

STATEMENT FOR THE RECORD

VICE CHAIRMAN DANNY LEE McDONALD

COMMISSIONER SCOTT E. THOMAS

ADVISORY OPINION 2000-16

In Advisory Opinion 2000-16, the Federal Election Commission considered whether a 501(c)(3) corporation could place on the Internet candidate ads of all presidential candidates who appear on enough state ballots to theoretically win an Electoral College majority. These ads would be shown to research survey respondents on the Internet as part of a project analyzing political participation of young voters. Results of the survey, it is thought, will help measure the effectiveness of the Internet as a means to increase young voter participation. The sponsor of the project, Third Millennium, seeks to "promote the civic involvement of young people" and "does not endorse or oppose any candidate for public office or otherwise engage in partisan activity."

The Commission unanimously agreed Third Millennium's proposed activity is permissible under the Federal Election Campaign Act ("the Act") and Commission regulations. The Commission could not reach agreement, however, on the rationale for its conclusion. In order to issue an opinion, the Commission decided to excise the analysis portion of the opinion and simply state the result upon which all agreed. Moreover, Commissioners were invited to explain their reasons for voting to approve Advisory Opinion 2000-16 in separate concurring opinions.

With respect to the underlying rationale, several Commissioners believe Third Millennium's proposed activity is permissible because it is not for the purpose of influencing a Federal election and, thus, the corporation's disbursements would not

constitute a prohibited contribution or expenditure. *See* 2 U.S.C. §441b. We do not agree with this approach. It seems fairly apparent the activity at issue here is election-related and meant to influence elections. After all, the ultimate purpose of the project is to encourage more people to vote for candidates in federal elections. Accordingly, we cannot agree with the conclusion of several of our colleagues that the proposed activity is not for the purpose of influencing federal elections.

We believe the better approach is to conclude the proposed activity fits within the Act's exception for nonpartisan activity designed to encourage individuals to vote or register to vote. 2 U.S.C. §431(9)(B)(ii). Our reasoning is based, in large part, on the analysis provided by the Office of General Counsel in Agenda Document No. 00-71-C (August 9, 2000) at 5-9.

The Act prohibits a corporation from making any "contribution or expenditure" in connection with a Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). The core issue presented in this Advisory Opinion is whether the proposed activity by Third Millennium would constitute a contribution or expenditure as defined by the Act and Commission regulations. The term "contribution" is defined as any gift subscription, loan, advance, or deposit of money or anything of value made by an person for the purpose of influencing any election for Federal office, and the term "expenditure" is defined as any purchase, payment, distribution, loan advance, deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. §431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1); see also 2 U.S.C. §441b(b)(2) and 11 CFR 114.1(a)(1) which provide a similar definition for "contribution" and "expenditure" with respect to corporate activity. According to Commission regulations, the phrase "anything of value" includes goods or services provided without charge, or, at less than, the usual and normal charge. 11 CFR 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A).

Third Millennium's proposal entails the display of campaign advertisements on a continuous basis to a selected audience of Internet subscribers. Third Millennium will pay the ISP for space to display these advertisements. The study assumes these advertisements very well may influence the voting behavior of the viewer, including

influence as to whom viewers will vote for or support. Despite the content of the ads themselves and the contemplated effect on some viewers, the nature of Third Millennium and of the project itself calls for an analysis that does not rely simply on those two circumstances to determine whether Third Millennium's disbursements for the project will be contributions or expenditures under the Act.

The Commission recently has examined a number of activities by entities producing web sites where the viewer had access to messages supporting candidates for Federal offices. See Advisory Opinions 1999-25, 1999-24, and 1999-7 at Fed. Elec. Camp Fin Guide (CCH) ¶¶ 6303, 6306 and 6287, respectively. The web sites were established for the purpose of promoting voter participation on a nonpartisan basis. These activities entailed partisan statements from the candidates about themselves and campaign issues and links from the web site to the candidates' web sites. In each situation, the Commission concluded that, even if specific content on these web sites was for the purpose of influencing, or in connection with, a Federal election, the activities fell within an exception in the Act to the definition of "expenditure," and, therefore, were permissible under the Act. This provision exempts "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. §431(9)(B)(ii).

In applying the nonpartisan activity exception in such instances, the Commission focused on both the nature of the producing entity and the nature of the activity. The entities included: non-profit corporations that were both tax exempt under 26 U.S.C. §501(c)(3) and created for providing information about government and the electoral process on a nonpartisan basis; a for-profit limited liability company formed to expand democracy by serving as a channel between voters and candidates on a nonpartisan basis which neither was affiliated with, nor accepted advertising or other sponsoring support from, any candidates, party, PAC, or advocacy group; and, the Minnesota Secretary of State. Advisory Opinions 1999-25, 1999-24, and 1999-7, *supra*. Although the web sites included such features as issue statements by candidates, candidate responses to questions from the public and opposing candidates, biographies and endorsements provided by the candidates, and links to candidate web sites, they displayed this information on a

nonpartisan basis.¹ For example, all ballot qualified candidates in a non-presidential race were invited to participate and equal space and time were made available to each participating candidate.

