



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: COMMISSION SECRETARY *MWD*

DATE: August 20, 2009

**SUBJECT: COMMENT ON DRAFT AO 2009-19
Club for Growth**

Transmitted herewith is a timely submitted comment from David Keating, Executive Director, of Club for Growth.

Proposed Advisory Opinion 2009-19 is on the agenda for Thursday, August 27, 2009.

Attachment



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2009 AUG 20 A 11:52

August 20, 2009

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Draft Opinions in Advisory Opinion Request 2009-19

Dear Ms. Dove:

I am writing to submit our comments on the two alternative drafts of Advisory Opinion 2009-19.

Draft A is an excellent statement of the law and regulations and I hope the Commission will adopt it unanimously. Draft A is also completely consistent with how the Commission has handled similar requests in the past.

Draft B misstates several facts in my request and significant facts in other cited advisory opinions, conflicts with other previously approved opinions, and appears to attempt to change a regulation without going through the process for issuing new regulations. It should be rejected.

Draft B attempts to distinguish between our request and essentially identical requests in the Gramm and Findley AOs. It claims that the "the communications proposed by the Club and Club PAC are not necessary to correct a misunderstanding, because Senator Specter has already publicly announced that he is running for re-election as a Democrat and that he will refund contributions made during the 2010 election cycle upon request. Thus, the communications are materially different from those at issue in Advisory Opinions 1984-02 (Gramm) and 1981-05 (Findley)."

There is nothing in the law or regulations that says the standard for contacting donors should be based on whether the information has been made publicly available or not. The Commission should not adopt a draft that appears to impose such a new standard.

Additionally, as detailed below, the draft misstates or omits the circumstances surrounding the Gramm and Findley AOs. Most importantly, the Commission's own records demonstrate nearly all of the Americans for Phil Gramm in '84 (APG) donors

who Phil Gramm wished to contact had already been provided the information that Gramm's campaign sought to communicate.

In contrast, to my knowledge, Sen. Specter only announced his refund policy at a press conference, apparently in reaction to a passer-by who "shouted, 'I want my money back!'" This is according to the *Associated Press* news account attached to my advisory opinion request.

A thorough search of the Specter campaign website finds no evidence that it has issued a press release announcing his refund policy. Furthermore his website does not contain any information about his refund policy nor does it provide information about how to request such a refund.¹ There is no evidence that Specter's campaign has contacted a single donor about his policy.

In Mr. Gramm's situation, it appears he repeatedly sought press and public attention to his concerns about APG. He evidently sought to garner this public attention by filing a blizzard of complaints -- one against APG with the Commission, another with the U.S. Postal Service and then a lawsuit against APG in Federal court.² He also requested an Advisory Opinion with the Commission seeking to contact donors to APG.

The Commission itself found that the Congressional Majority Committee (CMC), the group that ran APG, had informed nearly all the donors Gramm sought to contact that APG was independent of Gramm's Senate campaign.

AO 1984-02 says that Gramm proposed to write a letter to inform APG donors "that 'Americans for Phil Gramm in '84' is not authorized by you as your campaign committee." Arguably, using the logic in Draft B, the Gramm communication was unnecessary and improper as nearly all, if not all, of the donors already had the information Gramm sought to distribute.

The Conciliation Agreement in MUR 1603 says there were "approximately 15,000 communications that solicited contributions to" APG that failed to "include a statement that it was paid for by the Respondent and that it was not authorized by any candidate or candidate's committee." The FEC website says "In subsequent solicitation mailings, however, CMC did include such a disclaimer."³ In *Galliano v.*

¹ A Google advanced search performed August 17, 2009 searching for the word "refund" in the Specter campaign website "did not match any documents."
[http://www.google.com/search?hl=en&as_q=refund&as_epg=&as_oq=&as_eq=&num=10&lr=&as_filetype=&filetype=&as_siteresearch=http%3A%2F%2Fwww.specter2010.com%2F&as_qdr=all&as_rights=&as_occt=any&cr=&as_nlo=&as_nhl=&safe=images\)](http://www.google.com/search?hl=en&as_q=refund&as_epg=&as_oq=&as_eq=&num=10&lr=&as_filetype=&filetype=&as_siteresearch=http%3A%2F%2Fwww.specter2010.com%2F&as_qdr=all&as_rights=&as_occt=any&cr=&as_nlo=&as_nhl=&safe=images)

² http://www.fec.gov/law/litigation_CCA_G.shtml

³ http://www.fec.gov/law/litigation_CCA_G.shtml

United States Postal Service, 836 F.2d 1362 (D.C. Cir. 1988), the U.S. Court of Appeals for the District of Columbia Circuit opinion stated that "Between November 1983 and April 1984, CMC mailed, in three batches, over 200,000 solicitations for contributions to APG."

In other words, over 92% of all those who were solicited were already informed by APG that it was not a committee authorized by candidate Phil Gramm, which was the information Gramm sought to communicate, and that the Commission agreed in AO 1984-02 that he could provide this information.

It defies belief that over 92% of the Specter donors have been informed of his refund policy.

Nearly all the donors were informed about APG's independence from the Gramm campaign and there was likely far more public information available due to all the publicity surrounding Gramm's multiple complaints. Mr. Gramm sought to personally contact these donors so he could state that information more clearly in his own words and presumably suppress further donations to APG.

We agree with the Gramm AO, because it allowed Mr. Gramm's campaign to state his opinions about APG.

In the Findley AO, Mr. Findley sought to write to donors of his opponent to "set the record straight on certain defamatory charges made against me." Mr. Findley's campaign noted that his opponent raised enormous sums of money outside the district. He believes much of it was spurred by "defamatory charges" in fundraising appeals. It appears that Mr. Findley hoped to provide the facts so that the potential donors to his opponent might not be so quick to pull out their checkbooks in the event of a rematch.

I strongly object to the following claim in Draft B, which is a misstatement of the facts in our request:

[T]he telephone communications proposed by the requestors here would involve asking the contributor if he or she wished to receive additional information from the Club or Club PAC, thereby possibly opening the door to additional communications from the Club or Club PAC.

The request I made clearly stated that "The communication would only be made once to each donor . . . Follow up mailings and phone calls would not be made."

Draft B then goes on to misstate that in Gramm and Findley, "it was unnecessary for the requestors to make repeated communications to correct the misleading information, whereas here, Club or Club PAC may have an interest in making repeated communications with the same message."

We have no interest in making repeated communications and have stated we would not do so.

Draft A correctly finds that the proposed communication conforms with both the statute and regulation; that bar the use of information from FEC reports for the "purpose of soliciting contributions or for any commercial purpose" because the communication would not contain a solicitation of any kind for any entity. Furthermore the communication we propose to make is a one-time, one-way communication that provides information regarding a campaign and is essentially identical to those permitted in previous Advisory Opinions in AO 1984-02 and 1981-05.

I strongly urge the Commission to adopt Draft A.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Keating', with a long horizontal flourish extending to the right.

**David Keating
Executive Director**