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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commission

FROM: Vice Chair Cynthia L. Bauerly *CLB*
Commissioner Ellen L. Weintraub *ELW*

DATE: March 30, 2010

SUBJECT: Draft Policy on the Volunteer Materials Exemption

Attached is a proposed draft of a policy on the Volunteer Materials Exemption. We have asked that this draft be made available for public comment.

Attachments

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[NOTICE 2010-XX]

“Volunteer Materials” Exemption

AGENCY: **Federal Election Commission**

ACTION: **Interim Policy on the Volunteer Materials Exemption**

SUMMARY: The Commission is adopting an interim policy regarding the exemption from the definition of “contribution” and “expenditure” for the payment by a State or local committee of a political party of the costs of certain campaign materials used by such committee in connection with volunteer activities on behalf of nominees of such party.

DATES: Effective [upon publication in the Federal Register].

**FOR FURTHER
INFORMATION**

CONTACT: _____, Assistant General Counsel, or _____,
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or
(800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

I. Background

The Federal Election Campaign Act, 2 U.S.C. 431 *et seq.*, as amended (“FECA” or “the Act”) limits the amount that a State or local political party committee may contribute to or make an expenditure on behalf of a federal candidate. See 2 U.S.C. 441a(a)(2)(A), 441a(d). However, the Act exempts certain activities from the definition of “contribution” and “expenditure.” See 2 U.S.C. 431(8)(B) and (9)(B). As a result of these exemptions, State and local party committees may spend unlimited amounts on costs associated with the production and dissemination of certain campaign materials distributed in connection with volunteer activities on behalf of the nominees of such a party (hereinafter “volunteer materials exemption”). See 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87 and 100.147. Under the volunteer materials exemption, the term “campaign materials” generally refers to items such as pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs.

To qualify for the volunteer materials exemption, a State or local party committee must satisfy certain conditions: (a) the committee's "payment may not be made for the costs incurred in connection with any broadcasting, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising;" (b) the portion of the cost of the campaign materials allocable to a Federal candidate must be paid with funds subject to the Act's limitations and source prohibitions; (c) the committee's payment may not be made from contributions to the committee that have been designated by the donor for use on behalf a particular Federal candidate; (d) the campaign materials must be "distributed by volunteers and not by commercial or for-profit operations"; (e) the committee must report the payment as a disbursement; and (f) the campaign materials may not be purchased either directly by a national party committee or with funds donated by a national party committee for the purchase of such materials. 11 CFR 100.87 and 100.147.

During the past several election cycles, questions have arisen as to the applicability of the volunteer materials exemption, and specifically the application of the requirement that campaign materials must be "distributed by volunteers" and not by commercial or for-profit operations with respect to mailings distributed through the United States Postal Service.

Thus, the Commission is adopting an interim policy to provide guidance to the regulated community regarding the Commission's current application of the volunteer materials exemption with respect to mail. This is an interim policy; it will remain in effect until the Commission considers more formal guidance in future election cycles.

II. "Volunteer Materials" Exemption

A. The History of the Volunteer Materials Exemption

In the 1979 amendments to the Act, which were passed, *inter alia*, to "increas[e] the role of state and local political parties," Congress established an exemption from the definition of "contribution" and "expenditure" for the cost of campaign materials purchased by a State or local party political party committee which support a Federal nominee and which are used by the State or local party committee in connection with volunteer activity. H.R. Rep. No. 422, 96th Cong., 1st Sess. at 9. Congress explained that its purpose in creating this exemption was to "encourage volunteers to work for and with local and State political party organizations." *Id.*

As noted above, however, the statute specifically excludes "direct mail, or similar type[s] of general public communication or political advertising" from the exemption. 2 USC 431(8)(B)(ix)(1). The Section by Section analysis explains that the "term 'direct mail' as used in this provision refers to mailing[s] by commercial vendors or to mailings made from lists which were not developed by

the candidate.” *Id.* at 10. In promulgating implementing regulations, the Commission adopted much of the language of the House Report accompanying the 1979 amendments, including the “direct mail” provisions. See generally Amendments to the Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15080 (Mar. 7, 1980).

