to the Federal candidates listed in the brochure. The brochure would be an in-kind contribution if it were a coordinated communication under 2 U.S.C. 441a(a)(7)(B)(i) and 11 CFR 109.21.

The Act defines as an in-kind contribution an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. 441a(a)(7)(B)(i). The Commission's

"coordinated communication" regulation at 11 CFR 109.21 specifies that a payment for a communication is made for the purpose of influencing a Federal election, and is an in-kind contribution to the candidate or authorized committee with whom or which it is coordinated if it satisfies the following three-pronged test: (1) the communication must be paid for by a person other than the Federal candidate or authorized committee in question; (2) one or more of the four content standards set forth in 11 CFR 109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 CFR 109.2l(d) must be satisfied. *See* 11 CFR 109.21(a), (b)(1).

In the present case, because you represent that each Federal candidate will be included in the brochure only if he or she reimburses the Waters Committee or PHP for the full production and distribution costs attributed to him or her, the proposed brochure would not satisfy the payment prong of the coordinated communication test. Accordingly, the Commission determines that the payments by either the Waters Committee or PHP for the brochure would not constitute support of, or in-kind contributions to, any Federal candidate appearing in the brochure, so long as the authorized committee of that Federal candidate reimburses the Waters Committee or PHP within a reasonable period of time. *See* Advisory Opinions 2004-1 (concluding that communications produced and distributed by one candidate's authorized committee and coordinated with a second candidate's authorized committee would not result in an in-kind contribution to the second authorized committee so long as the second committee reimbursed the first committee for the attributed portion of the coordinated communications) and 2004-29 (reaching a similar conclusion with respect to a coordinated communication by a State ballot committee and the authorized committee of a Federal candidate). Thus, because the proposed brochure would not be an in-kind contribution to any of the Federal candidates listed in

it, the production and distribution of the brochure would not be subject to the limits of either 2 U.S.C. 432(e)(3) or 441a(a)(2)(A).

You represent in your October 7 letter 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." The Commission assumes that if PHP produces and distributes the sample ballot, the Waters Committee, like the authorized committees of all the other Federal candidates listed, will reimburse PHP for the full costs attributable to Representative Waters.

2. Would reimbursements by the authorized committees of the Federal candidates listed in the brochure constitute support of, or be contributions to, the Waters Committee or PHP and thus be subject to the Act's applicable contribution limits?

This question implicates the same sections of the Act and Commission regulations as your first question. The Commission concludes that reimbursements by the authorized committees of the Federal candidates listed in the brochure in amounts equal to the attributable costs associated with each candidate's listing would not constitute support of the Waters Committee or contributions to PHP because, in this situation, mere reimbursement of the costs associated with the production and distribution of the proposed brochure within a reasonable period of time would not constitute "anything of value" to the Waters Committee or PHP under 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52. *See* Advisory Opinion 2004-1. Therefore, such reimbursements would not be subject to the Act's limits at 2 U.S.C. 432(e)(3) and 441a(a)(2)(A). To the extent that any reimbursement by a candidate's authorized committee exceeds the costs attributed to that candidate, such excess reimbursement would constitute a contribution either to the Waters Committee or PHP and would be subject to the Act's applicable contribution limit. *See* 2 U.S.C. 432(e)(3)(B); 2 U.S.C. 441a(a)(1)(C); 11 CFR 102.12(c)(2); 11 CFR 110.1(d).

3. How should the Waters Committee or PHP calculate the amount of the brochure's production and distribution costs attributable to each candidate listed in the brochure?

Commission regulations provide for the attribution of the expenses of a communication that is for the purpose of influencing the election of more than one candidate. Under 11 CFR 106.1, expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. In the case of a publication such as the proposed brochure, the attribution shall be determined by the proportion of space devoted to each candidate as compared to the total space devoted to all candidates. 11 CFR 106.1(a)(1). The regulation makes clear that this attribution method also applies to payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates. 11 CFR 106.1(a). Thus, attribution is determined by the proportion of space devoted to each candidate, as compared to the total space devoted to all candidates, whether Federal or non-Federal.

Because, as you indicate, your proposed brochure will feature a prominent picture or likeness of Representative Waters, will be promoted as her official "sample ballot," and will expressly advocate the election of each of the other identified candidates, the Commission concludes that the costs of a particular version of the brochure must be attributed to each Federal or non-Federal candidate, including Representative Waters, according to the space devoted to such candidate in proportion to the space devoted to all candidates. Given that different versions of the brochure will be distributed, and not every candidate will appear in all versions, the

calculation of the costs attributable to a particular Federal or non-Federal candidate must also take into account the varying shares and costs attributable to each version of the brochure.

4. How should the Waters Committee or PHP report (a) the initial payments for the production and distribution of the brochure and (b) the reimbursements by the candidates listed in the brochure for their attributed portion of these costs?

The Waters Committee (on FEC Form 3) or PHP (on FEC Form 3X) must report all the production and distribution costs of the proposed brochure as operating expenditures and, likewise, report reimbursements by each authorized committee of the individual candidates listed in the brochure as offsets to operating expenditures. 2 U.S.C. 434(b)(2)(I) and (4)(A); 11 CFR 104.3(a)(2)(vii) and (3)(ix); 11 CFR 104.3(b)(1)(i) and (2)(i). Assuming that the costs attributable to each candidate will exceed $500, either the Waters Committee or PHP must disclose the costs attributable to each of the candidates as a debt owed to it on Schedule D of the 30-Day Post General Election Report and future reports, unless a candidate's complete reimbursement occurs on or before November 22, 2004, the closing date of the Post General Election Report.[2] 2 U.S.C. 434(b)(8); 11 CFR 104.11(a) and (b).

With the itemized entries under "operating expenditures," the Waters Committee or PHP should include a notation stating: "Exp. for mailing - see AO 2004-37." For each of the entries under "offsets to operating expenditures," the notation should read: "Reimb. for mailing - see AO 2004-37." Moreover, any related entries on Schedule D should state "For mailing - see AO 2004-37."

5. What are the disclaimer requirements for the proposed brochure?

[2] The debt will no longer have to be disclosed after the report covering the period in which the debt is completely extinguished.

Because more than 500 pieces of each version of the proposed brochure will be distributed by U.S. Mail, each version of the brochure will be a "mass mailing"[3] and therefore will constitute a public communication.[4] Under the Act and Commission regulations, public communications that are paid for by candidates, or their authorized committees or agents of either, must also include a disclaimer that clearly states that the communication has been paid for by the authorized political committee. 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1) and (b)(1). Accordingly, the proposed brochure must include a disclaimer stating that the brochure has been paid for by the authorized committees of each Federal candidate appearing in the brochure. The Commission has previously allowed for some flexibility in listing candidate names in a disclaimer notice. *See* Advisory Opinion 1994-13 and MUR 2216. In this case, the Commission determines that, instead of listing each Federal candidate's committee in the disclaimer, the Waters Committee or PHP would also satisfy the Act's disclaimer requirements by marking each paying candidate with an asterisk and including a statement on the mailing declaring that the brochure was "paid for by the authorized committees of the candidates marked with an asterisk."

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

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[3] A "mass mailing" is defined at 11 CFR 100.27 as "a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period . . . ."

[4] "Public communication" is defined in 2 U.S.C. 431(22) and 11 CFR 100.26 as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising."

this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Bradley A. Smith
Chairman

Enclosures (AOs 2004-29, 2004-1 and 1994-13)