"Hoersting, Steve" <SHoersting@nrsc.org> on 09/29/2003 11:38:08 AM

To: mailinglists@fec.gov
cc:

Subject: Comments of NRSC

Dear Mai,

Please find attached the comments of the NRSC as to the Commission's NPRM on mailing lists.

Steve Hoersting

General Counsel

National Republican Senatorial Committee

phone: (202) 675-6086 fax: (202) 675-6058

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National Republican Senatorial Committee

Stephen M. Hoersting
General Counsel

September 28, 2003

Ms. Mai Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E. Street NW
Washington, DC 20463
mailinglists@fec.gov

VIA ELECTRONIC MAIL

Re: Mailing Lists of Political Committees

Dear Ms. Dinh:

By and through the undersigned counsel, The National Republican Senatorial Committee submits comments on the Commission's Notice of Proposed Rulemaking regarding Mailing Lists of Political Committees.

The National Republican Senatorial Committee ("NRSC") is an unincorporated association formed in 1916 and comprised of sitting Republican members of the United States Senate. The NRSC's primary function is to aid the election of Republican Senate candidates and otherwise support the goals of the Republican Party.

The NRSC respects the efforts of the Commission in this area, appreciates the opportunity to comment, and is willing to answer questions in a public hearing.

Background

Twenty-four years ago the Commission recognized direct mail prospecting as a legitimate committee function susceptible of "normal industry practice." *See* AO 1979-36. The Commission also understood that direct mail prospecting

involves business risk and can be "less successful than anticipated." *Id.* Twenty-two years ago, the Commission recognized list exchanges of equal value as transactions for consideration that do not result in contributions or expenditures. *See* AO 1981-46. That same year, the Commission also recognized delayed-use exchanges -- a "current use of names in exchange for a future use of the names of another political committee" -- as an accepted practice that does not result in excessive or prohibited contributions. *Id.*

All these years later, the Commission now asks how it can know that list sales, rentals and exchanges are being conducted at usual and normal charges in a commercially reasonable fashion, and whether it should now presume they are not being conducted in this manner.

No Additional Rulemaking is Necessary

The NRSC respectfully submits there is no evidence from the Commission's deliberations and enforcement matters that these exchanges are not being conducted in a commercially reasonable manner at fair market value. The reason is simple. It is in the interest of political committees to make sure they receive fair market value, under commercially reasonable terms, for all list transactions. The Commission should not unnecessarily bureaucratize the process by creating presumptions of inequity, "frequency" requirements, or "delayed use" restrictions. Lists should continue to be purchased, rented and exchanged between entities for fair market value, in a commercially reasonable manner, without a contribution, expenditure or transfer occurring. The regulations contemplated by the NPRM are a prime example of overregulation where the case has not been made that additional regulation is needed.

Actors in the political world have ordered their affairs, post-BCRA, according to Advisory Opinion 2002-14. The Commission's longstanding policy, as affirmed and explained in that advisory opinion, is adequate management of the list market and sufficient guidance to the regulated community. The NRSC respectfully submits that if the Commission believes a rulemaking is necessary, it should do no more than codify Advisory Opinion 2002-14.

The NRSC will attempt to explain, below, the error in some of the Commission's proposals as set forth in the NPRM.

Usual and Normal Charge and Usual and Normal Practice

The Commission is correct to continue requiring that list transactions occur at the usual and normal charge subject to usual and normal practice. But the Commission is ill-equipped to detail those standards *a priori,* in a rulemaking.

The political list exchange, list rental, and list sale markets are driven by market forces. Getting "names" is the name of the game, and the game is played for the long term. Entities do not part with names frivolously, and lists are never "fundraising items" in the way the Commission has treated "fundraising items" during its history.

The list exchange and rental markets are a way to bring more people into the political process. They allow like-minded organizations and candidates to expand grassroots participation in the electoral process. Political committees that engage in prospecting must continually renew lists to find new potential participants to provide them with support. If they were to solicit only faithful donors or lapsed donors, they would soon be without prospects. Donor-name and contribution-level attritions are severe and committees are continually guarding against them. Therefore, political committees rent and exchange the lists of other organizations in a perpetual search for new names.