As a review of prior applications of the exemption included as “Attachment A” reflects, over the past thirty years, the procedures for the production, preparation and distribution of mailings have changed and, as a result, the State and local political party committee volunteer programs have also changed with respect to volunteer materials. Some activities that were previously done by volunteers are now automated, thereby making volunteer involvement in those activities unnecessary and obsolete. For example, address labels and postage no longer have to be affixed by hand because that process has been automated by advances in technology. Similarly, bulk mail Zip Code sorting is often also automated. The Commission has attempted to take these technological changes into account, rather than rigidly applying outdated standards to volunteer activities. However, the Commission has also insisted that volunteer involvement be “substantial” to qualify for the exemption. New technologies that require no more than token volunteer involvement do not materially advance the exemption’s goal of encouraging volunteer participation in party activities.

The numerous prior Commission audits and enforcement matters regarding volunteer participation in preparing mailers may have rendered the Commission’s interpretation of the Act’s volunteer materials exemption less than clear.¹ Most recently, on February 11, 2009, in dismissing a complaint involving volunteer materials, four Commissioners issued a Statement of Reasons noting the “complicated history of the volunteer materials exemption,” and announced their plan to “issue more detailed guidance to clarify the volunteer materials exemption and the circumstances in which it applies.”² This interim policy attempts to fulfill that commitment.

B. The Commission’s Interpretation of the Volunteer Materials Exemption, as Applied to Mail

¹ See e.g., Matters Under Review 5598 (Swallow for Congress), 5824 and 5825 (Pennsylvania Democratic State Committee), 5837 (Missouri Democratic State Committee), 4851 (Michigan Republican State Committee), 4754 (Republican Party of New Mexico), 4538 (Alabama Republican Party), 4471 (Montana State Democratic Committee), 3248 (New York Democratic Party), 3218 (Blackwell for Congress Committee), 2994 (Wyoming State Democratic Party), 2559 (Oregon Republican Party), 2337 (Texas Republican Congressional Committee), 2288 (Shimzu for Congress). All Matters Under Review (MURs) can be accessed through the Enforcement Query System available on the Commission’s website at <http://www.fec.gov/em/em.shtml>.

² MUR 5598 (John Swallow for Congress, Inc.), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Cynthia Bauerly, Caroline Hunter, and Ellen Weintraub at 4 (Apr. 9, 2010). See also Id., Certification dated Feb. 11, 2009 (The Commission voted 4-1 to dismiss MUR 5598. Chairman Steven Walther dissented. Commissioner Donald McGahn was recused.). Statements of Reasons can also be accessed through the Enforcement Query System available on the Commission’s website at <http://www.fec.gov/em/em.shtml>.

1. The funding restrictions:

Because it is an exemption to the Act's definitions of "contribution" and "expenditure," there is no limit to the amount of money that a State or local party committee may spend on qualified volunteer materials. However, there are several applicable funding restrictions. First, the portion of the cost of campaign materials allocable to Federal candidates must be paid with funds subject to the Act's limitations and source prohibitions. 11 CFR 100.87(b); 11 CFR 100.147(b).³ Second, any funds raised by the State or local party committee but designated by a donor to be spent on behalf of a particular Federal candidate or candidates may not be spent on volunteer materials. 11 CFR 100.87(c); 11 CFR 100.147(c). Third, a national party committee may not directly purchase and deliver the materials used by the State or local party committee; and, fourth, similarly, a national party committee may not donate funds specifically earmarked for the purchase of such materials.⁴ 11 CFR 100.87(g); 11 CFR 100.147(g).

2. The standard for a mail program to qualify for the volunteer materials exemption:

First, payment for costs incurred in connection with "direct mail," is excluded from the exemption. 11 CFR 100.87(a); 11 CFR 100.147(a). Direct mail means "any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists." *Id.* As indicated above, because the procedures for the production, preparation and distribution of mailings have changed over the last thirty years, the Commission has permitted the exemption for mailings bearing commercially printed labels and commercial postage stamps so long as the name and address information for the mailing labels was not obtained from commercial mailing lists, and provided that volunteer involvement in distributing the mailings remains substantial.⁵ Accordingly, consistent with prior Commission interpretation of this provision, involvement of a commercial vendor in the production of campaign materials does not automatically disqualify a mailing from the exemption.

Second, materials must be "distributed by volunteers and not by commercial or for-profit operations." 11 CFR 100.87(d); 11 CFR 100.147(d). The term "distributed" has never been defined explicitly by the Commission. However, in prior enforcement matters the Commission has interpreted "distributed" by volunteers to mean that there must be "substantial volunteer involvement"⁶ in the distribution of the mailing.

