



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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ADVISORY OPINION 2008-06

Marc E. Elias, Esq.
Caroline Goodson Parker, Esq.
Counsel to the Democratic Party of Virginia
607 Fourteenth Street, NW
Washington, D.C. 20005-2011

Dear Mr. Elias and Ms. Parker:

We are responding to your advisory opinion request on behalf of the Democratic Party of Virginia (the "Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the preparation and distribution of publications by the Committee in connection with the 2008 general election. The Commission concludes that publications distributed by Committee employees will satisfy the "slate card exemption," provided the content of the publications is consistent with the nature of this exception. Publications distributed by volunteers will satisfy both the "slate card exemption" and the "volunteer activity exemption."

Background

The facts presented in this advisory opinion are based on your letter received on June 6, 2008, your telephone conversation with Commission attorneys on June 17, 2008, and your email received on July 1, 2008.

The Committee is a state party that is registered as a political committee with the Commission. In connection with the 2008 general election, the Committee plans to prepare and distribute publications featuring Democratic Party candidates running for state and federal office in Virginia. The publications will include information about the general election, including the date and time of the election and how and where to cast a

ballot. To make the publications “more visually compelling,” the Committee also plans to include abstract designs and colors in the backgrounds or on the borders of the publications. In addition, the Committee plans to include in the publications any, or all, of the following images: (1) an American flag; (2) scenery from the Commonwealth of Virginia (*e.g.*, the Shenandoah Mountains, Skyline Drive, or Virginia Beach); and (3) photographs of diverse groups of Virginians. Finally, the Committee plans to include in the publications candidate photographs – both traditional candidate “headshots” as well as photographs of the candidates in informal settings and poses. These informal photographs will show the candidates with the above-mentioned images; for example, the Committee may use a photograph of a candidate (1) in a crowd of diverse Virginians, (2) next to an American flag, or (3) with the Shenandoah Mountains serving as a backdrop.

The Committee will distribute the publications by mail and by hand. Hand delivery will be effected by Committee employees and volunteers, who will take the publications door-to-door, or hand them out at locations where many potential voters are readily accessible, like, for example, Metro, train, and bus stops; parks; parking lots; and shopping centers. Those distributing the publications will be encouraged to converse with recipients of the publications, but the Committee has not yet determined what, if any, substantive guidance it will provide to employees and volunteers on how to engage these persons or what to say to them. All costs associated with the publications will be paid for by the Committee with funds subject to the prohibitions, limitations, and reporting requirements of the Act.

Questions Presented

- (1) *Will the Committee’s publications, with the images described above, qualify as exempt from the definitions of “contribution” and “expenditure” under either the “slate card exemption” or “volunteer activity exemption?”*
- (2) *If yes, what restrictions, if any, exist on the manner in which the Committee may distribute the publications discussed in Question 1?*

Legal Analysis and Conclusions

Question 1. Will the Committee’s publications, with the images described above, qualify as exempt from the definitions of “contribution” and “expenditure” under either the “slate card exemption” or “volunteer activity exemption?”

Yes, the publications with the images described above will qualify as exempt from the definitions of “contribution” and “expenditure” under the “slate card exemption,” provided their content is consistent with the nature of the exemption. These publications would come within the “volunteer activity exemption” if they are distributed by volunteers. Both exemptions are addressed below.

Slate Card Exemption

As noted in the request, the Act exempts from the definitions of "contribution" and "expenditure" the payment by state and local political party committees of the costs incurred to prepare, display, mail, or otherwise distribute a printed slate card, sample ballot, or "other printed listing(s)" of three or more candidates for any public office who are to be elected in the relevant state. *See* 2 U.S.C. 431(8)(B)(v) and 431(9)(B)(iv); *see also* 11 CFR 100.80 and 100.140. Properly understood, the exemption permits state and local parties "to educate the general public as to the identity of the candidates of the party."¹ This provision is commonly known as the "slate card exemption."

The Committee's publications meet the threshold requirements of the slate card exemption. The Committee will include on its publications a reference to at least three clearly identified candidates running for election in Virginia, including at least one clearly identified federal candidate, and will pay for all costs associated with the publications with funds subject to the prohibitions, limitations, and reporting requirements of the Act.

The Commission has previously addressed the scope of this exemption and has repeatedly advised that materials subject to the slate card exemption may include the following information: (1) information identifying candidates by name or by means of a picture; (2) the office or position currently held by the candidates; (3) the elective office being sought by the candidates; (4) party affiliation; and (5) voting information, such as the time and place of an election and instructions on the method for voting a straight party ticket. Publications that go beyond these informational limitations and provide additional biographical information, descriptions of candidates' positions on the issues, or statements of party philosophy, do not qualify under the slate card exemption. *See* Advisory Opinions 1978-09 (Republican State Central Committee of Iowa) and 1978-89 (Withers).

In Advisory Opinion 1978-09 (Republican State Central Committee of Iowa), for example, the Commission determined that the slate card exemption did not apply to brochures and flyers created and distributed by state and county party committees because they contained excess biographical data on the candidates, material on the candidates' positions, and statements of party philosophy. Similarly, in Advisory Opinion 1978-89 (Withers), the Commission determined that neither a pamphlet nor a letter sent by two local party committees fell within the slate card exemption because together they contained excess biographical information about the candidates; outlined candidate positions on government spending, the death penalty, and jobs; criticized incumbent officials; and included statements of party philosophy.

