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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 20, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli
Staff Attorney

SUBJECT: Draft AO 1994-13

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for May 26, 1994.

Attachment

**SUBMITTED LATE
AGENDA ITEM
For Meeting of: MAY 26 1994**

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DRAFT

ADVISORY OPINION 1994-13

Peter A. Bagatelos
Bagatelos & Fadem
The International Building
Suite 1801
601 California Street
San Francisco, California 94108

Dear Mr. Bagatelos:

0 This refers to your letters of May 19 and April 20,
1 1994, on behalf of Voter Education Project ("VEP") concerning
2 application of the Federal Election Campaign Act of 1971, as
3 amended ("the Act"), to a video slate advertisement program
4 VEP wishes to conduct with respect to Federal candidates on
5 the June 7, 1994 California statewide primary election
6 ballot.

7 You state that VEP is a California for-profit
8 corporation engaging in the business of selling cooperative
9 advertisements to or on behalf of candidates and ballot
0 measures. Such advertising normally takes the form of
1 written slate mailers. You state that VEP's customers can
2 include Federal, state and local candidates and their
3 committees and state and local ballot measure committees.

4 You state that VEP wishes to market the concept of a
5 video slate for broadcast on various television media
6 stations, including cable television. A list of candidates
7 and ballot measures included on the video slate to be shown
8 on television stations would be presented in a typical
30-second advertising spot. Each spot might feature

approximately 10 names of candidates and measures, the desired voting preference for each, and the required disclaimer for the advertisement, as required by the Federal Communications Commission and, as applicable, by the Federal Election Commission.

Specifically, the 30-second spot would be shown in each of California's 58 counties. Of the approximate 10 names of candidates and measures for each spot, you estimate that six would be the same in all of the counties, and four positions would vary depending on the local county races. Of the 10 names mentioned above, you expect that each 30 second spot in each county would name one candidate for the U.S. Senate and as many as three Congressional candidates. The listing of Congressional candidates would vary depending on the different jurisdictions where each advertising spot may be shown.^{1/}

^{1/} You state in your request that VEP has already had discussions with potential customers for this program, including one candidate for the U.S. Senate. You state that it is contemplated that each entity, candidate, and/or committee, will pay fair market value to participate in such video slate advertisements, and it is not currently planned that free advertising space will be provided to any candidate or ballot measure committee.

You have not presented any question or facts dealing with what would constitute fair market value for the service VEP offers. Therefore, this opinion is limited solely to the issues relating to the required disclaimer and the exhortation to vote to be included in the video slate. This opinion does not deal with any question relating to fair market value. However, for a discussion of the factors involved in determining what constitutes fair market value for commercial firms involved in political advertising or fundraising see Advisory Opinions 1991-32, 1990-19 and 1979-36. See also footnote four.

You state that VEP, in addition to encouraging viewers of the spots to vote for designated candidates and measures, also proposes to encourage viewers generically at the end of each spot to vote on Tuesday, June 7, 1994. As an example, you state the message might read: "Remember to vote on Tuesday, June 7, 1994."

While you seek advice as to the legal implications of this proposed program under the Act, you also raise the following specific questions:

1) If Federal candidates pay to participate in the program, what kind of disclaimer would be required under the Act and Commission regulations?

2) Is there any legal issue or complication under the Act if the exhortation were part of the services paid for by the candidates and committees participating in the slate program?

3) Would the answer to the second question be different if the exhortation to vote were limited to encouraging viewers to vote for the candidates and measures mentioned in the video slate on June 7, 1994.^{2/}

The Disclaimer

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any

^{2/} Your original April 20, 1994, letter indicated that the exhortation would be paid for by VEP. However, your May 19, submission indicated that the exhortation would, instead, be paid for by the candidates and committees.

contributions through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication--if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents--shall clearly state that the communication has been paid for and authorized by the candidate. 2 U.S.C. §441d(a)(1), 11 CFR 110.11(a).

