



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 8, 2010

MEMORANDUM

TO: The Commission

FROM: Chairman Matthew S. Petersen
Commissioner Caroline C. Hunter
Commissioner Donald F. McGahn II

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.

Attachment

Draft D

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[NOTICE 2010-XX]

Interpretation of “Volunteer Mail” Exemption

AGENCY: Federal Election Commission

ACTION: Interpretation

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 campaign materials distributed in connection with volunteer activities from the definition of “contribution” and “expenditure” when such distribution is made by a State or local political party committee on behalf of a federal candidate of that party. See 2 U.S.C. 431(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87 and 100.147. Under this exemption (hereinafter “volunteer materials exemption”), campaign materials are not subject to the Act’s contribution or expenditure limits, so a State or local political party committee may spend an unlimited amount on qualified materials.

Specifically, to qualify for the exemption, a State or local committee must satisfy certain conditions: (a) the committee’s payment is not made in connection with a “general public communication” or “political advertising,” including “direct

mail;” (b) the portion of the payment allocable to a federal candidate must be paid with federal funds; (c) the committee’s payment must not be made from funds designated for a particular Federal candidate by the donor; (d) campaign materials must be “distributed by volunteers;” (e) the committee’s payment must be reported; and (g) 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 with respect to mailings (hereinafter “volunteer mail”). As a consequence of the implementation of new technology in the production and dissemination of campaign materials, which has, in turn, led to new practices by State and local political party committees, the Commission’s volunteer mail framework has become outdated and does not provide clear guidance to the public.

Thus, the Commission is hereby announcing its interpretation of the scope of 11 CFR 100.87 and 100.147 as applied to volunteer mail. This interpretive guidance reconciles 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 – with the new reality of modern political practice thirty years later.

II. “Volunteer Materials” Exemption

A. The History of the Volunteer Materials Exemption, and the Need for Change for Volunteer Mail

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 candidate 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 8. 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.* at 9.

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 (Jan. 8, 1980). However, over the past thirty years, State and local political party committee volunteer programs have changed, specifically with respect to volunteer mail. Some activities that were previously done by volunteers are now automated, thereby making volunteer involvement in those activities obsolete. For example, address labels no longer

have to be affixed by hand because that process has been automated by advances in technology. Volunteers often distribute materials in shopping centers or door to door. However, to the extent this activity is not feasible, and in order to accommodate changes in political campaigning and technology, updated guidance regarding additional volunteer involvement is being provided by the Commission in order to encourage volunteer participation and provide clear notice to the public.

The numerous prior Commission audits and enforcement matters dealing with volunteer mail have created a patchwork of rules that are inconsistent, leaving the public without adequate 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, the Commission issued a statement noting the "complicated history of the volunteer materials exemption," and announced its plan to "issue more detailed guidance to clarify the volunteer materials exemption and the circumstances in which it applies."²

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 definition 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 restrictions on what funds may be used. 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). Second, any funds raised by the State or local party committee but designated by the donor to be spent on behalf of a particular Federal candidate may not be spent on volunteer mail. 11 CFR 100.87(c). Finally, a national party committee may not directly purchase the materials used by the State or local party committee; and, similarly, to the extent that any funds donated by a national party committee are used to pay for campaign materials, those funds cannot have been

¹ See e.g., MURs 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).

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. See also *Id.*, Certification dated Feb. 11, 2009 (The Commission voted 4-1 to dismiss MUR 5598. Chairman Steven Walter dissented. Commissioner Donald McGahn was recused.).

donated by the national party committee specifically for the purchase of such materials.³ 11 CFR 100.87(g).

2. What are the elements of an exempt volunteer mail program?

First, general public communications and political advertising, including direct mail, are excluded from the exemption. 11 CFR 100.87(a). Direct mail is any mailing by a commercial vendor or any mailing made from “commercial lists.” *Id.* However, 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.⁴

Second, materials must be “distributed” by volunteers. 11 CFR 100.87(d). The term “distributed” has never been defined explicitly by the Commission. However, in prior enforcement matters, the Commission has essentially interpreted “distributed” by volunteers to mean that volunteers must perform an activity but for which the production or dissemination of the mailing would not have been possible. The Commission hereby explicitly adopts this interpretation (the “but for” test).

As it has done in the past, the Commission declines to set forth specific volunteer activity requirements, since the capabilities and needs of State and local party committees and volunteers necessarily vary. However, the Commission recognizes certain activities, any of which satisfy the volunteer participation “but for” standard for “distributed” by volunteers – if, but for such activity, the production or dissemination of material would not have been possible:

- Distributing campaign material by hand
- 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

³ 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.

⁴ In 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.

- 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 is sufficient by itself 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.

To fall within the volunteer exemption, a State or local party must show that: (a) volunteers performed the specified activity, and (b) had the volunteers not performed the activity, the mailing could not have been produced or disseminated.

In considering evidence of volunteer participation, the Commission generally considers affidavits from individuals such as: (a) employees of the State or local party committee; (b) volunteers who participated in the activities, or (c) employees of the commercial mail vendor. Furthermore, the Commission previously has explained that where declarations by respondents are uncontroverted by any assertions to the contrary, there is no basis to investigate simply to verify facts asserted in the declarations.⁵ However, no adverse inference will be drawn if a respondent does not provide such affidavits.

The Commission also considers 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 announcement represents the Commission’s interpretation of an existing regulation and is not intended 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).

⁵ MUR 5837 (Missouri State Democratic Committee), First General Counsel’s Report at 7 (citing MUR 4851 (Michigan State Republican Committee), General Counsel’s Report #3 at 8)); MURs 5824/5825 (Pennsylvania Democratic State Committee).

Matthew S. Petersen
Chairman
Federal Election Commission

DATED _____
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