Appraisers

Under proposed rules 110.21 and 110.22, the Commission would require committees to have lists reviewed by outside appraisers before they can be rented or exchanged. And if a committee did not have its list appraised in this manner before a transaction is executed, a contribution would result. Other than aiding the list appraisers of the world, is this additional burden necessary or wise?

The sheer volume of list exchanges and rentals occurring in the political marketplace would quickly clog the system and create a gold rush for list appraisers. It is not clear how these appraisers would be certified, how long the pre-appraisal process would take, how much it would cost, and whether appraisers could be required to complete appraisals in the order in which they were received (a matter of equity that could concern certain committees over time).

But even if somehow the pre-appraisal process were manageable there is another reason it must be rejected.

The Commission may require political committees to report receipts and disbursements, and the names of contributors above certain dollar thresholds. *See* 2 U.S.C § 434. There are things the Commission may not do, however. It may not compel political committees to disclose to third party appraisers the names of persons on political mailing lists, or the names of those persons who respond to political solicitations but do not contribute. "[T]he Supreme Court has concluded that extensive interference with political groups' internal operations and with their

effectiveness does implicate significant First Amendment interests in associational autonomy." *AFL-CIO v. FEC,* 333 F.3d 168, 177 (2003).

But requiring political committees to disclose this very sensitive data to certified appraisers *is* the way the Commission proposes to ensure that a usual and normal charge for lists is being paid in the political world. The Commission states at 52532 that "even if a mailing does not appear in a catalogue ... [t]he price may depend on such factors as how recently the names were updated for accurate addresses, *how responsive the individuals on the mailing list have been to similar [political] solicitations,* the income level of the individuals." (Emphasis added).

The Commission has no statutory mandate to require political committees to disclose this kind of detailed and sensitive data to unknown third party appraisers. The Commission has no jurisdiction to require directly this method of ensuring that a "usual and normal charge" is being paid for lists. It would be unseemly for the Commission to achieve these results indirectly by conditioning a committee's ability to engage in prospecting (a core function of political association) on its willingness to divulge its inner workings to third party appraisers.

The Commission may rightly gain access to such data where necessary, as it has for years. Access comes in the enforcement process, and the Commission may require outside experts to examine the data. But this can and should be done in the enforcement context under the confidentiality protections of 2 U.S.C. §437g(a)(12).

Commercial Reasonableness

The Commission wants to be certain that list sale, rental and exchange transactions are commercially reasonable, and is correct in continuing to require this standard in all list transactions.

Arms length transactions and commercial reasonableness

But the Commission should not doubt or confuse a committee's arm's-length, business independence in the list market with any overlap in political interest that certain committees may share. As the Commission has recognized for the last twenty-four years, commercially reasonable list exchanges at fair market value do occur in the political marketplace. And in an era of Federal dollars and individual aggregate limits, candidates of the same political party, and parties of the same political party, compete at arm's length more zealously than ever.

The Commission now proposes at 52533, however, that a "lack of arm's length bargaining should result in a rebuttable presumption that an exchange is not for fair market value" and, if not rebutted, results in an in-kind contribution from one entity to another. The Commission also questions whether committees of the same political party can ever operate at arm's length. *Id.* It would appear under this proposal and the Commission's question about the business independence of committees of the same political party, that committees may only exchange lists with committees of the opposite party. These appear to be the only types of exchange that would not raise a presumption, and the NRSC can only infer that this is the type of exchange or rental the Commission is encouraging.

Political committees of opposite party, however, have no commercially-reasonable use for the lists of the other. If the Commission is going to presume that list transactions between entities that share some degree of political interest are not made at arm's length, the presumption will follow every list transaction that takes place in the political list market. Arm's length list transactions *never occur* between entities that do not share some political interest. This is the fundamental error in the Commission's presumption proposal.

One also wonders whether the Commission under its proposal would find a rebuttable presumption in the exchanges of parties and outside groups: say, the DSCC and Emily's List; the DSCC and the Environmental Defense Fund; the DSCC and Citizens for Tobacco Free Kids; the DSCC and The Girl Scouts of America? Where do the presumptions begin or end, and how are these distinctions to be made clear?

