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**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

May 14, 1998

**MEMORANDUM**

**AGENDA ITEM**

For Meeting of: 5-21-98

**TO:** The Commission

**THROUGH:** John C. Sumina  
Staff Director

**FROM:** Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin  
Senior Attorney

**Subject:** Draft AO 1998-09

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 21, 1998.

Attachment

# DRAFT

1 **ADVISORY OPINION 1998-9**

2  
3 **John Dendahl, Chairman**  
4 **Republican Party of New Mexico**  
5 **2901 Juan Tabo N.E.**  
6 **Suite 116**  
7 **Albuquerque, New Mexico 87112**

8  
9 **Dear Mr. Dendahl:**

10  
11 **This responds to your letter dated April 15, 1998, on behalf of the Republican**  
12 **Party of New Mexico ("RPNM"), requesting an advisory opinion concerning the**  
13 **application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and**  
14 **Commission regulations to costs incurred by the RPNM with respect to a special election**  
15 **in 1998.**

16 **Congressman Steven Schiff, who represented the First District of New Mexico,**  
17 **died on March 25, 1998. A special general election to fill the vacancy in the House seat**  
18 **for the rest of Mr. Schiff's term is scheduled for June 23, 1998. Meanwhile, a regularly**  
19 **scheduled primary election for the House seat (term to begin in January 1999) is being**  
20 **held on June 2, 1998. A number of party candidates will appear on the June 2 ballot for**  
21 **offices at the Federal, State, and local level. The June 23 election, however, will involve**  
22 **only the race to fill the U.S. House vacancy, and there will be only one candidate**  
23 **nominated by the Republican Party, Heather A. Wilson.<sup>1</sup>**

24 **In conjunction with the upcoming elections, the RPNM intends to make**  
25 **disbursements for certain party building activities including generic voter drive activities.**  
26 **You maintain that these activities will strengthen the Party by enabling it to communicate**  
27 **with its supporters, assisting in list development for future elections at all levels, and**  
28 **promoting Republican candidates and their legislative agendas. You state that these**  
29 **generic activities will be conducted throughout 1998 and will be consistent with those**  
30 **performed in prior years.**

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<sup>1</sup> According to the New Mexico Secretary of State, the June 23 ballot will also include one candidate each from the Democratic Party, the Green Party, and the Libertarian Party. In addition, the Secretary of State office has certified vote-count eligibility for one write-in candidate whose name will not appear on the ballot. See New Mexico Statutes Annotated §1-12-19.1.

1           The proposed generic activities will include disbursements for telephone,  
2 television, radio, and/or direct mail communications urging the general public to vote  
3 Republican in the June 23 special election. Such generic expenses might also include  
4 mailings containing absentee ballot applications or voter registration materials, or  
5 telephone calls prior to each election. You assert that these activities will fall within the  
6 definition of generic voter drive activities under 11 CFR 106.5(a)(2)(iv), and will not be  
7 conducted as exempt State Party activities under 2 U.S.C. §431(9)(B)(viii). This  
8 statutory provision and its counterpart at 2 U.S.C. §431(8)(B)(x) exempts, from the  
9 definitions of "expenditure" and "contribution," a State party committee's payments for  
10 campaign materials in connection with volunteer activities on behalf of the party's  
11 Federal nominees, if certain conditions are met. See 11 CFR 100.7(b)(15), 100.8(b)(16),  
12 and 106.5(a)(2)(iii).

13           You enclose a sample one-page communication to be mailed by the RPNM. At  
14 the top of the page is a photo of the late Mr. Schiff and the phrase, "Continue the Steve  
15 Schiff Tradition," in large, bold letters. Below that is a three-paragraph message from the  
16 Governor of New Mexico. The first two paragraphs laud Mr. Schiff's character and his  
17 performance in office. The third paragraph states: "On Tuesday, June 23, please vote in  
18 the special election for Congress. Vote Republican to continue the work of Steve Schiff."  
19 Below the three paragraphs are two lines. The first line states "Vote Republican" in  
20 large, bold letters. Directly below that line, in smaller letters, is the phrase "Special  
21 Election, Tuesday, June 23." The communication ends with a notice indicating that it  
22 was paid for by the RPNM.

23           You ask that the Commission respond to two questions: (1) whether "traditional"  
24 generic party disbursements under 11 CFR 106.5(a)(2)(iv) become coordinated  
25 expenditures for "clearly identified candidates" when combined with the date of a special  
26 election, such as telephone calls or mailings urging the public to "Vote Republican on  
27 June 23";<sup>2</sup> and (2) whether generic party communications that mention the date of a

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<sup>2</sup> In your first question, you use the term "contributions," rather than "coordinated expenditures." However, the context of your question, which includes a reference to Advisory Opinion 1985-14, indicates that the issue presented is whether the disbursements described would be expenditures under 2 U.S.C. §441a(d).

