

2010 FEB 24 P 4: 06



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 2-25-10

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

David C. Adkins *DAK*
Attorney

Subject: Alternative Draft AO 2010-01 (Nevada State Democratic Party)

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this alternative draft on the agenda for February 25, 2010.

Attachment

1 ADVISORY OPINION 2010-01

2

3 Marc E. Elias, Esq.

4 Graham M. Wilson, Esq.

5 Perkins Coie

ALT. DRAFT

6 607 Fourteenth Street, N.W.

7 Washington, DC 20005

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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 or have been chosen as the State Party’s preferred
19 nominees in accordance with party rules and by-laws, as described further below.

20 ***Background***

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

24 The State Party is registered with the Commission as a political committee and as
25 a State committee of the Democratic Party. Beginning “immediately,” the State Party
26 plans to purchase campaign materials, such as pins, bumper stickers, handbills,
27 brochures, posters, party newsletters, and yard signs, to be used in connection with

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

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

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

16 ***Question Presented***

17 *Will the cost of the State Party's proposed campaign materials be exempt from*
18 *the Act's definitions of "contribution" and "expenditure," if the materials are used in*
19 *connection with volunteer activities on behalf of the State Party's preferred candidates*
20 *before the State primary election?*
21

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).

⁴ *Id.*; 2010 Nevada Election Calendar.

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 or have been chosen in accordance with party rules and by-laws as the State
6 Party's preferred nominees, as described below.

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

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

18 Both the definitions of "contribution" and "expenditure" exempt certain payments
19 by a State or local committee of a political party in connection with volunteer activities.
20 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); *see also* 11 CFR 100.87 and 100.147. This
21 "volunteer materials exemption" is limited in several respects. For purposes of the
22 instant inquiry, the most important limitation is that the campaign materials purchased by
23 the State or local party committee must be used in connection with volunteer activities

1 “on behalf of nominees of such party.” 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); 11 CFR
2 100.87 and 100.147.

3 Accordingly, the relevant question for purposes of the instant inquiry is, at what
4 point will the candidate become the State Party’s nominee for purposes of the volunteer
5 materials exemption. Neither the Act nor Commission regulations define the term
6 “nominee.” However, the Commission has previously recognized the ambiguity in the
7 meaning of “nominees of such party” or “party’s nominee” and construed the term in a
8 permissive manner. In Matter Under Review (“MUR”) 4471, the Commission found that
9 the volunteer materials exemption applied to the cost of materials purchased by the
10 Montana State Democratic Committee and mailed by volunteers on behalf of Senator
11 Max Baucus approximately five days before Montana’s primary election. Statement of
12 Reasons, MUR 4471 (Montana State Democratic Committee) (Nov. 19, 1998) at 5.⁵

13 Here, under Nevada law, a candidate of a major political party must be nominated
14 in the primary election, and persons wishing to run in the June 8, 2010 primary election
15 must file a declaration of candidacy or acceptance of candidacy between March 1 and
16 March 12, 2010. The close of the filing period, in effect, closes the ballot and establishes
17 the field of candidates seeking major party nominations. Thus, March 12, 2010 is the
18 earliest date on which the State Party will be able to identify its presumptive nominee.
19 Any candidate of the State Party who, as of that date, is on the State ballot and has no
20 primary opponent will be the State Party’s presumptive nominee. Alternatively, if the

⁵ When the mailing occurred, Senator Baucus was the only Democratic candidate for the U.S. Senate, and there could not be any other Democratic candidate for that office under State law. *Id.* Accordingly, the Commission concluded that, “as both a matter of fact and as a matter of state law,” Senator Baucus was his party’s “presumptive nominee.” *Id.* Given that Senator Baucus was “the only candidate under Montana law who could receive the Democratic nomination,” the volunteer materials exemption applied. *Id.*

1 State Party has an official method through party rules or by-laws whereby it may
2 officially support a particular candidate in a contested primary, that candidate, the
3 preferred nominee, may be considered the “nominee of such party” for purposes of
4 exempt party activities, even prior to March 12, 2010.⁶

5 Therefore, payments made by the State Party for materials used in connection
6 with volunteer activities⁷ on behalf of the State Party’s presumptive nominee or preferred
7 nominee will qualify for the volunteer materials exemption and will not count towards
8 either the State Party’s contribution or expenditure limits.⁸

9 The Commission’s conclusion is limited to the volunteer materials exemption in
10 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii), and implementing regulations. This conclusion
11 does not apply to any other use or variation of the term “nominee” appearing in the Act
12 or Commission regulations, such as 2 U.S.C. 432(e)(3)(A) (referring to the presidential
13 candidate “nominated” by a political party).

⁶ As the Supreme Court said, “our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party ‘selects a standard bearer who best represents the party’s ideologies and preferences.’” *Calif. Democratic Party, et al. v. Jones, et al.*, 530 U.S. 567, 575-76 (2000).

⁷ Requestor represents that its planned activities will comply with all other aspects of the volunteer activity exemption listed in 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii) and 11 CFR 100.87 and 100.147. See MURs 2377 (Texas Republican Congressional Committee); 3218 (Blackwell for Congress); 3248 (New York Democratic Party); 4538 (Alabama Republican Party); 4754 (Republican Party of New Mexico); 4851 (Michigan Republican State Committee); 5824/5825 (Pennsylvania Democratic State Committee); 5837 (Missouri Democratic State Committee).

⁸ 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 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).

1 This response constitutes an advisory opinion concerning the application of the
2 Act and Commission regulations to the specific transaction or activity set forth in your
3 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
4 of the facts or assumptions presented, and such facts or assumptions are material to a
5 conclusion presented in this advisory opinion, then the requestor may not rely on that
6 conclusion as support for its proposed activity. Any person involved in any specific
7 transaction or activity which is indistinguishable in all its material aspects from the
8 transaction or activity with respect to which this advisory opinion is rendered may rely on
9 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
10 conclusions in this advisory opinion may be affected by subsequent developments in the
11 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
12 The cited advisory opinion is available on the Commission's Web site at
13 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman