



AGENDA DOCUMENT NO. 18-13-A
APPROVED APRIL 26, 2018

MINUTES OF AN OPEN MEETING
OF THE
FEDERAL ELECTION COMMISSION
THURSDAY, JANUARY 25, 2018

PRESENT:

Caroline C. Hunter, Chair, presiding

Ellen L. Weintraub, Vice Chair

Lee E. Goodman, Commissioner

Matthew S. Petersen, Commissioner

Steven T. Walther, Commissioner

Alec Palmer, Staff Director

Lisa Stevenson, Acting General Counsel

Dayna C. Brown, Secretary and Clerk

Chair Caroline C. Hunter called the Federal Election Commission to order in an open meeting at 10:05 A.M. on Thursday, January 25, 2018 with a quorum present.

Chair Hunter recognized Vice Chair Weintraub who

MOVED to waive the rules on the timely submission of agenda documents so that the Commission may consider Agenda Document No. 18-03-A.

The motion carried by a vote of 5-0 with Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voting affirmatively for the decision.

I. PROPOSED INTERIM ENFORCEMENT POLICY ON VOLUNTEER MAIL EXEMPTION

Memorandum from Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen dated January 24, 2018

**Agenda Document No. 18-03-A
(Submitted Late)**

Chair Hunter recognized Mr. Lorenzo Holloway of the Office of General Counsel and thanked him for all of his help on this issue over the years. Mr. Holloway stated that this issue has had a significant impact on the Office of General Counsel and the Audit Division given that the policy on the matter has been unclear. Mr. Holloway explained that the issue plays out

on two levels: on one level is the issue of how much is enough, both qualitatively and quantitatively, with respect to volunteer activity; and on another level, assuming that volunteers actually participate, the question becomes how to prove this. Providing the example of an Interim Audit Report coming to the Office General Counsel in which volunteers have participated in mailings and the committee has offered color photographs as proof, Mr. Holloway stated that while the Audit Division may indicate that the proof offered does or does not satisfy the volunteer materials exemption, the problem is that there is no clear standard by which to determine whether the volunteer materials exemption has been met and whether the color photographs offered are sufficient in terms of proof. As a result, the Office of General Counsel usually advises the Audit Division to note the lack of clarity in their report and to raise the issue for the Commission in the cover memorandum that accompanies the report. Mr. Holloway noted that there have been at least 13 audits where this has occurred.

Chair Hunter stated that one of the reasons she sought to discuss this issue and was very hopeful that the Commission could prepare a policy that would garner four (4) votes today was because often times at least three (3) Commissioners will vote to move the finding related to volunteer mail exemption to the "Other Issues" portion of the Audit Report. She explained that this means the finding did not receive four (4) votes to support it, in part

due to the lack of clarity on the policy. Chair Hunter stated that she remains hopeful that the Commission can do something to prevent the Audit Division and the Office of General Counsel, as well as committees from spending a great deal of time on this issue only for it to go nowhere given the lack of a clear policy. Chair Hunter reiterated her hope that the Commission can come up with a policy that provides guidance to both staff and the public, and also encourages volunteer participation. She stated that even if the Commission is not able to garner four (4) votes today it would be of value, after so many years, to let the public know where Commissioners stand on this issue. Chair Hunter stated that she and Commissioners Goodman and Petersen have put out a Proposed Interim Policy which is essentially the same as the one put out in 2010, inclusive of minor edits, and that having a vote on it to let the public know where the Commission stands may be useful.

Chair Hunter recognized Commissioner Petersen who commended the Chair on her effort to bring greater clarity to when state and local parties may avail themselves of the volunteer materials exemption as found in the Federal Election Campaign Act. Commissioner Petersen then asked Mr. Holloway about the time frame of the 13 audits he previously referenced as being impacted by the lack of policy on this matter. Mr. Holloway stated that the audits go back to at least the 2010 election-cycle. Commissioner

Petersen stated that this was something the Commission has grappled with for some time, and that the Commission has had several Matters Under Review (MURs) that have dealt with this issue. Commissioner Petersen explained that as the Commission has dealt with volunteer materials exemptions in the case of volunteer mail programs by state and local parties, it has often come down to how many verbs were being cited by the parties, such as “loading, unloading, packaging, tagging, sorting, stamping, addressing, stuffing” etc., in an effort to determine what was a sufficient amount of volunteer activity in order to avail a party of the volunteer materials exemption. He stated that it has been a bit of an uneven road in terms of determining what is and what is not sufficient, and noted that it is important to recall why this exemption was put into the Federal Election Campaign Act (the Act) in the first place. He highlighted for the Commission some of the legislative history that surrounded the 1979 amendments which amended the Act to include the volunteer materials exemption.