³ The costs of qualified campaign materials distributed in conjunction with non-Federal activity may be allocated between a State or local party committee's Federal and non-Federal accounts. 11 CFR 106.7(c).

⁴ See MUR 5575 (Tony Knowles for U.S. Senate, et al.), Statement of Reasons of Vice Chairman Matthew Petersen, and Commissioners Cynthia Bauerly, Caroline Hunter, and Donald McGahn at 4.

⁵ See Statements of Reasons in MURs 5824 and 5825 (Pennsylvania Democratic State Committee) and 5837 (Missouri Democratic State Committee).

⁶ See Factual and Legal Analysis in MUR 5841 (Arizona Democratic Party) (describing past enforcement matters as examining whether there was "substantial volunteer involvement" in the distribution of the materials); Statement of Reasons in MUR 5837 at 4 (Missouri Democratic State Committee) (observing that in past matters the Commission has emphasized that "substantial volunteer involvement" is required for the exemption to apply);

The Commission recognizes certain activities which will be considered by the Commission in its determination of whether or not there has been “substantial volunteer involvement” in the process of preparation and distribution of a mailing:

- Bundling and sorting of mailers, provided that such activity is required by the Post Office in order for the committee to send the mailer under the applicable postage rate
- Feeding the mailers into label-affixing machines, or affixing address labels or stamping the return address or bulk mail indicia on mailers
- Sorting by Zip Code or placing bundled mailers into mail bags based on the laser printed address, provided that such activity is required by the Post Office in order for the committee to send the mailer under the applicable postage rate
- Loading mailers into trucks for delivery to the Post Office or unloading mailers at the Post Office or other weigh-in location approved by the Post Office (and, if required, signing-in of mailers at the Post Office or other weigh-in location), provided that such activity is required by the Post Office in order for the committee to send the mailer under the applicable postage rate
- Developing a new mailing list or enhancing a mailing list that was developed by the candidate, such as through door-to-door address collection or confirmation

These examples of volunteer activity will be considered by the Commission in its determination of whether or not there has been “substantial volunteer involvement” in order to satisfy the “distribution by volunteers” aspect of the volunteer materials exemption because the distribution of the mailer or campaign material would not have been possible but for such activity. However, this list is not exhaustive, and other activities may also be considered by the Commission in its determination of whether or not a State or local party has satisfied the test. Moreover, no inference will be drawn from the absence of any of these activities.

To fall within the volunteer exemption, a State or local party must show that: (a) there was “substantial volunteer involvement” as a result of volunteers performing the specified activity, and (b) had the volunteers not performed the activity, the mailing could not have been distributed.

In considering evidence of volunteer participation, the Commission has previously considered, and will continue to consider various types of evidence respecting the extent to which, if any, the volunteer materials exemption is applicable. Some of these types of evidence include photographs of the volunteer

activity, volunteer sign-in sheets, payment of travel or subsistence for, or customary token payments to volunteers, affidavits attesting to the scope of volunteer activities, and the State or local party committee's written policies regarding volunteer materials.

III. Conclusion

With this interim policy, the Commission intends to provide guidance to the regulated community regarding the Commission's current application of the exemption from the definition of "contribution" and "expenditure" for the payment by a State or local committee of a political party of the costs of certain campaign materials used by such committee in connection with volunteer activities on behalf of nominees of such party. This interim policy is not intended bind the Commission or any member of the public, or to create or remove any rights or duties, nor is it intended to affect any other aspect of 11 CFR Part 100, the Act, or the Commission's regulations. See 5 U.S.C. 553(b)(A).

IV. Operative Period of Interim Policy

This is an interim policy; it will remain in effect until the Commission considers more formal guidance in future election cycles.

Matthew S. Petersen
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-P

Attachment A:
Enforcement Matters Involving the Volunteer Materials Exemption

MUR 2288 (Utah Republican Party) was the one of the first enforcement matters involving the volunteer materials exemption as it related to mailers. In this matter, the Commission determined that volunteer activities to stamp the non-profit mail seal on each mailer, bundle them and deliver them to a direct mail firm were insufficient to “convert an essentially commercial operation into the type of exempt activity envisioned by the Act.” MUR 2288, General Counsel’s Report dated May 2, 1989, at 10-11. The Commission went on to explain that “the touching of each mailer by an individual volunteer” is insufficient to transform a commercial operation into exempt activity, and that such an approach would be “squarely at odds with the legislative intent envisioning significant volunteer participation.” *Id.* The Utah Republican Party ultimately entered into a conciliation agreement, which stated that the mailers met the definition of expenditure, not the volunteer exemption. . See MUR 2288, Certification dated February 2, 1990; Conciliation Agreement, dated February 7, 1990.

