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From: Joe Sandler

Fax:	219 3923	**Pages:**	2 Incl cover
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•Comments : NPRM—Mailing Lists—Request to Testify

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September 25, 2003

Via Facsimile

Mai T. Dinh, Esq.
Acting Assistant General Counsel
Federal Election Commission
999 E Street, S.E.
Washington, D.C. 20003

Re: Notice of Proposed Rulemaking—Mailing Lists of Political Committees

Dear Ms. Dinh:

We intend to submit comments on behalf of our client, the Democratic National Committee, in response to the Commission's Notice of Proposed Rulemaking: Mailing Lists of Political Committees, 68 Fed. Reg. 52531 (Sept. 4, 2003). Those comments will be submitted before the new deadline announced today, i.e., before noon Monday September 29.

In the meantime, we wish to inform the Commission of our desire to testify on this NPRM at the hearing scheduled for October 1, 2003. We wish to testify solely about the NPRM on mailing lists of political committees.

Thank you for your time and attention to this matter.

Sincerely yours,

Joseph E. Sandler

Joseph Sandler <sandler@sandlerreiff.com> on 09/26/2003 05:42:59 PM

To: mailinglists@fec.gov
cc:

Subject: Comments of DNC, DSCC and DCCC

Attached please find, in Word format, joint comments of the Democratic National Committee, Democratic Senatorial Committee and Democratic Congressional Campaign Committee on the Commission's Notice of Proposed Rulemaking: Mailing Lists of Political Committees.

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 - mailing lists nprm comments of dnc dscc dccc.doc

September 26, 2003

Via E-Mail

Mai T. Dinh, Esq.
Acting Assistant General Counsel
Federal Election Commission
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Washington, D.C. 20003

Re: Notice of Proposed Rulemaking—Mailing Lists of Political Committees

Dear Ms. Dinh:

These comments are submitted on behalf of our clients, the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC") and the Democratic Congressional Campaign Committee ("DCCC"), in response to the Commission's Notice of Proposed Rulemaking on Mailing Lists of Political Committees, 68 *Fed. Reg.* 52531 (Sept. 4, 2003).

Each of us requests to testify on behalf of our respective clients in the event the Commission determines to hold a hearing on October 1, 2003.

The national Democratic Party committees appreciate the opportunity to present comments on the issues raised in the NPRM, issues which are of critical importance to the committees' ongoing efforts to expand their grassroots organizing, communications and fundraising capabilities. Such expansion was one of the express goals of the sponsors and supporters of the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). The Commission should adopt policies that encourage political party committees to engage in a wide variety of sales, rentals and exchanges of lists in order to build their own databases of activists and low-dollar donors.

In general, the national Democratic Party committees support the approach of the NPRM, which is to establish a clear set of criteria for determining when rental or sale of a list by a federal political committee does not result in a contribution to that committee. In establishing these criteria, however, the Commission should recognize that the fair market value of a list that may be sold or rented by or to a political committee, or exchanged by a political committee with another organization or entity, may depend on a number of different factors. It would be impossible to capture all of the possible factors

in a regulation and inadvisable to limit the determination of market value to a particular set of factors.

It should be noted that, in general, the proceeds from list rentals and sales by party committees are treated under the Internal Revenue Code, and IRS regulations, not as contribution income, but as taxable income. This tax treatment recognizes that these transactions are inherently commercial in nature, and not contributions, and also provides party committees with an incentive not to overstate the value of any list that they rent or sell.

As long as the rental, sale and exchange of lists are not actually used as means to receive impermissible contributions, party committees should be able to engage in rentals, sales and exchanges without being required to undertake extensive investigations of market value or to prepare elaborate documentation for each transaction.

I. Committee Rental or Sale of Mailing Lists

A. Rental of Mailing Lists

1. Usual and Normal Charge

Proposed section 110.21(a) should distinguish between the situation in which a political committee rents a list directly to another organization or entity, and the situation in which the political committee uses an established independent list company, that is, a company listed in the SRDS as a broker or manager. In the latter case, since a list broker is in the business of selling and renting lists for what the market will bear, it should be presumed that the rental is a *bona fide* arm's length transaction and that the rental being charged by the list broker is the "usual and normal charge." In that situation, the political committee should not be required, itself, to ascertain the "usual and normal charge" of a mailing list in advance of the rental, but should be able to rely on whatever rental charge is established by the list company.

In the situation in which a political committee rents a list directly to another organization or entity, it is reasonable to require that the political committee establish the "usual and normal charge" in advance of the rental. The regulation should not, however, specify the factors that a committee should use to determine the normal or usual charge. As the NPRM itself recognizes, many lists do not appear in the SRDS or other catalogues and a fair rental charge may depend upon any number of factors. 68 *Fed. Reg.* at 52532. In addition to those noted in the NPRM (how recently the names were updated, how responsive the individuals on the list have been to various other solicitations), such factors may include the number, reliability, usefulness of demographic and other fields included in the data and the usefulness of the list for particular purposes (e.g., voter contact as distinct from fundraising).

It is impossible for the regulation to capture all of the possible factors that could reasonably be considered in setting a fair rental charge in a list rental agreement between a political committee and another organization. For this reason, the new regulation should not specify any particular factors or methodologies for determining the usual and normal rental charge for a list.

Nor should the new regulation attempt to enumerate the various list-related services that may be provided in connection with rental of a list, nor should it require the ascertainment in advance of the value of such services. The national Democratic Party committees have been advised by their list brokers that the prices for such services vary widely due to variation in the costs incurred by the list company or computer company that processes the list; that there is no reliable industry standard for the pricing of these services, which is often subject to negotiation on a case by case basis; and that the charges for these services represent a small fraction of the rental charge for a list.

2. Rental With Commercially Reasonable Contractual Terms

Again, proposed section 110.21(a)(2) should distinguish between the situation in which a political committee uses a list broker and the situation in which a political committee rents a list directly to another organization. In the former situation, for the reasons noted above, there should be a presumption that the transaction is a *bona fide* arm's length transaction on commercially reasonable terms, without need for the political committee to consider the factors listed in subsection (a)(2) or any other particular factors.

In the case in which a political committee rents its list directly, the committee should be required to satisfy itself that the transaction is a *bona fide* arm's length transaction on commercially reasonable terms. The specific factors listed in the proposed regulation, however, are not reliable indicators of what is "commercially reasonable" and should be deleted.

With respect to factors (i) and (ii), the party committees' list brokers have advised that, while rental agreements may specify that the rented list is to be used on or before a particular date, it is common for mailers to request a new mail date, often months after the original date agreed upon. Such a delay may be requested for any number of possible reasons, including subjective judgments about the timing of particular political message, personnel and budget issues, logistical problems with supplies and materials, and the like. The Commission should not be in the business of second-guessing what constitutes "reasonable business considerations" for delay in use of a list, if agreed to by the lessor directly or through its list broker.

With respect to factor (iii), the unique features of a particular list or of the use to which the lessee plans to put that list, may render it difficult to establish that the duration of the rental or number of uses comports with the "usual and normal practice of the list

industry," or with the "lessee's established procedures and past practice." The evaluation of commercial reasonableness should not be based on these particular factors, but on all the facts and circumstances involved.

In connection with proposed factor (iii), the NPRM questions whether the regulation should establish a rebuttable presumption that multiple uses are not commercially reasonable. No such presumption should be established. Such a presumption would not reflect the actual practice in the industry, in which multiple uses are common, usually at a discount from the original rental charge.

The NPRM further questions whether the regulation should create a presumption against the presence of a *bona fide* arm's length transaction in any case in which party committees of the same political party rent lists from each other. A presumption of this nature would be unfair and makes no sense. If a party committee rents a list to another committee of the same party, and the price and other terms are fair and reasonable considering all the facts and circumstances, the rental payment should not be treated as a contribution.

Proposed section 110.21(a)(2) should not include any factor relating to whether a mailing list is developed over time by a political committee primarily for its own use. Party committees (as well other political committees) may collect names for different types of lists from a wide variety of sources—for example, sign-ups on party websites, sign-ups at party political events and rallies, trainings, and/or names submitted by existing activists, donors, staff and volunteers. Some of these names are added to existing lists; some lists, or parts of lists, may be tested and found not be valuable for particular purposes. If these lists are rented to other organizations, the lessor political committee should not have to determine whether the entire list was actually ever used by that lessor committee or was "developed over time" for its own use.

Finally, proposed subparagraph (a)(iv) would examine whether the organization leasing the mailing list actually uses it. The regulation should not be further broadened to require that the lessor ensure itself that the lessee organization has in fact used the list in accordance with the agreement. In the case in which a list broker is used, it is standard for the broker to require submission (to the lessor organization) of the proposed mailing piece; shipment of the list to a recognized computer service bureau or mailing house; and credit verification of the lessee organization (the mailer). The list broker ensures that these conditions are met before the list is released.

In the case in which a political committee leases a list directly, if there is a written agreement providing for use of the list, there is no reasonable way for the lessor organization to verify that the list has been used in accordance with the agreement. Unless the lessor political committee is actually aware of circumstances indicating that the transaction is not *bona fide*, the political committee should not be held responsible if,

for whatever reason, the lessee organization does not in fact use the list, or does not use it as contemplated in the agreement.

B. Political Committee Sale of a List

For the reasons stated above, it is reasonable for proposed section 110.21(b) to require that a political committee ascertain in advance the usual and normal charge for sale of a list; it is not reasonable to impose such a requirement where a list broker is used; and the regulation should not list particular factors for determining the commercial reasonability of the sale of a mailing list.

In response to the question posed by the NPRM, its is indeed 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 and where both entities subsequently have access to the list. For example, a political committee might send a list of voters or donors to a commercial firm that has compiled demographic information about consumers. The committee and firm might agree that certain information will be appended to the political committee's list; and, in exchange, both the committee and firm can use the resulting list, with the committee benefiting from the demographic information and the commercial firm benefiting from identification of certain consumers as supporting a particular political party. A committee might engage in a similar exchange with another type of non-profit organization or entity. All of these situations are commercially reasonable and should be recognized as not resulting in any contribution.