Commissioner Petersen then stated that, as acknowledged in the draft document before the Commission, the technology by which mail is produced and addressed has changed significantly in the nearly four (4) decades since the 1979 amendments. Nevertheless, the purpose that underlined the 1979 amendments remains as relevant as ever, particularly in this era when outside spending has weakened the relative strength and position of our

political parties, especially the state and local political parties in our electoral system. Commissioner Petersen stated that we need more, not less, grassroots participation at the state and local level and thus the need to maintain incentives for state and local parties to be able to involve volunteers remains as important as ever, and is essential to maintaining the health and vitality of our state and local parties. He further stated that the document before the Commission is a good effort toward providing clarity as to when parties may avail themselves of this important exemption.

Chair Hunter recognized Vice Chair Weintraub who expressed her desire to look at the language of the statute. Reading the relevant portion of the statute, the Vice Chair emphasized that though the statute states that direct mail was not to be covered, the proposed policy before the Commission seeks to adopt a mail exemption. Vice Chair Weintraub stated that despite Commissioners' thoughts on the importance of volunteers working at the grassroots level, she did not see how the proposed policy was consistent with the words of the statute. She further indicated that the legislative history does not preempt the words of the statute. Vice Chair Weintraub stated that it was problematic for Commissioners, who are empowered and authorized to interpret a statute, to read the statute in a way that vitiates the words that are on the page. She further stated that the type of mail at issue is mass mailing; plainly the type of public communication or

political advertising that was exactly what the statute was talking about.

The Vice Chair stated that perhaps if there were an old-fashioned mailing party where there were 20 volunteers stuffing envelopes and affixing address labels and then hand carrying them to the post office so that the entire activity is a volunteer activity, maybe an argument could be made. In actuality what is happening is the entire process is being handled by commercial operations with a few volunteers brought in and given small tasks to do even though the whole process could be handled by the mail house. Vice Chair Weintraub explained that the kinds of activities that lend themselves to the language outlined in statute include volunteers who are going door-to-door, standing on street corners, or manning booths at county fairs and want to have something to hand out to people to remind them of who the candidates are. She reiterated that impersonal mass mailing activity appears to be inconsistent with what Congress actually had in mind given the words of the statute.

Chair Hunter recognized Commissioner Petersen who stated that the Commission, essentially since the beginning of the statute, has drawn a distinction between direct mail which is considered to be vendor produced mail from start to finish, and mail programs that have a significant volunteer component. He stated that this was a distinction that had been drawn since the 1980s. Referencing a late 1980s Statement of Reasons from MUR 2377

involving the mailing of close to 300,000 pieces of mail, Commissioner Petersen stated that precedent was drawn when the Commission determined, by a majority, that there was sufficient volunteer activity to justify the mailing falling within the scope of the volunteer materials exemption. Commissioner Petersen stated that this was a legitimate exercise of interpreting a statute and drawing a distinction between direct mail which is vendor generated, produced, and distributed mail, and mail that has a significant volunteer component in terms of preparing it for mailing. He further stated that this case was not an outlier but rather a decades-long precedent.

Discussion continued.

Chair Hunter recognized Vice Chair Weintraub who stated that Commissioners may have been ignoring the words of the statute for years. She stated that she was willing to share some of the blame, as the policy existed prior to her arrival at the Commission and she went along with it until 2009. Vice Chair Weintraub highlighted a 2009 case wherein the volunteer activity cited by the committee was particularly slender and stated that it was at this point that the Commission started to try to come up with a policy, though there was some misunderstanding amongst Commissioners as to what the policy would say. With regard to the “but for” standard currently before the Commission in the proposed policy, Vice Chair Weintraub stated

that the Commission had not previously adopted such a standard and expressed her belief that such a standard is too easy to manipulate. The Vice Chair stated that to the extent that the proposed policy is an attempt to codify a standard that the Commission has previously adopted, this is inaccurate. She further stated that to the extent that the proposed policy would codify a standard that would guarantee substantial volunteer participation, she does not believe it will.

Vice Chair Weintraub stated her belief that the intent was for the focus to be on the volunteers being active in party politics at the grassroots level and communicating with voters; instead the materials are produced commercially and the volunteer participation is minimal, used only so that the parties can claim the benefit of the volunteer exemption which allows parties to put out a large amount of mail and not have it subjected to the ordinary coordinated spending limit that they would have with their party committees.

