



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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June 1, 1994 **SUBMITTED LATE**
AGENDA ITEM

For Meeting of: JUN 2 1994

MEMORANDUM

TO: The Commission

FR: Lee Ann Elliott
Commissioner

RE: Alternative language for Advisory Opinion 1994-13

I am in general agreement with the General Counsel's draft, but I have several language changes that I think will clarify or sharpen the opinion's analysis. To expedite consideration of this Advisory Opinion Request, I suggest the following language changes be made in the General Counsel's draft:

Delete the sentence on page 4 lines 23 to 27 beginning with "Further, if the ..."

Replace the words "General Counsel's brief" on page 5, five lines from the top, with the word "Commission."

Delete the two sentences on page 6 lines 15-24 beginning with "An exhortation" and "There is no ..."

Delete the first full paragraph on page 7 (except for footnote 4) beginning with "Under these circumstances ..."

Add the following language on page 7 after the citation to Advisory Opinion 1991-32:

Because your letter of May 19, 1994, clearly states that participating candidates will pay for the cost of the general exhortation at the end of the video slate, including such an exhortation would not be a contribution or an expenditure by VEP under the Act.

I request this memorandum be placed on the open Session Agenda for June 2, 1994. Attached to this memorandum is an edited copy of the General Counsel's draft.

Enc.

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).

0 The Act and Commission regulations exclude from the
1 definition of "contribution" and "expenditure," the payment
2 by a candidate for any Federal office, or by the candidate's
3 authorized committee, of the costs of campaign materials
4 which include information on or reference to any other
5 candidate and which are used in connection with volunteer
6 activities. This exception does not, however, include the
7 use of broadcasting, newspapers, magazines, billboards,
8 direct mail or similar types of general public communication
9 or political advertising. Furthermore, slate cards used in
10 mailings by commercial vendors, or in lists not developed by
11 a listed candidate, require a proper disclaimer with regard
12 to all the candidates listed. See 2 U.S.C. §441d(a)(1), 11
13 CFR 110.11(a) and Advisory Opinion 1986-29. ~~Further, if the~~
14 ~~slate card developed in this way is not paid for by the~~
15 ~~candidate listed, the slate card would constitute a~~
16 ~~contribution to that candidate. See Advisory Opinion~~
17 ~~1986-29.~~

18 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 ^{Commission} ~~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. 5441d(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. *INSERT*

~~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.