



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 9, 2009

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-23

Ms. B. Holly Schadler, Esq.  
Mr. Michael B. Trister, Esq.  
Lichtman, Trister & Ross, PLLC  
1666 Connecticut Avenue, NW, Fifth Floor  
Washington, D.C. 20009

Dear Ms. Schadler and Mr. Trister:

We are responding to your advisory opinion request on behalf of the Virginia Chapter of the Sierra Club ("VA Chapter") and the Sierra Club Voter Education Fund ("SC-VEF"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to certain activities in which the State political action committee of VA Chapter ("State PAC") wishes to engage, and for which SC-VEF wishes to provide funds, in connection with upcoming Virginia elections.

The Commission concludes that, given certain representations that VA Chapter and SC-VEF have made, both with respect to their status and with respect to the activities in which they wish to engage, neither the State PAC nor SC-VEF is subject to the provisions of 11 CFR 106.6.

***Background***

The facts presented in this advisory opinion are based on your letters dated July 8 and July 31, 2009, an e-mail received on August 14, 2009, telephone conversations with Commission attorneys, and information on file with the Internal Revenue Service.

***The State PAC and SC-VEF***

VA Chapter is a State chapter of the Sierra Club, which is a non-profit corporation established under California law and pursuant to section 501(c)(4) of the

Internal Revenue Code. 26 U.S.C. 501(c)(4). State chapters of the Sierra Club, such as VA Chapter, are not separately incorporated and operate as part of the Sierra Club. State chapters have the authority to form State PACs for the exclusive purpose of engaging in State and local political campaign activities. VA Chapter formed the State PAC pursuant to this authority in 1985. The State PAC is registered as a political action committee with Virginia's State Board of Elections. It maintains a bank account separate from that of VA Chapter. VA Chapter raises funds for the State PAC's account in accordance with Virginia law from its members, corporations, labor organizations and other individuals. The State PAC has made contributions to State and local candidates from its account and has also used its account to finance activities supporting or opposing State and local candidates. It has not used its account to make any contributions or expenditures in connection with Federal elections. *See* 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i). Since July 31, 2000, the State PAC has been organized under section 527 of the Internal Revenue Code. 26 U.S.C. 527. According to its registration statement, the State PAC's purpose is "[p]olitical activities on State and local levels, including endorsing and making financial contributions to individual candidates."<sup>1</sup>

SC-VEF is organized under section 527 of the Internal Revenue Code. The Sierra Club established SC-VEF as a non-Federal political organization, the purpose of which, according to its registration statement, is "[t]o educate people about public official's environmental records, voting records and position of candidates for election to Congress, the Presidency, and State and local offices. Based on this information, the public can make judgments about the environmental positions and qualifications of their elected officials and candidates during an election season."<sup>2</sup> Both VA Chapter and SC-VEF represent that neither the State PAC nor SC-VEF is a "political committee" as that term is defined in 2 U.S.C. 431(4)(A) and (B) and in 11 CFR 100.5.

### *The Proposed Activities*

The State PAC intends to conduct three categories of activities in connection with the 2009 Virginia and 2010 Federal general elections. SC-VEF intends to assist by providing partial funding for these activities. First, the State PAC intends to conduct voter drives, including voter identification efforts asking potential voters for their views on certain environmental issues and how those views will affect their voting behavior in the upcoming elections. The voter drives will also involve voter registration and GOTV activity urging the public to register to vote and to elect candidates who support government actions to protect the environment. None of these voter drive activities will involve references to any clearly identified Federal, State, or local candidates, or political parties.

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<sup>1</sup> *See* <http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formID=7284&formType=E71> (last visited Sept. 8, 2009) for a copy of the most recently amended version of Internal Revenue Service (IRS) Form 8871 filed by the State PAC.

<sup>2</sup> *See* <http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formId=35606&formType=E71> (last visited Aug. 27, 2009) for a copy of the most recently amended version of IRS Form 8871 filed by SC-VEF.

Second, the State PAC intends to disseminate public communications expressly advocating the election or defeat of clearly identified State and local (but not Federal) candidates in connection with the 2009 Virginia general election. Some of these public communications will feature Federal officeholders who are also candidates for re-election in the 2010 Federal general election endorsing State and local candidates. These public communications will not mention that the officeholders are Federal candidates, and will not reference the 2010 Federal election.