We acknowledge the viewers of the ads posted in connection with Third Millennium's project will not see the ads in a format indicating they are viewing a web site designed to present campaign material on a nonpartisan basis; instead, they will see ads in a manner similar to any other ads (whether political or not) viewed prior to accessing their e-mail services. Third Millennium, however, is prohibited by the Federal tax code from participation or intervention in political campaigns. Moreover, the purposes and activities of the organization are not aimed at influencing the election to political office of any specific candidates or the candidates of any one political party. Its general purpose, instead, is to enhance the civic involvement of young adults, including increased voter participation, and to focus the nation's attention on issues affecting young adults.

In addition, the purpose of the Neglection 2000 project itself is to research the extent of, and reasons for, young adult apathy toward the political process and to test a method for reducing this apathy and increasing young voter participation, regardless of party or ideology. This is being done on an objective, social science basis. Factual circumstances surrounding the conduct of the project support this assessment of the purpose and the methods used to achieve this purpose. The examination of young adult voting participation in the primaries was a research study not aimed at, or conducted for, the promotion of any candidacy either in the survey questions asked or, as reflected in the report already issued ("Don't Ask, Don't Vote"), in the resulting analysis. With respect

¹ This is a brief summary of the features referred to in the three opinions. The web sites varied in the quantity and details of the features they provided. Interestingly, these web sites also contained express advocacy. Even though the Commission's regulations on non-partisan activity indicate public communications must avoid express advocacy, see 11 CFR 114.4(c)(2), the Commission in those three prior advisory opinions involving the Internet approved the proposed activity. In those opinions, the Commission looked to the statutory provision which does not contain a ban on express advocacy and essentially found that express advocacy could be allowed where there was a balanced, politically neutral presentation of the material. See 2 U.S.C. §431(9)(B)(ii). Similarly, the presence of express advocacy material in Advisory Opinion 2000-16 does not eliminate the use of the non-partisan exemption. This approach recognizes the proposed activity is designed to influence elections as well as the politically neutral manner in which it is being conducted. In our view, the non-partisan activity allowance is preferable to a conclusion that get-out-the-vote activity somehow is not election-related and intended to influence elections.

to the proposed activity, the effect of the ads on the viewers will not be known until after the second survey of the viewers is taken, so no information on the effect of the display of the ads will be available to the public (including the candidates) until after the election. Moreover, the facts indicate the individuals surveyed would be a random universe of subscribers, they would be divided randomly, and each individual within a group would see the same ads as the others of that group. Thus, it appears Third Millennium will not target the distribution of the ads so as to increase or diminish support for any particular candidate. Communications with the campaigns, if any, will be kept to the minimum necessary to obtain advertisements for display,² Third Millennium will have the final control over the choice of the ads, and Third Millennium, not the campaigns, will have discretion as to how the ads will be distributed. This is consistent with the concept of the study as research for nonpartisan purposes.

Finally, it is significant that the proposed project will include a range of candidates beyond the major party candidates and will treat all the candidates equally in obtaining the ads and in their exposure to viewers. In the cited opinions concerning nonpartisan web sites, viewers would have the opportunity to see materials from candidates for a particular Federal office in addition to the two major party candidates (assuming those candidates chose to participate). In the case of non-presidential candidates, all ballot-qualified candidates were invited, and in the case of presidential candidates, two of the advisory opinions indicated the web site would include all general election candidates who were on the ballot in enough states to win a majority in the Electoral College. Advisory Opinions 1999-25 and 1999-24, *supra*. As noted with approval in those two opinions, this standard for presidential candidates was consistent with the range prescribed in the voter guide regulations where there is some minimal

² The degree of cooperation with candidates noted in the request might become legally significant in other circumstances. As a general rule, an expenditure made at the request or suggestion of a candidate or in coordination or cooperation with a candidate must be treated as an in-kind contribution to such candidate. 2 U.S.C. §441a(a)(7)(B)(i); 11 CFR 109.1(a) and (c). Where, as here, the activity so clearly fits within the intended scope of the non-partisan allowance at 2 U.S.C. §431(9)(B)(ii)), the cooperation contemplated in the request does not pose a problem. See, by analogy, the Commission's regulations allowing minimal cooperation with a candidate where other safeguards showing political neutrality are evident: 11 CFR 114.4(b) (candidate appearance before all employees where similar opportunity offered to other candidates and no discussion of candidate's plans, projects, or needs relating to the campaign); 11 CFR

contact between the guide issuer and the candidate. 11 CFR 114.4(c)(5)(ii)(B)(2).

Moreover, as noted above, candidates were provided with equal space availability and time access. We assume the range of candidates for whom ads will be shown will include all the general election presidential candidates who appear on enough state ballots to win an Electoral College majority.

Based on the foregoing discussion, we concluded Third Millennium's proposed activity would fall within the exemption to the definition of expenditure at 2 U.S.C. §431 (B)(9)(ii) and, therefore, would be permissible under the Act.

8/25/00

Date

Danny L. McDonald

Danny Lee McDonald

Vice Chairman

8/25/00

Date

Scott E. Thomas

Scott E. Thomas

Commissioner