As noted above, the Committee plans to include in its publications content which has been previously approved by the Commission for use on slate cards (*e.g.*, candidate headshots and informational text), as well as eye-catching borders and backgrounds,

¹ H. Conf. Rept. 1438, 93d Congress, 2d Sess., p. 65 (1974).

images, and pictures of candidates in informal settings and poses. On its face, the Committee's plan is consistent with the slate card exemption. The inclusion of designs, images, and photographs on the Committee's publications neither provides excess biographical information about candidates, nor expresses candidate positions or statements of party philosophy, which fall outside the exemption.

In addition, it has long been the Commission's practice to "interpret the Act and its regulations in a manner consistent with contemporary technological innovations . . . where the use of the technology would not compromise the intent of the Act or regulations." Advisory Opinion 1999-09 (Bradley for President) (approving Federal matching funds for contributions received over the Internet through the use of a credit card). In the thirty years since the Commission last issued an Advisory Opinion directly addressing the permissible scope of content under the slate card exemption, innovations in the field of graphic design have made it easier to enhance publications with color, designs, graphics, and photographs, making them more eye-catching and, possibly, more effective.

Though it has not yet finalized its slate cards, the Committee is considering a layout in which the additional images and candidate photographs would be used to supplement – rather than supplant – the candidate pictures and text found on traditional slate cards. The Committee has specifically mentioned the possibility of designing a door hanger that would feature a traditional slate card on one side and the above-described images and candidate photos on the reverse side. Because including extra pictures does not cause the publication to include any additional prohibited information,² the publication is consistent with the exemption. Accordingly, the Committee's plan to create a publication that features a traditional slate card on one side of a publication and a spread of candidate photographs on the reverse side does qualify for the slate card exemption.

Volunteer Activity Exemption

If Committee volunteers distribute the Committee's publications, the slate card exemption's limit on content would be unnecessary. The Act and Commission regulations include a "volunteer activity exemption," which exempts from the definitions of "contribution" and "expenditure" the costs to create, purchase, and distribute campaign materials, including pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs, that are used by state and local political party committees *in connection with volunteer activities* on behalf of that party's nominees.³ See 2 U.S.C. 431(8)(B)(ix) and 431(9)(B)(viii); *see also* 11 CFR 100.87 and 100.147 (including "newsletters" in the

² For example, a photograph of a candidate in a group of people who were wearing t-shirts featuring campaign slogans or holding placards adorned with campaign slogans could disqualify a publication for treatment under the slate card exemption.

³ Costs associated with the distribution of campaign materials on behalf of candidates running in the primary election are not covered under this exemption.

list of campaign materials covered by the exemption). The purpose of this exemption is to encourage volunteer participation in the activities of state and local political party committees. *See* 11 CFR 100.87(d) and 11 CFR 100.147(d).

Importantly, the content of campaign materials is not restricted under this exemption; indeed, the application of this exemption is almost entirely contingent upon *who* distributes the materials, not what those materials say. The types of campaign materials covered by this exemption include all manner of publications, including the publications proposed by the Committee. *See* 11 CFR 100.87 and 100.147 (providing non-exclusive list of the types of campaign materials covered under the exemption). Accordingly, the Committee's publications would satisfy this exemption, provided they are distributed in a manner consistent with applicable Commission regulations.⁴

Question 2. What restrictions, if any, exist on the manner in which the Committee may distribute the publications discussed in Question 1?

The slate card exemption specifically includes the cost of distribution. *See* 2 USC 431(8)(A)(v) and 431 (9)(A)(iv) (“the payment by a state or local committee of a political party of the costs of preparation, display, or mailing or *other distribution* incurred by such committee . . .”) (emphasis added). However, the exemption does not allow for distribution *via* “broadcasting stations . . . newspapers, magazines, or similar types of general public political advertising.” *Id.* Because this statutory provision includes a series of specific prohibitions, methods of distribution not included were excluded by choice, and are permitted.⁵ Thus, the Committee's workers are permitted to distribute slate cards door-to-door or in other locations where potential voters might be found, as suggested by the request. With respect to restrictions on, as the requestor asks, “the political speech⁶ in which the Committee's workers, both paid and volunteer, may engage in while distributing the party slate cards,” the slate card exemption itself does not restrict such speech.⁷

⁴ For this exemption to apply, the Committee must also comply with the additional restrictions set forth in 11 CFR 100.87 and 11 CFR 100.147, which address issues outside the scope of this advisory opinion request.

⁵ The Commission interprets this statute under the doctrine *expressio unius est exclusio alterius*: “[The action is not prohibited when it is not included in a statute and] when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

⁶ As the Supreme Court recognized, “[t]he distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs,” all of which are “indispensable instruments of effective political speech.” *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). More recently, the Commission has been instructed to “err on the side of protecting political speech rather than suppressing it.” *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2659 (2007).

⁷ *See Alaska Democratic Party*, Matter Under Review 5564, Statement of Reasons of Chairman Robert D. Lenhard (F.E.C. Dec. 31, 2007).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Donald F. McGahn II
Chairman