Finally, the State PAC will disseminate “issue advertisements” in connection with both the 2009 Virginia and the 2010 Federal general elections. These public communications will refer to positions on issues of public policy held by clearly identified Federal officeholders from Virginia. Some or all of these Federal officeholders will also be candidates for re-election in the 2010 Federal general election. The public communications will not expressly advocate the election or defeat of any Federal candidates, nor will they contain the functional equivalent of such express advocacy. The public communications will not be coordinated with any Federal candidates.

### ***Question Presented***

*Are the political activities of the State PAC and SC-VEF subject to 11 CFR 106.6?*

### ***Legal Analysis and Conclusions***

No, 11 CFR 106.6 does not apply to the State PAC and SC-VEF because these entities are not “political committees” under the Act and Commission regulations.<sup>3</sup>

The Act and Commission regulations establish three types of “political committee”: (1) “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year”; (2) “any separate segregated fund established under the provisions of [2 U.S.C. 441b(b)]”; or (3) “any local committee of a political party” that receives contributions or makes expenditures or certain other kinds of payments exceeding certain threshold amounts during a calendar year. 2 U.S.C. 431(4); 11 CFR 100.5(a)-(c). The Supreme Court has held that only organizations under the control of candidates or whose major purpose is Federal campaign activity (i.e., the nomination or election of Federal candidates) can be considered political committees under the Act. *See, e.g. Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Political Committee Status: Supplemental Explanation and Justification*, 72 FR 5595, 5597, and 5601 (2007).

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<sup>3</sup> The Commission notes that the Court of Appeals for the District of Columbia Circuit recently issued its opinion in *EMILY'S List v. FEC*, Civil Action No. 08-5422 (D.C. Cir. Sept. 18, 2009), regarding, *inter alia*, 11 CFR 106.6(c) and (f). That opinion does not change the Commission’s answer to the question presented by the requestor.

Commission regulations have required political committees of various types that engage in certain kinds of activities in connection with both Federal and non-Federal elections to allocate their expenses between Federal funds (i.e., those funds raised in accordance with the amount limitations and source prohibitions on contributions imposed by the Act, *see* 11 CFR 300.2(g)) and non-Federal funds (i.e., those funds not subject to the limitations or prohibitions of the Act, *see* 11 CFR 300.2(k)). *See generally* 11 CFR Part 106.

Specifically, section 106.6 requires separate segregated funds and nonconnected committees that make disbursements in connection with both Federal and non-Federal elections to allocate expenses in certain ways depending upon the nature of the activity involved. 11 CFR 106.6. Under section 106.6(a), separate segregated funds and nonconnected committees may make such disbursements in one of two ways: they may make them entirely from funds raised subject to the source prohibitions and amount limitations of the Act; or, if they have established separate Federal and non-Federal accounts pursuant to 11 CFR 102.5, they may allocate them between these accounts. By its express terms, 11 CFR 106.6 applies to “separate segregated funds” and “nonconnected committees.” “Separate segregated fund” is a term of art used in the Act to describe a type of political committee that is “established under 2 U.S.C. 441b(b)(2)(C).” 2 U.S.C. 431(4)(B); 11 CFR 100.5(b). “Nonconnected committee” is defined, for the purposes of 11 CFR 106.6, to include “any committee which conducts activities in connection with an election, but which is not a party committee, an authorized committee of any candidate for [F]ederal election, or a separate segregated fund.” 11 CFR 106.6(a).

An examination of the history of 11 CFR 106.6 indicates that the Commission has consistently understood the term “nonconnected committees” to refer only to entities that are “political committees” under the Act and Commission regulations.<sup>4</sup>

Accordingly, given the representation that the State PAC and SC-VEF are not political committees under the Act and the representations made above pertaining to their proposed activities, and assuming that neither entity engages in any activity that would cause it to become a political committee under the Act, it follows that 11 CFR 106.6 does not apply to their proposed activities.

The Commission expresses no opinion as to the possible application of any State or local law to the described activities, or as to the possible tax ramifications of the described activities, because those issues are outside its jurisdiction.

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<sup>4</sup> For example, the Commission noted in a recent advisory opinion that “[s]ince 1977, Commission regulations have required *political committees* active in both Federal and non-Federal elections to allocate their administrative expenses between the committee’s Federal and non-Federal accounts ‘in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis.’” Advisory Opinion 2003-01 (NORPAC) (emphasis added), *citing Explanation and Justification to the Final Rules on Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting*, 55 FR 26058, 26059 (June 26, 1990).

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 requester 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 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)  
Steven T. Walther  
Chairman