1 special election are financed the same as other generic communications under 11 CFR  
2 106.5(d)(1).

3 In summary, based on the following discussion, the answer to your first question  
4 is that the costs of the described RPNM communications are not generic party  
5 disbursements and must be paid entirely by the RPNM's Federal account. In addition,  
6 they may be subject to the party expenditure limits of the Act.

7 The Act and Commission regulations require that contributions made and  
8 accepted for the purpose of influencing a Federal election are subject to certain  
9 limitations and prohibitions. 2 U.S.C. §§431(8), 441a, 441b, 441c, 441e, 441f, and 441g;  
10 11 CFR Parts 100, 110, 114, and 115. Most of these restrictions do not apply to funds  
11 raised and spent to influence only State and local elections.<sup>3</sup> Disbursements by  
12 committees that constitute expenditures for the purpose of influencing a Federal election  
13 (see 2 U.S.C. §431(9)(A)), such as "independent expenditures," must be made only with  
14 funds that are subject to the limitations and prohibitions of the Act. Advisory Opinion  
15 1980-70; 11 CFR 109.1(a), 114.2(b), 110.4(a)(1), and 115.2(a). Moreover, the Act  
16 provides for limitations on disbursements by committees under certain circumstances.  
17 Included among these limitations are the limits on coordinated expenditures by a State  
18 committee of a political party in connection with the general election campaign of a  
19 candidate for U.S. Representative in that State. 2 U.S.C. §441a(d)(3)(B); 11 CFR  
20 110.7(b)(2)(ii).<sup>4</sup>

21 Commission regulations set forth the procedures to be followed by a party  
22 committee when it makes a disbursement that is in connection with both Federal and non-  
23 Federal elections. 11 CFR 106.5. Under section 106.5(a), party committees may make  
24 such disbursements in one of two ways: They may make them entirely from funds raised  
25 subject to the prohibitions and limitations of the Act; or, if they have established separate  
26 Federal and non-Federal accounts pursuant to 11 CFR 102.5, they may allocate them

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<sup>3</sup> The prohibitions on contributions by national banks, by corporations organized by authority of a Federal statute, and by foreign nationals apply to contributions made in connection with any election, whether Federal, State or local.

<sup>4</sup> The limit set out at 2 U.S.C. §441a(d)(3)(B) is adjusted at the beginning of each calendar year based upon changes in the Consumer Price Index. Hence, the limit for each 1998 general election in New Mexico for a U.S. House seat is \$32,550. 2 U.S.C. §441a(c); 11 CFR 110.9(c).

1 between these accounts according to various formulas set forth in section 106.5. Section  
2 106.5(a)(2) establishes four categories of costs to be allocated under these rules, including  
3 generic voter drive costs, which is the category that you say would cover the RPNM's  
4 proposed activity. 11 CFR 106.5(a)(2)(iv).<sup>5</sup>

5 The category of generic voter drive costs includes "voter identification, voter  
6 registration, and get-out-the-vote drives, or any other activities that urge the general  
7 public to register, vote, or support candidates of a particular party or associated with a  
8 particular issue, without mentioning a specific candidate." 11 CFR 106.5(a)(2)(iv). A  
9 communication that asks the public to "Vote Republican," or "Vote Republican on" a  
10 specific election date or "on Election Day," without referring to a specific candidate, is  
11 usually a message that falls definitively within the category of generic voter drive cost.  
12 This would generally be the case where the election described is held on a date when  
13 there are a number of offices on the ballot, Federal and non-Federal, with Republican  
14 candidates listed for two or more of these offices. In this instance, however, there is only  
15 one election on June 23.

16 Disbursements for a communication that urges the public to vote for a clearly  
17 identified candidate cannot be considered generic voter drive costs. Under the Act and  
18 Commission regulations, a candidate is clearly identified if her name or likeness appears  
19 or if her identity is apparent by unambiguous reference. 2 U.S.C. §431(18); 11 CFR  
20 100.17. Since there is only one office at stake in the June 23 election and only one  
21 Republican on the ballot, the communication can mean no other candidate but the  
22 Republican nominee in the June 23 special election for the House seat from the First  
23 District of New Mexico. In view of the clear identification of the candidate and the  
24 message conveyed, the disbursements would instead come within one of the categories of  
25 expenditure discussed below.

26 A disbursement for a communication that depicts a clearly identified candidate  
27 and conveys an electioneering message will be an expenditure subject to the limits of 2

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<sup>5</sup> The other categories are administrative expenses; the direct costs of a fundraising program or event; and the cost of activities on behalf of Federal candidates that are exempt from the definitions of contribution and expenditure and that are combined with activities on behalf of State or local candidates. 11 CFR 106.5(a)(2)(i)-(iii).

1 U.S.C. §441a(d) if the communication results from coordination between RPNM and the  
2 Republican candidate. Advisory Opinion 1985-14; see also Advisory Opinion 1984-15  
3 and *Colorado Republican Federal Campaign Committee v. Federal Election*  
4 *Commission*, \_\_\_ U.S. \_\_\_, 116 S. Ct. 2309, 2315-2319 (1996) (where the Court  
5 concluded that expenditures by a political party are not presumed to be coordinated with  
6 the party's candidate, and that the limitations of 2 U.S.C. §441a(d) would apply only to  
7 expenditures that are coordinated with the candidate).<sup>6</sup> Electioneering messages include  
8 statements "designed to urge the public to elect a certain candidate or party." *United*  
9 *States v. United Auto Workers*, 352 U.S. 567, 587 (1957), quoted in Advisory Opinion  
10 1985-14; see also Advisory Opinion 1995-25, n.1. The message to vote Republican on  
11 June 23 fits within this definition and thereby would constitute an electioneering  
12 message. (Moreover, under the facts presented, such a message would constitute express  
13 advocacy of the election of a clearly identified candidate, as discussed below.) If the  
14 proposed communication results from coordination between the RPNM and the  
15 Republican candidate, the disbursements for it would be expenditures subject to the limits  
16 of 2 U.S.C. §441a(d)(3)(B).<sup>7</sup> They would have to be funded entirely from contributions  
17 subject to the limitations and prohibitions of the Act, i.e., paid for from the Federal  
18 account only. In addition, they would have to be reported by the RPNM. 2 U.S.C.  
19 §434(b)(4)(H)(iv) and (6)(B)(iv); 11 CFR 104.3(b)(1)(viii) and (3)(viii).

20 On the other hand, if the described communications are not made in coordination  
21 with the candidate, other provisions of the Act and regulations would apply.  
22 Disbursements for communications that expressly advocate the election or defeat of a  
23 clearly identified candidate and that are not made in coordination with the candidate are

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<sup>6</sup> The Act addresses coordination when it states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. §441a(a)(7)(B)(i). The Commission regulations further define coordination at 11 CFR 109.1(b)(4).

<sup>7</sup> The Commission assumes that RPNM would apply such coordinated spending first to the section 441a(d) limit. Since any coordination between the RPNM and the candidate with respect to the proposed communications would be for the purpose of influencing a Federal election, party spending for the communications would also be contributions to the candidate. See 2 U.S.C. §431(8)(A)(i). If the limit of section 441a(d) is exceeded, the disbursements for these communications will be considered contributions to the candidate subject to the \$5,000 per election limit of 2 U.S.C. §441a(a)(2)(A).

1 "independent expenditures." 2 U.S.C. §431(17); 11 CFR 100.16; see 2 U.S.C.  
2 §441a(a)(7)(B)(i). Independent expenditures are not limited by the Act, but, as stated  
3 previously, must come entirely from funds subject to the limitations and prohibitions of  
4 the Act. Advisory Opinion 1984-30. In addition, a party committee that makes an  
5 independent expenditure has specific reporting requirements and must certify, under  
6 penalty of perjury, that the expenditure was not made in coordination with the candidate.  
7 2 U.S.C. §434(b)(4)(H)(iii) and (6)(B)(iii); 11 CFR 104.3(b)(1)(vii) and (3)(vii)(B). In  
8 defining "expressly advocating," Commission regulations include such phrases as  
9 "support the Democratic nominee" or "cast your ballot for the Republican challenger for  
10 U.S. Senate in Georgia" or other words which in context can have no other reasonable  
11 meaning than to urge the election or defeat of one or more clearly identified candidates.  
12 11 CFR 100.22(a). The phrase "Vote Republican on June 23," in the context presented  
13 here, where there is one election and one Republican nominee, fits into the above  
14 description and constitutes express advocacy of a clearly identified candidate. If the  
15 proposed RPNM communications are not made in coordination with the candidate (or  
16 any agent or campaign personnel, of the candidate), the above-described requirements  
17 would apply.<sup>8</sup>

18 Since this opinion has concluded that disbursements for the proposed  
19 communications would not be generic party disbursements and would either be RPNM  
20 expenditures subject to the limits of 2 U.S.C. §441a(d) or independent expenditures, there  
21 is no need to answer the second question.

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<sup>8</sup> The Commission does not intend that this analysis and conclusion should restrict the application of the Act's definition of "expenditure," in the context of communications produced by a party committee, to only those with content that mentions a particular candidate for Federal office. See Advisory Opinion 1995-25. A political committee's uncoordinated disbursements for the purpose of influencing a Federal election only, although not subject to a limit, would, at the very least, have to be made entirely from a Federal account and reported as operating expenditures. 2 U.S.C. §434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(1)(i) and (3)(i). These operating expenditures would be reported on line 21b, which covers "Other Federal Operating Expenditures," as distinguished from line 21a(i) which covers the Federal share of mixed Federal/non-Federal activity.