The Act and Commission regulations exclude from the definition of "contribution" and "expenditure," the payment by a candidate for any Federal office, or by the candidate's authorized committee, of the costs of campaign materials which include information on or reference to any other candidate and which are used in connection with volunteer activities. This exception does not, however, include the use of broadcasting, newspapers, magazines, billboards, direct mail or similar types of general public communication or political advertising. Furthermore, slate cards used in mailings by commercial vendors, or in lists not developed by a listed candidate, require a proper disclaimer with regard to all the candidates listed. See 2 U.S.C. §441d(a)(1), 11 CFR 110.11(a) and Advisory Opinion 1986-29. Further, if the slate card developed in this way is not paid for by the candidate listed, the slate card would constitute a contribution to that candidate. See Advisory Opinion 1986-29.

A prior enforcement case, Matter Under Review ("MUR")

2216, presented disclaimer issues arising from written slate mailers and is relevant to your situation. In MUR 2216, a commercial firm prepared a slate card mailer that included several Federal candidates, some of whom had authorized the use of their names. The General Counsel's brief concluded, that as to these specific candidates, a statement on the mailing declaring that the card was "paid for and authorized by candidates marked with an asterisk" was a sufficient disclaimer for purposes of the Act. Therefore, in answer to your first question, in your situation, a similar visual or oral statement that the video slate was paid for and authorized by the candidates and committees who were otherwise identified in the slate would likewise be a sufficient disclaimer under 2 U.S.C. §441d(a)(1) and 11 CFR 110.11(a).^{3/}

^{3/} Your request discusses the concern of VEP regarding the question of sponsorship of the slate for purposes of the FCC regulations. You state your belief that under one interpretation of FCC regulations, VEP could be considered the sponsor, rather than the participating political committees, because VEP will pay the station through media buyers for the advertising spot and will control the format of the advertisements, including how they are arranged and presented on each spot. The Commission notes that for purposes of the Act, it is the individual political committees rather than its agents or its vendors that must be identified in the disclaimers required by the Act. See Advisory Opinion 1991-32 and MUR 2216.

You also suggest the difficulty of placing multiple disclaimers in the video message. You therefore suggest that in this situation the Commission should apply 11 CFR 110.11(a)(2) and find that "the inclusion of a disclaimer would be impracticable." 11 CFR 110.11(a)(2). As noted above, for purposes of the Act, multiple disclaimers are not necessary in this case.

Exhortation to Vote

The Act prohibits any contribution or expenditure by any corporation in connection with a Federal election. 2 U.S.C. §441b(a). For the purposes of this prohibition, the term "contribution or expenditure" includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value ... to any candidate, [or] campaign committee ... in connection with any" Federal election. 2 U.S.C. §441b(b)(2). Commission regulations define "anything of value" as "the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services." 11 CFR 100.7(a)(1)(iii).

An exhortation to viewers to vote in the June primary, which is included as part of a video slate that endorses candidates, would be something of value or a service to a political committee whose candidate or proposition is supported by the slate. There is no real distinction whether the exhortation to vote is general, or whether it is specifically linked to the slate candidates or proposition, since its inclusion as part of the video message would convey an association with the advocacy message in support of the listed candidates and ballot measures. However, the Commission has concluded in the past that the term contribution does not include services, provided by vendors, including vendors who provide political advertising and solicitation services, as long as those services are

adequately paid for within a commercial relationship. See Advisory Opinion 1991-32.

Under these circumstances, including the exhortation, as long as it is paid for by the participating candidates and political committees, would not be a contribution or expenditure under the Act.^{4/} However, if the exhortation is not paid for by the participating candidates and committees, but is provided free of cost, it would constitute a prohibited corporate contribution or expenditure by VEP. See Advisory Opinion 1984-62.

The Commission expresses no opinion regarding any application of FCC regulations to the proposed video slate program because those issues are outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Com-

^{4/} Again, the Commission notes that while no question is raised regarding what constitutes fair market value for the services discussed in this opinion, an underlying assumption of this opinion is that the fair market value and usual commercial business practices will be followed by VEP. It is also assumed that VEP will treat all Federal candidates and committees alike and in the same manner it treats all its clients. See footnote one.

mission, to the specific transaction or activity set forth in
your request. See 2 U.S.C. §437f.

For the Commission,

Trevor Potter
Chairman

Enclosures (AOs 1991-32, 1990-19, 1986-29, 1984-62, and
1979-36)

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