



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

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

FROM: ACTING COMMISSION SECRETARY *S.H.*

DATE: February 23, 2010

SUBJECT: COMMENT ON DRAFT AO 2010-01
Nevada State Democratic Party

Transmitted herewith is a timely submitted comment from Marc E. Elias, Esq., and Graham M. Wilson, Esq., regarding the above-captioned matter.

Proposed Advisory Opinion 2010-01 is on the agenda for Thursday, February 25, 2010.

Attachment

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February 23, 2010

VIA FACSIMILE

Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments on Draft of Advisory Opinion 2010-01

Dear Ms. Duncan:

We are writing on behalf of the Nevada State Democratic Party ("NSDP") to comment on the Draft of Advisory Opinion 2010-01, issued by the Office of General Counsel ("OGC") on February 19, 2010. OGC correctly concluded that NSDP could pay for exempt volunteer materials on behalf of its "presumptive nominees," but created an unjustifiably narrow definition of that term.

OGC's draft opinion depends on an exceedingly restrictive reading of Matter Under Review ("MUR") 4471. At issue in that proceeding was whether the Montana State Democratic Committee could make expenditures for volunteer materials on behalf of Senator Baucus under 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii) before the Montana primary. In its First General Counsel's Report, OGC advocated for a very narrow reading of the law, just as it does here: it argued that the volunteer materials exception only applies when a party's candidate has been officially selected at a primary election. See MUR 4471, First General Counsel's Report, at 12 (October 19, 1998). In an unanimous decision, the Commission voted 6-0 to reject this interpretation. See MUR 4471, Statement of Reasons, at 7 (November 19, 1998). The Commission "decline[d] to elevate form over substance," and ruled that a state party could make expenditures for volunteer materials on behalf of its "presumptive nominees." *Id.* at 5.

Yet OGC continues to focus on the "form" rather than the "substance" of what it means to be a "presumptive nominee." The draft opinion concludes that a party's chosen candidate may only be a "presumptive nominee" after it is legally impossible for another candidate to appear on the

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ballot. While it is true that it was too late for other candidates to challenge Senator Baucus in MUR 4471, that was not a necessary element of the Commission's decision. The Commission "reject[ed] the conclusion of its Office of General Counsel (OGC) that the exemption was not available ...[b]ecause Mr. Baucus's *nomination was a foregone conclusion.*" *Id.* (emphasis added). A candidate's nomination is a foregone conclusion when he or she does not face any real opposition. This may be the case even if someone else who is ostensibly a candidate has filed to appear on the ballot or may otherwise receive votes at the primary. Simply because a local car salesman could run for office as a publicity stunt, or if Mickey Mouse could get a few write-in votes, it should not mean that a state party can't support its presumptive nominees under 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii).

The draft advisory opinion also blatantly avoids the Commission's decisions concerning analogous § 441a(d) expenditures. While the rule has since been codified, the Commission determined in an advisory opinion that a party could make § 441a(d) expenditures before a primary election, even though the statute refers to expenditures "in connection with a general election." *See* FEC Adv. Op. 1984-15. In its First General Counsel's Report in MUR 4471, OGC tried to make the argument that the § 441a(d) decision was inapplicable to the volunteer materials exemption. *See* MUR 4471, First General Counsel's Report, at 12. Yet, the Commission relied on the § 441a(d) analogy in its unanimous Statement of Reasons. *See* MUR 4471, Statement of Reasons at 5, n. 6. In determining that Senator Baucus was a "presumptive nominee," the Commission noted that it had "reached even broader holdings regarding the availability of general election spending limits prior to the actual nomination of a candidate." *Id.* Nevertheless, OGC persists in arguing that the § 441a(d) decision is not relevant here, using nearly identical arguments as it did before. *Compare* MUR 4471, First General Counsel's Report, at 12, *with* FEC Adv. Op. 2010-01 (Draft) at 5, n. 6. The only fair conclusion based on past Commission decisions is that there is no difference between a candidate in a general election under § 441a(d) and a nominee under §§ 431(8)(B)(ix) and (9)(B)(viii). Just as under § 441a(d), NSDP's presumptive nominees "appear[] assured of [the] party's ... nomination" and "the general election campaign ... may begin prior to the formal nomination." *See* FEC Adv. Op. 1984-15.

MUR 4471 should inform the Commission's decision in this case. However, OGC's draft advisory opinion is based more on its First General Counsel's Report than the spirit of the Commission's unanimous decision. In a situation like this one, where there is no regulatory definition of the word "nominee," the Commission should not fall back to the most narrow and restrictive interpretation of the statute or its past decisions. The Commission did not take that approach before, and it should not do so now.

For the reasons stated above, we urge the Commission to reject the draft opinion proposed by OGC. Based on its past decisions, the Commission should find that NSDP is allowed to make exempt expenditures under 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii) on behalf of any its

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presumptive nominees who appear assured of winning the nomination or whose nominations are a foregone conclusion.