In MUR 2559 (Oregon Republican State Central Committee), the Commission found, by a vote of 4-1, probable cause to believe the respondent state committee did not qualify for the exemption with regard to 91,612 mailers for which the volunteer activity was limited to stamping the mail permit onto each piece and sending it back to a commercial vendor, which handled the postage, labeling, stuffing, sorting and delivery to the post office of the mailing.¹ However, because 10,388 copies of the same brochure were directly distributed by volunteers door-to-door rather than returned to the vendor for mailing, the Commission found that the committee qualified for the exemption. See MUR 2559, General Counsel’s Report dated September 18, 1990 and Certification dated September 26, 1990; Conciliation Agreement, dated March 1, 1991.

In MUR 2377 (Texas Republican Congressional Committee), the Commission determined that where the activities of a commercial vendor were limited to printing the mailer itself and shipping it to the party office, and all other activities – including unpacking the mailers, labeling, sorting by zip code, bundling by carrier route and delivering them to the post office – were undertaken by volunteers, the activity was extensive enough to satisfy the requirement that the campaign materials be used “in connection with volunteer activity.” See MUR 2377, Statement of Reasons of Commissioners Elliott, Aikens, Josefiak, and Thomas dated March 12, 1990. Similarly, the Commission found the level of volunteer activity to be insufficient in MUR 2994 (Wyoming State Democratic Central Committee), where volunteers merely reviewed a mailing list produced by a commercial vendor, inserting county information for each address. See MUR 2994, General Counsel’s Report dated October 22, 1990 and Certification dated October 31, 1990.

¹ Commissioners Josefiak, McDonald, McGarry, and Thomas voted affirmatively. Commissioner Elliott dissented and Commissioner Aikens was not present.

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In MUR 3218 (Ohio Republican Party Federal Candidate Committee), the Commission rejected OGC's recommendation to find reason to believe and three Commissioners focused on the level of volunteer involvement in "distributing" the mailing, which arrived at the party office with pre-printed sequential address labels already affixed to the mailers:

[The Respondent] indicated that a large number of volunteers had opened the cartons of printed direct mail materials and "stamped on each piece individually, the return address and the bulk mail indicia" and "sorted the pieces into the requisite postal/zip code categories and transported the Mailings to the Postal Service, where they were mailed."

We note in this matter that sequential address labeling by the printer may have made batching of the mailing by zip code and carrier route considerably simpler, but did not eliminate that step Since volunteers had also stamped the return address and bulk mailing rate mailing indicia upon each piece, we concluded that the scope of volunteer involvement in the distribution of this mailing satisfied the Act's requirements that such campaign materials be used "in connection with volunteer activity."

MUR 3218, Statement of Reasons of Commissioners Aikens, Elliott and Josefiak, dated May 23, 1991.²

In several easier cases, where the only activities by a commercial vendor were related to printing the actual mailpiece and all other activities were conducted by volunteers, the Commission consistently found that the exemption applied. For example, in MUR 3248 (New York State Democratic Committee), the evidence suggested that the only vendor involvement was in printing the mailer itself, and that volunteers labeled, sorted and addressed mailers, and also brought the mailers to the post office for delivery. There, OGC recommended, and the Commission found, that this level of activity satisfied the volunteer mail exemption. See General Counsel's Report dated July 23, 1993 and Certification dated August 3, 1993. Similarly, in MUR 4471 (Montana State Democratic Central Committee), the Commission found that the exemption applied to mailers that were merely printed and folded by a commercial vendor, with volunteers conducting all other activities including affixing labels, sorting and bundling, and conveying the mailers to the post office. See MUR 4471, Statement of Reasons of Chairman Thomas and Commissioners Elliott, Mason, Sandstrom, Wold and McDonald dated November 19, 1998.

In several more difficult matters where there was more involvement by a commercial vendor and less by volunteers, the Commission queried whether the level of volunteer involvement in a mailing was "sufficient," or "substantial." In MUR 4754 (Republican Campaign Committee of New Mexico) the Commission relied on a "sufficient

² In addition to Commissioners Aikens, Elliott and Josefiak, Commissioner McGarry also voted to find no reason to believe the respondents violated the Act in MUR 3218. Commissioners Thomas and McDonald recused themselves from the matter. See MUR 3218, Certification dated May 8, 1991.

