Charles Spies - Legal <CSpies@rnchq.org> on 09/24/2003 05:26:26 PM

To: mailinglists@fec.gov
cc:

Subject: RNC Comment

Attached please find the RNC's comment on the Proposed Rules Relating to Mailing Lists of Political Committees.

- Charlie

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Republican
National
Committee

Counsel's Office

September 24, 2003

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

VIA E-MAIL: mailinglists@fec.gov

Dear Ms. Dinh:

The Republican National Committee ("RNC") appreciates the opportunity to comment on the Federal Election Commission's ("the Commission") Proposed Rules relating to Mailing Lists of Political Committees, 68 Fed. Reg. 52531 ("Proposed Rules" or "Rulemaking"). The RNC requests an opportunity to testify before the Commission at its hearing on this subject, and will be pleased to clarify and expand upon any responses at that time. The failure of the RNC to answer any specific question asked by the Commission in the Rulemaking should not be interpreted as having any implication on the merits of the question.

The Commission states that the purpose of this Rulemaking is to both formally adopt its historical approach, and provide candidates and political committees with more comprehensive guidance on issues involving mailing lists. Before formalizing Regulations, however, it is important to note the unique nature of issues involving political committee development of all types of lists. The nature of lists and list development has changed dramatically over even just the past few years as new technology and enhancement techniques have been developed, and until now the Commission has addressed these issues as they have arisen. To give just one example of changing technology, in the year 1990 there were only two computers in the whole RNC building, and we had very little in-house list development capability. Just thirteen years later there are hundreds of computers at the RNC, and we have the in-house capability to almost instantaneously merge and enhance lists of all types. While the focus of this Rulemaking appears to be on fundraising lists, the scope of it covers all types of lists, including e-mail addresses of web activists and GOTV lists. Because of the changing

and unpredictable nature of issues in this area, we urge the Commission to adopt as flexible of an approach as possible (while working within the constraints of the Statute, of course) to the valuation of lists. The Commission should avoid any sort of rigid rules or reference points for valuation that will almost inevitably become obsolete in the near future.

Perhaps the most troubling aspect of the Proposed Rules, as a whole, is the Commission's seeming unwillingness to simply to state that list rentals, sales, and exchanges must be conducted at the "usual and normal charge." The Commission instead proposes tacking on the requirement that, notwithstanding a "usual and normal charge," the transaction must be a "*bona fide* arm's length transaction." Even worse, the Commission then suggests the addition of "presumptions" that the transaction is not at the "usual and normal charge," based on the not necessarily relevant (to the value of the transaction) factor of whether there was a "*bona fide* arm's length transaction." These requirements and presumptions lead one to believe that the Commission is laboring under the notion that political committees are running around trying to violate the statute, and the only thing that could reign them in are detailed and restrictive Commission regulations. We respectfully reject that notion. A better approach is for the Regulations to simply and clearly state what the standard for valuation of list rental, sale and exchanges is the "usual and normal charge."

The Regulations should reflect that the "usual and normal charge" must be the valuation used. Any additional factors the Commission finds relevant, such as whether a sale or rental for the "usual and normal charge" also happens to be a *bona fide* arm's length transaction, should be added in the form of safe harbors. As the Commission itself notes, Black's Law Dictionary defines "fair market value" as "[t]he price that a seller is willing to pay on the open market and in an arm's length transaction."[1] Because the concept of "fair market value" and/or "usual and normal charge" already incorporates the concept that the price is what would be charged in an arm's length transaction, it is superfluous to additionally require that that market-determined price be paid in a literal arm's length transaction. The importance of the Commission not promulgating the extra-statutory requirement of the presence of a "*bona fide* arm's length transaction" is brought to light by the Commission's question asked in § II.B regarding proposed 11 CFR 110.22(a) – *Exchanges of Equal Value.* The Commission asks if, for example, it is possible for party committees of the same political party to engage in a "*bona fide* arm's length transaction." Because it is clear that it is possible for party committees of the same political party to determine what the fair market value is for a list (just as any two entities could determine it), and then engage in a transaction based upon that value, the Commission's question about whether certain political entities can engage in a "*bona fide* arm's length transaction" should never have to be asked.