Chair Hunter recognized Commissioner Petersen who stated that if the Commission is getting it wrong, it was probably getting it wrong from the very beginning, and noted that direct mail may mean different things to different people. He stated that in looking at the Explanation and Justification from 1980 regarding direct mail, it references mailings from lists developed by a state or local committee as being permissible. It seems

from the outset there was a distinction drawn between direct mail and other types of mail, and that distinction appears to have been followed for 40 years. He continued that maybe they got it wrong at the outset, but the Commission's interpretation has never been challenged. Commissioner Petersen stated that a big picture issue about whether or not the Commission might be able to find common ground going forward was whether or not the Commission can agree that direct mail and mail that involves a substantial volunteer component is a legitimate distinction to draw. He stated that if the Commission thinks this is a legitimate distinction to draw, it may be able to find a consensus at some point, but if it does not, there is a divide that cannot be bridged. If in fact there is agreement on the distinction, Commissioner Petersen stated that he was open to considering what the Commission thinks should be the quantum of involvement that is necessary for committees to avail themselves of this exemption.

Commissioner Petersen further stated that he agreed that the "but for" language was not included in past Statements of Reasons, and explained that the effort was being made to maybe distill what was being said in those prior statements. He further articulated that the primary purpose underlying the effort was to have there be a standard that is readily knowable by state and local parties as well as the Commission's own Audit Division and Office of General Counsel so that it is not a guessing game, given that there has not

previously been an articulation from the Commission as to what was sufficient.

Chair Hunter recognized Vice Chair Weintraub who stated that there is a regulatory definition of direct mail in 11 C.F.R. § 100.147(a). After reading the regulation, she stated that in 1979 there were likely still old-fashioned mailing parties that commercial vendors were not involved in, but today virtually all of the mail is handled by commercial vendors with volunteers brought in by state parties in a ministerial capacity in order to take advantage of the exemption.

Chair Hunter recognized Commissioner Goodman who first associated himself with the opinions of Commissioner Petersen, and then stated that it was a perfectly reasonable interpretation of this statute to define direct mail as that type of mail that is wholly turned over to a commercial direct mail operation and they perform all the services to send that mail out to the public. This is what makes direct mail, in this context, similar to the other forms of advertising in this statute. Commissioner Goodman provided the example of broadcasting. He stated that volunteers are not typically involved in broadcasting. The ad is cut, turned over to the television station and it runs without a role for volunteers to disseminate the message through the facilities of a broadcasting station. Commissioner Goodman stated his belief that it was reasonable to say that this is the same concept captured

by the use of direct mail here and in the regulation, and noted that it was not much of a gloss on the regulation for mailings by a commercial vendor to mean 100% turned over to the commercial vendor for the vendor to design, produce, print, mail and disseminate from start to finish. Commissioner Goodman stated that once that type of definition is accepted for what direct mail means, that gives some room to read other types of mailings into the volunteer activities contemplated under 52 U.S.C. § 30101(9)(B). He stated that it is a perfectly reasonable read; it has been the read that has animated the Commission's treatment of the rule for nearly 40 years; and that Congress has known of the Commission's treatment for those 40 years. Commissioner Goodman then stated that he finds the "but for" test too restrictive once there is volunteer involvement because the only limitation in the statute is that it be in connection with volunteer activities. Commissioner Goodman shared examples of volunteer activities he has seen over the course of his career related to the mailings in question. He acknowledged that technology is eclipsing such volunteer work, but stated that just because a party can avail itself of new technologies does not mean that the volunteer exemption should be removed when volunteers are engaged with the technology that helps produce the direct mail that will be distributed. Commissioner Goodman stated that the technical statutory and regulatory read that he comes to is somewhat informed by the first amendment and

policy issues at stake, which is the desire to encourage and strengthen state and local political parties. He remarked that this is one area of great utility which has played a significant role for 40 years.

Discussion continued.

Commissioner Goodman stated that there appeared to be two arguments before the Commission: 1) as a matter of law, whether any mail can fit as a volunteer material or whether all mail is considered direct mail; and 2) if the first argument is not the case and there is room for mailing something under the volunteer materials exemption, it is a matter of degree and determining how much volunteer activity is necessary. Commissioner Goodman then asked Vice Chair Weintraub whether her argument was the former or the latter.

Vice Chair Weintraub stated that the Commission has defined direct mail as mail that is sent out by commercial vendor. She further stated her belief that to the extent that mail was contemplated at all as a part of the volunteer materials exemption, it was in the context of an old-fashioned mailing party where the volunteers did all the work, including stuffing and stamping envelopes, which is every different from the commercial mail operation of today. She stated that perhaps what Congress had in mind in 1979 does not occur anymore.

Commissioner Goodman then stated that it seemed to be the degree of volunteer activity that concerned the Vice Chair. He explained that it seemed that Vice Chair Weintraub was concerned that modern technologies and the use of outside vendors to assist in volunteer activity is akin to direct mail. Commissioner Goodman stated that the Commission is left with an interpretive problem: how much volunteer activity is sufficient to fall within the volunteer materials exemption. He concluded that he was comfortable that as long as it is in connection with volunteer activities, that it is not direct mail under the statute and that the question is how much volunteer activity is necessary.

Chair Hunter recognized Vice Chair Weintraub who stated that she was looking to both the statute and the regulation which defines direct mail as any mailings by a commercial vendor or any mailings made from commercial lists. She further stated that as she thinks about the cases, she cannot think of any that did not involve a commercial vendor in a way that the regulations appear to say makes it ineligible for the exemption. She stated that while the Commission could debate whether volunteers could so substantially participate in what is otherwise a commercial operation, that it would make it not mailings by a commercial vendor, it would be difficult for her to contemplate such a scenario and noted that it was not the norm of what the Commission sees.

Discussion continued.

Chair Hunter recognized Commissioner Petersen who stated that he did not think involvement of a commercial vendor was the linchpin in the volunteer materials exemption at-large. He explained that the crux of the matter, in his opinion, comes down to the distribution issue and what level of involvement in the distribution is considered sufficient in order for the volunteer materials protections to kick-in. He stated that he views a commercial mail house producing a piece as similar to commercial vendors producing bumper stickers, pens, pamphlets and so forth. It is when the commercial vendor is also taking care of all of the elements of distribution that it is placed in the category of direct mail, as opposed to when you have volunteers handling multiple elements of the distribution up to the point of delivery of the mailings to the post office. He stated his desire to raise this point as part of the reasoning for his support of a policy similar to the one presently before the Commission, and noted that he was open to weighing the different levels of involvement that the Commission thinks should be required in order for this exemption to kick-in.

Chair Hunter recognized Commissioner Walther who stated his desire to associate himself, to a large degree though not entirely, with the Vice-Chair's comments, and indicated that he proposed a policy last July that he continues to adhere to. He further stated that the draft before the

Commission today has some issues for him that center mainly around the idea of degree. The proposed policy would allow one factor to be sufficient, which he does not agree with. He stated that for him the basic policy should encourage substantial individual participation with meaningful results. With regard to the “but for” standard, he stated that in some cases the standard makes sense; however, it is not the end all in the analysis and should not be used as the exclusive factor in any one case. Commissioner Walther indicated that he was not able to support this draft but looked forward to continuing to work on the issue.

Chair Hunter stated that she and Commissioners Goodman and Petersen were happy to discuss the matter further in the future and welcomed any edits Commissioner Walther may have to their proposal or edits to the proposal he submitted last summer. She stated that today’s conversation was very helpful and that Commissioners better understand where their colleagues stand on the issue. Chair Hunter then called for a motion and recognized Commissioner Petersen who

**MOVED to approve Agenda Document No. 18-03-A,
Proposed Interim Enforcement Policy on Volunteer
Mail Exemption.**

The motion failed by a vote of 3-2 with Commissioners Goodman, Hunter, and Petersen voting affirmatively for the motion. Commissioners Walther and Weintraub dissented.

II. PROPOSED REVISIONS TO FORMS 8 & 9 AND INSTRUCTIONS

**Memorandum from the Forms Committee dated
July 3, 2017**

Agenda Document No. 18-02-A

Chair Hunter stated that since this matter was placed on the agenda, Commissioners have changed their votes to approve the matter. The Chair recognized Mr. Joshua Blume of the Office of General Counsel to provide an update to the public on the revisions. Mr. Blume stated that Form 8 is used by terminating political committees to submit debt settlement plans for Commission review. Form 9 is used to disclose disbursements for electioneering communications and must be filed within 24 hours of the electioneering communications disbursement. The revisions were proposed by an interdisciplinary FEC Forms Committee consisting of staff from multiple FEC offices. The revisions to Form 8 are intended to elicit additional information from terminating committees that Commission regulations require, including information that the regulations require the Commission to consider when evaluating a debt settlement plan. The revisions to Form 9 would update the form by removing references to terms and regulatory provisions that have been rendered obsolete by the Supreme Court's Citizens United decision. Corresponding revisions were also made to the Instructions for completing the two forms.

Chair Hunter thanked Mr. Blume for his presentation and the work put into the revisions.

III. MANAGEMENT AND ADMINISTRATIVE MATTERS

There being no further business to come before the Commission, the meeting adjourned at 11:25 A.M.

Signed:



**Caroline C. Hunter
Chair of the Commission**

Attest:



**Dayna C. Brown
Secretary and Clerk of the Commission**