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involvement” test to determine whether the committee using a commercial mailing list and the volunteers bundling the mailers by zip code were dispositive, where available information indicated that the volunteers unloaded the mail at party headquarters, stamped the party’s non-profit indicia on the mailers, and bundled and brought the mail to the post office. By a 6-0 vote, the Commission approved OGC’s recommendation to find reason to believe and to investigate. Following the investigation, the Commission determined that the Committee did not use a commercial list and that the volunteers also bundled the mailers by zip code, and the Commission voted to take no further action in the matter. See MUR 4754, General Counsel’s Report, dated March 10, 2000 and Certification, dated March 16, 2000. See also MUR 4851 (Michigan Republican State Committee), General Counsel’s Report dated June 7, 2003 (where all other requirements of the exemption are met, volunteer activity to affix postal indicia on each piece of mail, place address labels on them, and bring mailers to the post office “is sufficient” to qualify for the volunteer materials exemption);

In MUR 4538 (Alabama Republican Party), four Commissioners agreed with the General Counsel’s determination that there was insufficient evidence that mailers were not subject to the exemption where volunteers individually stamped each article of mail with bulk mail indicia and transported the mail to the post office, and where there was some indication that volunteers may have sorted the mailers and bundled them by zip code. See MUR 4538 General Counsel’s Report dated September 11, 2001 and Certification dated September 21, 2001. Citing many of the MUR’s discussed above, the General Counsel succinctly summarized the Commissions application of the volunteer materials exemption to mailers at that point in time:

[I]n order for a party committee’s mass mailing expenses to be covered by the exemption, volunteers must affix labels or stamp on each piece, individually, the return address/bulk mail permit indicia, and sort and bundle the materials by zip code (the vendor may use sequential address labeling to make sorting and bundling simpler). The commercial vendor may print, fold and ship materials to the state or local party, but only volunteers may deliver the materials to the post office for mailing to the public.

MUR 4538, General Counsel’s Report dated September 11, 2001 at 24-25.

In two more recent cases, the Commission examined whether there was “substantial involvement” of volunteers. In a Statement of Reasons for MUR 5837 (Missouri Democratic State Committee) four Commissioners explained that a mailer qualified for the volunteer materials exemption because there was “substantial volunteer involvement” in the mailing which included “bundling, bagging, tagging, and loading the mailers onto a USPS truck,” despite the postage and the labels being printed commercially. The Statement noted that it is unclear based on the record whether volunteers were involved in sorting the mail pieces by zip code, a crucial factor in the previous matter. However, despite the commercial involvement in the production of the mailers, the Commissioners stated that the commercial involvement did “not diminish the work done with respect to

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the most important tasks related to 'distribution' – separation and delivery." See MUR 5837, Statement of Reasons of Commissioners Lenhard, Mason, von Spakovsky, and Weintraub, dated December 20, 2007.

In the Statement of Reasons for MURs 5824 and 5825 (Pennsylvania Democratic State Committee), three Commissioners explained that a mailer paid for by the committee qualified for the exemption because volunteers were involved in "distributing the mailers, including unpacking, bundling, sorting, bagging, tagging, wrapping and loading the mailers on trucks specifically hired for transport to the Post Office as well as presenting them to a Postal Service employee on-site for weighing." Although the Statement considered the delivery of the mailers to the Postal Service by hired trucks as a relevant factor to the distribution of the mailers, it was not dispositive, given the substantial amount of volunteer involvement in the other aspects of distribution. See MURs 5824 & 5825, Statement of Reasons of Commissioners Lenhard, Mason and Weintraub dated January 2, 2008.

Most recently, on February 11, 2009, the Commission dismissed a complaint involving whether certain mailers qualified for the volunteer materials exemption. There, an investigation revealed that volunteers were involved in stamping the bulk mail permit indicia on mailers and helping load boxes of the mailers into a truck that took the mailers back to the mail vendor. The vendor then printed addresses on the mailers, sorted them by postal carrier route, and delivered the completed mailers to the post office for mailing. Without determining whether the mailers at issue qualified for the exemption, the Commission exercised its prosecutorial discretion and dismissed the matter based upon the "complicated history of the volunteer materials exemption," See MUR 5598, Statement of Reasons of Commissioners Petersen, Bauerly, Hunter and Weintraub dated April 9, 2009.