Very truly yours,



Marc E. Elias
Graham M. Wilson
Counsel to the Nevada State Democratic Party

1 **ADVISORY OPINION 2010-01**

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3 **Marc E. Elias, Esq.**
4 **Graham M. Wilson, Esq.**
5 **Perkins Coie**
6 **607 Fourteenth Street, N.W.**
7 **Washington, DC 20005**

DRAFT

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9 **Dear Messrs. Elias and Wilson:**

10 **We are responding to your advisory opinion request on behalf of the Nevada State**
11 **Democratic Party (the "State Party") concerning the application of the Federal Election**
12 **Campaign Act of 1971, as amended (the "Act"), and Commission regulations to**
13 **disbursements by the State Party for campaign materials to be used in connection with**
14 **volunteer activities on behalf of candidates for Federal office before the 2010 Nevada**
15 **primary election. The Commission concludes that such payments by the State Party**
16 **would be exempt from the definitions of "contribution" and "expenditure" if the Federal**
17 **candidates on whose behalf the volunteers distribute the campaign materials are the State**
18 **Party's presumptive nominees, as described further below.**

19 ***Background***

20 **The facts presented in this advisory opinion are based on your letter received on**
21 **January 4, 2010, and on publicly available information regarding Nevada election law**
22 **and the State Party's registration with the Commission.**

23 **The State Party is registered with the Commission as a political committee and as**
24 **a State committee of the Democratic party. Beginning "immediately," the State Party**
25 **plans to purchase campaign materials, such as pins, bumper stickers, handbills,**
26 **brochures, posters, party newsletters, and yard signs, to be used in connection with**
27 **volunteer activities on behalf of Federal candidates seeking to become the State Party's**

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1 nominee for the general election. Specifically, the State Party plans to have volunteers
2 distribute campaign materials on behalf of Federal candidates whom the State Party
3 believes will either run unopposed in the June 8, 2010 State primary election, or whom
4 the State Party believes are "assured of winning the nomination."

5 The State Party will coordinate with its preferred candidates regarding the
6 proposed campaign materials, which may expressly advocate for the election of the
7 preferred candidates. The State Party plans to pay for all of the proposed campaign
8 materials with funds subject to the limitations and prohibitions of the Act.

9 In Nevada, candidates for partisan office of a major political party must be
10 nominated at the primary election.¹ The primary election must be held on the second
11 Tuesday of June in each even-numbered year; in 2010, the primary will be held on June
12 8.² Persons wishing to run in the primary election must file a declaration of candidacy or
13 acceptance of candidacy.³ For Nevada's 2010 primary election, this filing period begins
14 on March 1, 2010 and ends on March 12, 2010.⁴

15 ***Question Presented***

16 *Will the cost of the State Party's proposed campaign materials be exempt from*
17 *the Act's definitions of "contribution" and "expenditure," if the materials are used in*
18 *connection with volunteer activities on behalf of the State Party's preferred candidates*
19 *before the State primary election?*
20

¹ NEV. REV. STAT. ANN. §§ 293.167 and 293.175 (2010).

² See NEV. REV. STAT. ANN. § 293.175 (2010); Ross Miller, 2010 Nevada Election Calendar, available at <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1242> ("2010 Nevada Election Calendar").

³ NEV. REV. STAT. ANN. § 293.177 (2010). Write-in candidates are not permitted. Request at 1; see NEV. REV. STAT. ANN. § 293.270 (2010).

⁴ *Id.*; 2010 Nevada Election Calendar.

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1 ***Legal Analysis and Conclusions***

2 Yes, the costs of the State Party's proposed campaign materials will be exempt
3 from the definitions of "contribution" and "expenditure" if the Federal candidates on
4 whose behalf the volunteers distribute the materials are the State Party's presumptive
5 nominees, as described below.

6 The Act limits to \$5,000 per election the amount that a multicandidate committee,
7 including a State party committee, may contribute to a Federal candidate. 2 U.S.C.
8 441a(a)(2)(A). In addition to this \$5,000 per election limit, State party committees may
9 make coordinated expenditures that are in connection with the general election campaign
10 of candidates for Federal office. 2 U.S.C. 441a(d).

11 Under the Act and Commission regulations, a "contribution" includes "any gift,
12 subscription, loan, advance . . . or anything of value made by a person for the purpose of
13 influencing any election for Federal office." *Id.* at 431(8)(A)(i); 11 CFR 100.52. An
14 "expenditure" is similarly defined as "any purchase, payment, distribution, loan, advance,
15 deposit, or gift of money or anything of value, made by any person for the purpose of
16 influencing an election for Federal office." 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111

17 Both the definitions of "contribution" and "expenditure" exempt certain payments
18 by a State or local committee of a political party in connection with volunteer activities.
19 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); *see also* 11 CFR 100.87 and 100.147. This
20 "volunteer materials exemption" is limited in several respects. For example, the
21 campaign materials must be distributed by volunteers and not by commercial or for-profit
22 operations. *See* 11 CFR 100.87(d) and 100.147(d). For purposes of the instant inquiry,
23 the most important limitation is that the campaign materials purchased by the State or

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1 local party committee must be used in connection with volunteer activities "on behalf of
2 nominees of such party." 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87 and
3 100.147.

