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January 5, 2010

Thomasenia Duncan, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Advisory Opinion Request**

Dear Ms. Duncan:

We write on behalf of the Nevada State Democratic Party ("NSDP"), pursuant to 2 U.S.C. § 437f (2009), to seek an advisory opinion from the Federal Election Commission ("FEC" or "Commission"). NSDP seeks an opinion regarding its ability to pay for materials used by its volunteers in support of candidates for federal office under 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii) ("volunteer materials"). As NSDP would like to begin engaging in 2010 races immediately, we ask that the Commission expedite this request and issue a response as soon as possible.

NSDP is a state committee of a political party as defined at 11 C.F.R. § 100.14(a). Under certain limitations, a state committee may pay for "the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party" without the payments constituting "contributions" or "expenditures" under the Federal Election Campaign Act of 1971 (the "Act"). See 2 U.S.C. §§ 431(8)(B)(ix), (9)(B)(viii); see also 11 C.F.R. §§ 100.87, .147. In an unrelated enforcement action, and as discussed in more detail below, the Commission previously found that a state party could pay for volunteer materials under these provisions on behalf of a "presumptive nominee," i.e., before the candidate was officially selected in a primary election. See Matter Under Review 4471. NSDP seeks confirmation that the same holding applies to its planned activities, and that it can pay for volunteer materials under 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii) before the Nevada state primary.

In Nevada, the nominees of the major political parties are decided through the primary election process. Subject to certain limitations, members of a party may file as candidates for nomination in the primary until March 12, 2009. Write-in candidates are not permitted. The party candidate

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who receives the greatest number of votes in the primary election becomes that party's nominee in the general election.

NSDP wants to pay for campaign materials for volunteers to use in their efforts on behalf of federal candidates that they support. In each instance, the federal candidate would be someone whom NSDP believes will run unopposed in the party primary, which will become certain after March 12, 2010. However, even if other individuals do seek to appear on the primary ballot, NSDP believes that its chosen candidates are assured of winning the nomination; the fact that these candidates will be NSDP's official nominees is a foregone conclusion.

The volunteer materials that NSDP wants to pay for may include pins, bumper stickers, handbills, brochures, posters, party newsletters, and yard signs. Some of these materials may expressly advocate for the election of federal candidates and some may also depict or refer to other state or local candidates. NSDP plans to coordinate with its preferred candidates regarding the proposed volunteer materials such that its disbursements for these materials would not be independent. None of the volunteer materials will be used in connection with any television or radio broadcast, newspaper, magazine, billboard, or mailing by any commercial vendor or from any commercial mailing list. The cost of the volunteer campaign materials that name or depict federal candidates will be paid for with hard money, i.e., from contributions raised pursuant to the limitations and prohibitions of the Act. None of the contributions that NSDP will use to pay for volunteer campaign materials were designated by the donor to be spent on behalf of any particular candidate or in any particular election; NSDP has final decision making authority over how all of the relevant funds will be spent. All of the volunteer materials will be distributed by volunteers, not commercial or for-profit operations. NSDP will report all of its disbursements related to the volunteer materials and no national Democratic party committee will pay for any portion of the related costs.

The Commission has addressed the question of whether a state party can pay for grassroots volunteer materials before a primary under 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii) and 11 C.F.R. §§ 100.87 and 100.147 one time in the past. In Matter Under Review ("MUR") 4471 the National Republican Senatorial Committee ("NRSC") filed a complaint against the Montana State Democratic Central Committee (the "Montana Democratic Party" or "MDP") and Friends of Max Baucus (the "Baucus Committee"), the authorized campaign committee of Senate candidate Max Baucus. NRSC alleged that MDP made an excessive contribution to the Baucus Committee by paying for approximately 75,000 pamphlets supporting Senator Baucus five days prior to the Montana primary election. See MUR 4471, Statement of Reasons, at 1 (November 19, 1998). NRSC argued that the volunteer materials exemption could not apply because "Senator Baucus's nomination as the Democrat nominee did not become official until" well after the pamphlets were distributed. *Id.* at 2. MDP responded that, *inter alia*, "the 'volunteer materials' exemption is available for disbursements made on behalf of the presumptive nominee,

before the time of formal nomination, with the purpose and effect of influencing the general election." *Id.* The Commission agreed.

In an unanimous decision, the Commission found that the "volunteer materials" exemption applied to MDP's pamphlets even though "the mailing was prepared on behalf of the MDP's presumptive nominee." *Id.* at 5. The Commission "reject[ed] the conclusion of its Office of General Counsel (OGC) that the exemption was not available to the MDP because the primary election was still a few days away." *Id.* In instances where no other candidate have filed for the primary, as in MUR 4471, or when a candidate is otherwise assured of winning the nomination, a state party should be allowed to pay for materials under the volunteer materials exception even if its candidate has not been officially declared the nominee. As the Commission concluded in MUR 4471, "[b]ecause Mr. Baucus's nomination was a foregone conclusion, the Commission declines to elevate form over substance." *Id.* at 3.

One of the factors shaping the Commission's decision in MUR 4471, was that it had already permitted state parties to make expenditures under 2 U.S.C. § 441a(d) before primary elections, a decision that the Commission acknowledged was an "even broader holding." *Id.* at 5, note 6. NSDP should be permitted to make exempt payments for volunteer materials before Nevada's primary just as it is permitted make coordinated party expenditures before Nevada's primary. Currently, FEC regulations explicitly permit political party committees to make coordinated expenditures before a candidate has been formally nominated, but as noted in MUR 4471, this rule only codified what was already the Commission's policy. *See* 11 C.F.R. § 109.34; *see also* Party Committee Coordinated Expenditures, 64 Fed. Reg. 42,579, 42580-81 (August 5, 1999) (stating that the new provision "is consistent with [the Commission's] previous policy permitting coordinated expenditures to be made before the date of the primary election.") The policy considerations justifying the Commission's position on coordinated party expenditures apply equally to payments for volunteer materials.

The key is that while sections 100.87 and 100.147 exempt payments "in connection with volunteer activities on behalf of any nominee(s)," NSDP is able to identify its nominees now. As the Commission observed in regards to coordinated party expenditures, "[w]here a candidate appears assured of a party's ... nomination, the general election campaign, at least from the political party's perspective, may begin prior to the formal nomination." *See* FEC Adv. Op. 1984-15 (May 31, 1984); *see also* FEC Adv. Op. 1985-14 (May 30, 1985) (stating that "expenditures pursuant to 2 U.S.C. 441a(d) ... may be made before the party's general election candidates are nominated."). NSDP needs to pay for volunteer materials now, because for its nominees, the general election campaign has already begun. NSDP's volunteers are eager to support their candidates and it is appropriate that NSDP be able to assist them by paying for volunteer materials under sections 100.87 and 100.147.

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Furthermore, just as "nothing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election", there is no indication that state parties must wait until their nominees are formally chosen to pay for exempt volunteer materials. FEC Adv. Op. 1984-15 at 3. While provisions regarding coordinated party expenditures refer to payments "in connection with the general election campaign" and the rules regarding volunteer materials refer to "activities on behalf of any nominee(s)" both types of disbursements are appropriate when a candidate is "assured" of a party's nomination. As the Commission determined in MUR 4471, a state party may make expenditures for volunteer materials for its "presumptive nominees" and there is no reason to disturb this ruling here.

NSDP would like to be making payments for volunteer materials immediately and needs to know how such payments should be reported. Accordingly, this is a time sensitive question and we ask that the Commission consider it for expedited review.

Please do not hesitate to call us should you have any additional questions.

Very truly yours,



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Counsel to the Nevada State Democratic Party