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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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March 10, 2010

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Chairman Matthew S. Petersen *MS*
Commissioner Caroline C. Hunter *CH*
Commissioner Donald F. McGahn II *DM*

Subject: Proposed Interim Enforcement Policy

For Meeting of 03-11-10

SUBMITTED LATE

Attached is a proposed interim enforcement policy. We have asked to place this draft on the agenda for March 11, 2010.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[NOTICE 2010-XX]

“Volunteer Mail” Exemption

DRAFT

AGENCY: Federal Election Commission

ACTION: Interim Enforcement Policy

SUMMARY: This notice expresses the view of the Commission 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 (hereinafter "volunteer mail"). As a consequence of the implementation of new technology in the production, preparation and distribution of mailings, which has, in turn, led to new practices by State and local political party committees, the Commission's volunteer mail framework may have, in some respects, become outdated and may no longer provide adequate guidance to the public.

Thus, the Commission is hereby announcing its interim policy regarding enforcement of 11 CFR 100.87 and 100.147 as applied to volunteer mail. This interim policy is consistent with the intent of Congress in establishing the volunteer materials exemption in 1979 – to increase the role of State and local parties and volunteer civic participation in the activities of such parties – and with the new reality of current political practice thirty years later.

This interim policy will remain in effect until July 1, 2011, and will not apply to any activities that occur after that date. As of July 1, 2011, the interim policy will automatically expire leaving previous guidance in effect prior to this interim policy and subject to four votes of the Commission. The interim policy as enunciated herein may only be modified or continued by four votes of the Commission.

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.

In promulgating implementing regulations, the Commission adopted much of the language of the House Report accompanying the 1979 amendments. See generally Explanation and Justification, Amendments to the Federal Election Campaign Act of 1971, 45 FR 15080 (Mar. 7, 1980). However, 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 mail. 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. In order to accommodate changes in political campaigning and technology, updated guidance regarding additional volunteer involvement in the distribution of mailings sent through the United States Postal Service is being provided by the Commission in order to encourage volunteer participation and provide more definitive guidance to the public.

The numerous prior Commission audits and enforcement matters regarding volunteer mail have created a patchwork of guidance that might not be entirely consistent, leaving the public unclear guidance or notice about the Commission’s interpretation of the Act’s volunteer materials exemption with respect to volunteer mail.¹ Most recently, on February 11, 2009, in dismissing a complaint involving volunteer mail, 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.

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 Baucry, 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

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

1. What are 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, including volunteer mail. 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 mail. 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. What are the elements of an exempt volunteer mail program?

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 in 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.⁵ Accordingly, consistent with prior Commission interpretation of this provision, involvement of a commercial vendor in the production of campaign materials does not disqualify a mailing from the exemption.⁶

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>.

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 In several prior MURs where the exemption has been found to apply, a commercial vendor has been involved in the production of the materials. See, e.g., MURs 2377 (Texas Republican Congressional Committee), 3281 (Blackwell for Congress), 3248 (New York Democratic Party), 4538 (Alabama Republican Party), 4471 (Montana State Democratic Committee), 4851 (Michigan Republican State Committee), 4754 (Republican Party of New Mexico), 5824 and 5825 (Pennsylvania Democratic State Committee), 5837 (Missouri Democratic State Committee). Moreover, the Commission has never found that the mere involvement of a commercial vendor *per se* rendered a mailing ineligible for the exemption.

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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”⁷ but for which the distribution of the mailing would not have occurred. The Commission hereby adopts this interim policy applying the “but for” test.

The Commission recognizes certain activities, any of which may be used to show that there has been “substantial volunteer involvement” in the process of preparation and distribution of a mailing “but for” which, the distribution of the materials would not have been possible:

- 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 or enhancing a mailing list, such as through door-to-door address collection or confirmation

Each of these examples of volunteer activity may be used to show that 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 satisfy the test. Moreover, no inference will be drawn from the absence of any of these activities.

⁷ 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); Statement of Reasons in MURs 5824/5825 at 5-6 (Pennsylvania Democratic State Committee) (observing that the exemption applied where there was “substantial amount of volunteer involvement”).

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 mail 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, and the State or local party committee’s written policies regarding volunteer mail.

III. Conclusion

This interim policy represents an articulation of how the Commission intends to exercise its discretion in enforcing an existing regulation on an interim basis and 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 Enforcement Policy

This interim policy will remain in effect until July 1, 2011, and will not apply to any activities that occur after that date. As of July 1, 2011, the interim policy will automatically expire leaving previous guidance in effect prior to this interim policy and subject to four votes of the Commission. The interim policy as enunciated herein may only be modified or continued by four votes of the Commission.

Matthew S. Petersen
Chairman
Federal Election Commission

DATED _____
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