The Commission seeks comment on a proposed rule that would not specify who has the burden of establishing what the usual and normal charge is or when that charge must be established, but that would still require political committees to rent their mailing lists at the usual and normal charge in order to avoid receiving contributions from the

[1] Black's Law Dictionary 1549 (7th ed. 1999).

lessees. This is the approach that the Commission should take for the sale, rental, and exchange of mailing lists. The apparent statutory authority for this Rulemaking derives from the definition of "contribution" which includes "anything of value." 2 U.S.C. 431(8)(A)(i). The Commission should seek in this Rulemaking, therefore, to clarify in the Regulations that if there has been a sale, rental, or exchange of lists at "the usual and normal charge for such goods or services,"[2] then a contribution has not been made for the purposes of 2 U.S.C. 431(8)(A)(i). Anything that the Commission is considering requiring beyond reinforcing that these transactions must be conducted at the usual and normal charge, such as requiring that a certain party to the transaction be the one to make the valuation determination, or that the valuation determination be made at a certain time, or that a particular catalogue be used to make the determination, or that the parties to the transaction have a certain relationship to one another, is beyond the scope of what is mandated by the statute and should therefore be avoided. If the Commission feels the need to make detailed prescriptions about other aspects of the transaction, this should be done in the form of suggestions and safe harbors, but not Regulatory mandates. For example, while the *SRDS Direct Marketing List Source* is indeed a premier resource for determining commercial list values, it is by no means the only such resource, and because it is commercially (and not politically) based, it is not always directly applicable. The Commission could reasonably create a safe harbor for valuations based upon the SRDS catalogue, or those based upon written appraisals by independent entities, but should by no means create some sort of noxious presumption that if the SRDS catalogue is not used, or a written appraisal for a so-called "independent entity" is not procured, then the valuation has strayed from market value. While it is perhaps reasonable to create an obligation for political committees that engage in list sale, rental, or exchange transactions to maintain documentation of how they reached their valuation determination, and be able to justify that determination if questioned, it is not reasonable to mandate that that determination be made a certain way.

The Commission asks in § I.H.1. *Allocation of Rental Proceeds* whether national party committees would be allowed to retain the entire amount of proceeds from the rental of lists developed with mixed funds prior to the effective date of the BCRA. The answer is clearly yes. While it is correct that at one point there may have been a percentage of non-federal resources used for developing national party lists, those lists have been constantly modified and enhanced using only Federal funds for close to a year now, and it would be impossible to make an accurate determination of which parts of those are the results of non-federal spending years in the past. The current value of the lists is derived from constant updating and enhancement, which is conducted with 100% Federal funds, so any proceeds from a commercial transaction involving said lists should be fully deposited in the national party's Federal account.

In § II.B. regarding exchanges of mailing lists of equal value, the Commission asks whether the committee's ability to use the names from another organization's mailing list to solicit contributions to the Federal account is affected by whether funds from the committee's non-Federal account were used to develop the list. The answer is no, and must be no to follow the logic of the Commission's recent Libertarian Party

[2] *See* 11 C.F.R. 100.52(d)(1).

Advisory Opinion, in which commercial transactions with corporations were allowed. If a national party committee, for example, purchases a list at fair market value, the national party's use of that list should not be affected by how that list was developed prior to purchase.

The Commission next asked about the usual and customary practice for list enhancement in the commercial marketplace. The list development and enhancement marketplace is a constantly evolving field with new technologies frequently being implemented, and agreements frequently being made regarding exchanges and enhancements. These transactions are market driven, and political committees must be given the flexibility to evaluate market factors to reach their own determinations of commercially reasonable valuation for list exchanges. The political marketplace, just like the commercial marketplace, is full of agreements based upon valuations of data gathering and enhancement, and the Commission should not enact any rigid Regulations that would inhibit political committees' ability to conduct these sorts of exchanges that are so vital to the ability for parties to engage in grass roots political activity.

We look forward to answering questions and expanding upon these and other issues that the Commission deems relevant at the upcoming hearing.

Respectfully Submitted,

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