There is no evidentiary record to support such a thoroughgoing presumption. As has always been true, but particularly post-BCRA, political committees of the same party have a business interest in ensuring that list transactions occur for fair value in arm's length transactions. There should be no presumption that entities of like political interest do not make exchanges for value.

Delayed Use

The Commission need not try to define or discourage "delayed use," in a rulemaking. Such use is difficult to define and is often mutually beneficial to certain organizations. Senate candidates of the same state have been known to exchange lists; the consideration being that the candidate in cycle will develop the list for the other candidate's use in a later cycle. One can imagine such agreements spanning 4 years and legitimately encompassing periods of dormancy before terminating. The Commission blessed delayed use transactions in 1981, *see* AO 1981-46, and the NRSC is aware of no reason that warrants reversal of that position now.

"Actually Using the List" and Doing So in a Manner that "Comports with ... Usual and Normal Practice"

The NRSC has no problem with the Commission requiring organizations to actually use the lists they have rented or received through exchange. But the NRSC does have some concern that the Commission will force an inapplicable standard onto the political marketplace. It is enough for the Commission to state that the list must actually be used by the renter or purchaser in a commercially reasonable manner, as the Commission rightly noted in Advisory Opinion 2002-14.

Frequency of Exchanges

The Commission asks whether the frequency of using a list can affect commercial reasonableness, and whether the Commission should address the number of uses in its rules in some way. Frequency of use can be used by the Commission in an enforcement context to determine whether a given transaction was commercially reasonable. But the Commission need not detail the bounds of reasonable frequency in a rulemaking.

Ownership of Lists

The NRSC understands that the Commission would like to make clear whether mailing lists are the property of a candidate or a candidate's authorized committee. This is not a problem in the Senate context because a candidate who owns names may make unlimited contributions to her campaign committee.

This leaves the question of a candidate who loans her list to her own authorized committee, and the committee spends funds to develop the list. Any alleged problem in this area, however, is no reason for the Commission to prevent list sales, rentals or exchanges for fair market value in a commercially reasonable fashion, subject to review in an enforcement case.

Signature Agreements

Like many Senators, Senator Hillary Rodham Clinton (D-NY) has signed three letters on behalf of her national party committee, the DSCC, so far this cycle; one in each of the months of July, August and September of 2003. It is often the case that a Senator does so in anticipation of receiving the names of those individuals that respond to her signature. The NRSC believes such agreements are legitimate, fair market value transaction that should not be permitted to continue without overregulation by the Commission.

Fundraising Items

Fundraising items are t-shirts, books, bumper stickers, and things of that sort. They are not mailing lists. According to practice, political committees have a right to resell names they have either purchased (not rented) or received in response to a solicitation. Solicitations involve expensive mailing and prospecting. List names do not come cheaply, and in the case of the NRSC, are constantly being renewed through significant effort financed with Federal funds.

In Advisory Opinion 2003-19 the Commission determined that a party committee may sell used office equipment and furniture for fair market value without the transaction being considered a "contribution, donation or transfer of funds," and may be deposited into a committee's Federal account.

If the Commission believes that political committees do not buy furniture and computers for the purpose of selling them as fundraising items later, then it must believe that political committees do not spend significant resources developing names for the purpose of selling them as fundraising items later. The Commission should realize that just as computers and chairs purchased at fair market value can wear out, so can donor names in the estimation of certain political committees. Those names are hard earned. Political committees should be able to sell those names without a contribution, donation or transfer occurring.

Raw List Data

The Commission asks at 52534 "whether it is usual and customary in the commercial list marketplace for one entity to provide raw list data to another entity that updates and enhances the data where both entities consequently have access to the list." It is not uncommon for one committee to exchange names with another committee who mails the lists, adds demographic information obtained in the responses, and then exchanges it back with the representation that the enhanced list is of equal value to the original names.

No Comment

The NRSC does not use "label" services, and has no comment on the practice.

The NRSC lacks a non-Federal account, and has no comment on "allocation."

The NRSC has no comment on 11 CFR Part 9004.

Conclusion

The NRSC appreciates the opportunity to comment on this rulemaking and is available to provide additional testimony in a public hearing.

Respectfully submitted,

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