With respect to outright sales of lists by a political committee, the Commission should not adopt any presumption that a sale by a political committee is per se unreasonable unless the committee is terminating. Committees maintain many types of lists and a particular type of list may prove to be of so little continuing value that its outright sale makes sense. Further, it could be difficult to distinguish an outright sale from an agreement—common in the list industry—allowing multiple ongoing uses of a list by the recipient organization.

Finally, while the sale price for a list is normally higher than for rental of the same list, the amount of the difference could be influenced by a number of factors and could vary greatly from list to list. The Commission should not adopt any blanket rules or presumptions regarding the sale price of a list. In that regard, the purchase of a list does not necessarily result in a contribution merely because the list has not been updated recently. In the experience of the party committees, and their list brokers, some older lists can be quite valuable, depending on the nature of the list and the information. For example, the party committees' list broker indicated that it managed one list of contributors to the campaign of a deceased Member of Congress and that other organizations were still renting that list six years after the Member's death. Information about the concerns or interests of voters on a particular list may be valuable even one or two cycles after the election cycle in which the information was collected.

C. Recordkeeping

In the case in which a list broker handles the rental or sale of a political committee's list, the committee should not be required either to maintain a copy of the sale or rental agreement, or to document the usual and normal charge for the list. List brokers normally transmit list orders electronically and maintain records of the order and its terms and conditions in electronic form. While it is possible to print out this information if needed (*e.g.*, in a Commission audit or enforcement matter), to require that list brokers maintain separate paper files for orders placed for or involving political committees—representing perhaps 5 or 10 out of hundreds of orders placed on any given day—would force list brokers significantly to increase their charges to political committees. Given that the use of an independent list broker inherently ensures that the transaction is *bona fide*, at arm's length and is on commercially reasonable terms, it is entirely unreasonable to require political committees to maintain their own paper records where a list broker is used.

For the same reason, there is no reason whatsoever, where a broker is employed, to force a political committee in any way to document the usual and normal charge for its list. It is the broker who determines that charge, based either on standard industry lists and/or the broker's independent judgment.

In the case in which a political committee rents or sells its list directly, it is reasonable for the Commission's regulations to require that there be some form of written agreement reflecting the transaction. It is absurd, however, to require a political committee to obtain an independent written appraisal of its list before engaging in any such transaction. Obtaining such an appraisal would be costly and time-consuming at best; in some cases, because of the unique features of a list, it may be difficult or impossible to obtain such an appraisal. The Commission should allow political committees to determine the rental or sale charge of a list based on all the relevant facts and circumstances.

D. Allocation of Rental Proceeds

The NPRM seeks comment on whether the new regulations should specify that, where a political committee's list had been developed in part with non-federal funds, only some allocable portion of the rental proceeds could be deposited and retained in the committee's Federal account. The NPRM raises the question whether national party committees should be allowed to retain the entire amount of proceeds from the rental of lists developed with mixed funds prior to the effective date of BCRA.

In our view, that a party committee complied with the allocation regulations in paying for an asset prior to the enactment of BCRA is absolutely irrelevant to the

treatment of that asset subsequently. BCRA could not, and did not, require national party committees to divest themselves of physical assets that had been lawfully paid for on an allocated basis, under part 106 of the Commission's rules, prior to enactment of the new law. Nor did BCRA—or the Commission's implementing regulations--require national party committees to disgorge to the government, or otherwise give up or pay back, some allocable share of the value of such assets. Obviously any such requirement would give rise to a strong claim under the Fifth Amendment, of deprivation of property without due process. In these circumstances, it would be nothing short of ludicrous for the Commission to contemplate forcing national parties to repay or disgorge any portion of the proceeds from sale or rental of lists.

II. Committee Exchange of Mailing Lists

The national Democratic Party committees support proposed section 110.22 as worded in the NPRM. This section would establish the standards for exchanges of lists that do not result in a contribution to the political committee undertaking the exchange.

Again, the proposed regulation should not in any limit the ability of committees to exchange lists under agreements permitting multiple or delayed uses. Depending on the particular features of each list being exchanged, multiple or long-term use by each organization of the other's list may be entirely commercially reasonable. Further, delayed use is actually quite normal in list exchanges, including those handled by list brokers. A political committee might allow a list broker to offer its list to a non-profit organization in exchange for use of the non-profit organization's list. But the political committee might not want to make use of the latter's list for some period of time because of the political environment, the desired timing of particular messages or a host of other factors.

It is reasonable for the regulations to require each party to an exchange to establish the fair market value of is own list in advance. Again, each party should be allowed to take into account all of the relevant facts and circumstances in establishing the value of its list for use in the specific proposed exchange.

For the reasons stated above, a political committee's ability to use the name on another organization's mailing list to solicit contributions to the committee's federal account (its only account, in the case of national party committees) should not be affected in any way by whether funds from the committee's non-federal account were used to develop the list.

Finally, as explained above, it is indeed usual and customary for one entity to provide raw list data to another entity that updates and enhances the data, and where both entities subsequently have access to the list. Such transactions should be regarded as commercially reasonable exchanges of equal value that do not result in any in-kind contribution.

Respectfully submitted,

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