4 Although neither the Act nor Commission regulations define the term "nominee,"
5 the Commission has previously determined that the volunteer materials exemption may,
6 in certain limited circumstances, apply even before a State party's nominee is formally
7 elected through the State primary process. In Matter Under Review ("MUR") 4471, the
8 Commission found that the volunteer materials exemption applied to the cost of materials
9 purchased by the Montana State Democratic Committee and mailed by volunteers on
10 behalf of Senator Max Baucus approximately five days before Montana's primary
11 election. Statement of Reasons, MUR 4471 (Montana State Democratic Committee)
12 (Nov. 19, 1998) at 5. When the mailing occurred, Senator Baucus was the only
13 Democratic candidate for the U.S. Senate, and there could not be any other Democratic
14 candidate for that office under State law. *Id.* Accordingly, the Commission concluded
15 that, "as both a matter of fact and as a matter of state law," Senator Baucus was his
16 party's "presumptive nominee." *Id.* Given that Senator Baucus was "the only candidate
17 under Montana law who could receive the Democratic nomination," the volunteer
18 materials exemption applied. *Id.*

19 Accordingly, the relevant question for purposes of the instant inquiry is, at what
20 point will the State Party be able to identify its presumptive nominee "as both a matter of
21 fact and as a matter of State law"? See Statement of Reasons, MUR 4471 at 5. As noted
22 above, under Nevada law, a candidate of a major political party must be nominated in the
23 primary election, and persons wishing to run in the June 8, 2010 primary election must

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1 file a declaration of candidacy or acceptance of candidacy between March 1 and March
2 12, 2010. The close of the filing period closes the ballot and establishes the field of
3 candidates seeking major party nominations. Thus, March 12, 2010 is the earliest date on
4 which the State Party will be able to identify its presumptive nominee. Any candidate of
5 the State Party who, as of that date, is on the State ballot and has no primary opponent
6 will be the State Party's presumptive nominee; any candidate who does have a primary
7 opponent will not be the State Party's presumptive nominee.

8 Therefore, payments made by the State Party after March 12, 2010 for materials
9 used in connection with volunteer activities on behalf of candidates not facing primary
10 challengers will qualify for the volunteer materials exemption and will not count towards
11 either the State Party's contribution or expenditure limits.⁵ By contrast, payments made
12 by the State Party before March 12, 2010 for materials used in connection with volunteer
13 activities on behalf of candidates will not qualify for the volunteer materials exemption,
14 nor will payments made after March 12, 2010 for materials used in connection with
15 volunteer activities on behalf of candidates who have an opponent in the primary
16 election. If the State Party pays for campaign materials in either of these two latter
17 situations, then such payments will either count against the State Party's \$5,000 per
18 candidate primary contribution limit under 2 U.S.C. 441a(a), or its coordinated party
19 expenditure limit, if the expenditures are in connection with the general election, under
20 2 U.S.C. 441a(d).⁶

⁵ Requestor represents that its planned activities will comply with all other aspects of the volunteer activity exemption listed in 2 U.S.C. 431(B)(B)(ix) and (9)(B)(viii) and 11 CFR 100.87 and 100.147

⁶ In Advisory Opinion 1984-15 (RNC), Commission considered whether, under 2 U.S.C. 441a(d), a party committee may make coordinated party expenditures prior to the formal selection of that party's presidential nominee. In that Advisory Opinion, the Commission explicitly noted the differences between

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1 The Commission's conclusion is limited to the volunteer materials exemption in
2 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii), and implementing regulations. This conclusion
3 does not apply to any other use or variation of the term "nominees" appearing in the Act
4 or Commission regulations, such as 2 U.S.C. 432(c)(3)(A) (referring to the presidential
5 candidate "nominated" by a political party).

6 This response constitutes an advisory opinion concerning the application of the
7 Act and Commission regulations to the specific transaction or activity set forth in your
8 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
9 of the facts or assumptions presented, and such facts or assumptions are material to a
10 conclusion presented in this advisory opinion, then the requestor may not rely on that
11 conclusion as support for its proposed activity. Any person involved in any specific
12 transaction or activity which is indistinguishable in all its material aspects from the
13 transaction or activity with respect to which this advisory opinion is rendered may rely on
14 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the
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the language in 441a(d) and the section at issue here, 431. The Commission found it "[s]ignificant[]" that 2 U.S.C. 441a(d) "does not by its terms refer to candidates for Federal office as the party's nominees; it refers to such candidates only as those who are 'affiliated with' the political party." Advisory Opinion 1984-15 (RNC) n.4. The Commission noted, "[b]y contrast, in other contexts where Congress was concerned with the status of Federal office candidates as regards political party activity, it has explicitly referred to 'nominees of' the political party" and cited as an example the volunteer materials exemption provisions in 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii). *Id.* (emphasis added).

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- 1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
- 2 The cited advisory opinion is available on the Commission's Web site at
- 3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman