ADVISORY OPINION 2000-16
THIRD MILLENIUM

CONCURRENCE OF
CHAIRMAN WOLD AND COMMISSIONERS MASON AND SMITH

We write to express our reasons for finding that the activities contemplated by Third Millennium, as stated in the Commission's Advisory Opinion 2000-16, do not violate the Federal Election Campaign Act.

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 the request 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 any 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). Further, Commission Regulations require that corporate registration and get-out-the-vote communications to the general public are allowed "provided that the communications do not expressly advocate the election or defeat of any clearly identified candidate(s) . . .." 11 CFR 114.4(c)(2).

Third Millennium's proposal entails the display of candidate advertisements on a continuous basis to a selected audience of Internet subscribers. Third Millennium will pay the ISP for space to display these advertisements. It is assumed, as part of the study, that these advertisements may very well have an influence on the voting behavior of the viewers, including influence as to whom viewers will support or vote for. On its face, then, Third Millennium's activity would seem to be prohibited corporate contributions or expenditures. Further, because the communications would expressly advocate the election or defeat of clearly identified candidates, they would not qualify as non-partisan get-out-the-vote activities under 11 CFR 114.4(c)(2). However, we do not believe that the analysis stops here.

In *Buckley v. Valeo*, the Supreme Court held that the statute's limitations on "expenditures relative to a clearly identified candidate" could withstand a constitutional challenge for vagueness only by interpreting the phrase "relative to" to apply solely to communications "that include explicit words of advocacy of election or defeat of a

candidate" and to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 43-44 (1976). In discussing disclosure requirements under the Act, the Court reiterated this point and expressed concern with the overbreadth of the phrase "for the purpose of influencing," holding that reporting requirements could apply only to groups making "contributions earmarked for political purposes or authorized or requested by a candidate or his agent," or "mak[ing] expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. *See also Federal Election Commission v. Massachusetts Citizens for Life Inc.*, 479 U.S. 238, 248 (1986). The *Buckley* Court held that this was necessary to avoid a chilling effect on speech about political issues, noting that a less bright line "offers no security for free discussion." 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). While the holdings in *Buckley* and *Massachusetts Citizens For Life* preclude the application of the Act to uncoordinated communications which do not contain "express advocacy,"[1] and thereby establish a constitutionally mandated safe harbor for much political speech, they do not hold that all communications including express advocacy are automatically subject to regulation under the FECA. Though the Act's limitations on uncoordinated expenditures are constitutionally constrained to apply only to communications including express advocacy,[2] the Constitution does not conversely mandate that all communications containing express advocacy must be covered by the Act. In fact, the Act, by its express terms, applies only to those contributions and expenditures "made . . . for the purpose of influencing any election for Federal office." 2 U.S.C. 431 (8)(A)(i) and 2 U.S.C. 431 (9)(A)(i). Thus, the statute does not necessarily prohibit the corporate expenditures at issue here, and Commission regulations which purport to limit all express advocacy communications, including those not made "for the purpose of influencing any election for Federal office," are invalid, as they exceed the statutory mandate. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1984); *Fireman v. United States*, 44 Fed. Cl. 528, 538 (1999).

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[1] Lower federal courts and state courts have also consistently struck down efforts to regulate speech that do not include explicit words of advocacy of the election or defeat of clearly identified candidates. *See e.g.* Vermont Right to Life v. Sorrell, 216 F.3d 264 (2d Cir. 2000); Clifton v. Federal Election Comm'n, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds* 114 F.3d 1309 (1st Cir. 1997); Maine Right to Life Comm. v. Federal Election Comm'n, 98 F.3d 1 (1st Cir. 1996), *cert. denied* 118 S. Ct. 52 (1997); Federal Election Comm'n v. Christian Action Network, Inc., 92 F.3d 1178 (4th Cir. 1996); Faucher v. Federal Election Comm'n, 928 F.2d 468 (1st Cir. 1991), *aff'd* 453 U.S. 182 (1991); Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980); Federal Election Comm'n v. Survival Education Fund Inc., 1994 WL 9658 (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); Federal Election Comm'n v. GOPAC, Inc. 917 F. Supp. 851 (D.D.C. 1996); Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Colo. 1993), *rev'd on other grounds*, 59 F. 3d 1015 (10th Cir. 1995), *and vacated on other grounds*, 116 S. Ct. 2309 (1996); Federal Election Comm'n v. National Org. For Women, 713 F. Supp. 428 (D.D.C. 1989); Federal Election Comm'n v. American Fed'n of State, County & Mun. Employees, 471 F. Supp. 315 (D.D.C. 1979); Washington State Republican Party v. State Public Disclosure Comm'n, No. 67442-6 (Wash., July 27, 2000); Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce, 227 Wis. 2d 650 (1999), *cert. denied* 120 S. Ct. 408 (1999).

[2] We do not address the possible application of the Act to coordinated expenditures that do not include explicit words of advocacy of the election or defeat of a clearly identified candidate.

Given this, the regulations at 11 CFR 114.4(c)(2), prohibiting all corporate expenditures for get-out-the-vote activities aimed at the general public and including express advocacy, must be interpreted as a safe harbor for corporations wishing to engage in registration and get-out-the-vote communications. That is to say, the activities described in 11 CFR 114.4(c)(2) are clearly protected communications because they do not include express advocacy. However, other corporate communications which include express advocacy, such as those proposed by Third Millennium, might also be exempt from regulation, if they are not made "for the purpose of influencing any election for federal office." Such a construction is consistent with the Commission's recent Advisory Opinions 1999-25 and 1999-24, which allowed a 501(c)(3) organization, and a limited liability company (LLC), respectively, to engage in web-based activities that involved the transmittal of communications including express advocacy.

In determining whether or not corporate communications are prohibited by the Act, we are required to engage in a two-step analysis. The first step is to determine whether or not the communications contain "explicit words of advocacy of the election or defeat of a clearly identified candidate." Only after determining that express advocacy is involved is it necessary to examine whether or not the communications are for the purpose of "influencing an election."

This approach recognizes that investigation, intimidation, and uncertainty can have the effect of "chilling" speech. However, by providing speakers with a safe-harbor, this approach overcomes the vagueness problems and the potential for a "chilling effect" on speech that led to the Court's decision in *Buckley*. Groups and individuals engaging in non-coordinated political speech can rest assured that their speech is protected so long as they refrain from engaging in express advocacy.

Therefore, in analyzing the described activities proposed by Third Millennium, we begin by considering whether or not express advocacy is involved in the communications. As the project is described, Third Millennium's communications will contain such express advocacy. Next, we consider whether or not the activities are for the purpose of influencing an election.

Based on the facts outlined in the opinion of the Commission, we believe that Third Millennium's proposed activities are not for the purpose of influencing an election. While Third Millennium's express intent and its status as a 501(c)(3) organization may be helpful in assessing the purpose of the proposed activity, the objective design of Third Millennium's proposal is essential to our conclusion that the activity is not for the purpose of influencing the presidential election. First, advertisements will not be targeted demographically or geographically. Instead, participants will be solicited randomly from a relatively diverse groups of Juno users, and will be divided into subgroups on a random basis. Second, candidates included in the study will be treated equally in regard to the number of advertisements shown and the selection of viewers. Third, the anticipated number and dispersion of participants is such that the study is not at all likely to affect the

outcome of the Presidential race nationally or in any single state, in part because Third Millennium will not be targeting, and as the project is designed, will not be able to target, participants in a particular geographic region or state.

We also note that communications with the campaigns, if any, will be kept to the minimum necessary to obtain advertisements for display, and the choice of ads and how they will be distributed will be under Third Millennium's sole control, rather than any candidate or committee. This is consistent with the concept of the study as research for nonpartisan purposes, rather than an opportunity for the candidates to refine, target, or otherwise convey their messages to the electorate.

Based on the facts as described in the Commission's opinion, and for the reasons outlined above, we conclude that the proposal does not entail activity for the purpose of influencing an election, and thus the proposal would not result in prohibited contributions or expenditures by Third Millennium.

8/24/00
Date

Daryl R. Wold
Chairman

8/24/00
Date

David M. Mason
Commissioner

August 24, 2000
Date

Bradley A. Smith
Commissioner