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AOR 2008-06

BY HAND

June 6, 2008

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

2008 JUN -6 P 4: 58
RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Ms. Duncan:

We are writing on behalf of the Democratic Party of Virginia (the "Committee"), pursuant to 2 U.S.C. § 437f, to seek an advisory opinion from the Federal Election Commission concerning party slate cards to be paid for entirely with federal funds

INTRODUCTION

The Committee is a state party that is registered as a political committee with the Commission. In connection with the 2008 election, the Committee proposes to prepare and distribute party slate cards by mail or by hand. Each party slate card will contain a reference to at least three clearly identified candidates in Virginia, including at least one clearly identified federal candidate. The Committee stipulates that it intends to coordinate, within the meaning of 2 U.S.C. § 441a(a)(7)(B) and 11 C.F.R. § 109.37, with any federal candidate who is to be clearly identified in a particular slate card. The Committee also stipulates that the slate card will expressly advocate the election of the party's ticket in November, including the clearly identified federal candidates on the slate card, and will contain all the content previously approved by the Commission in FEC Advisory Opinion 1978-09.

The Committee seeks confirmation that party slate cards created and distributed as described herein, to be paid for with 100% federal funds, will satisfy the slate card exemption from the definition of contribution and expenditure under the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations. See 2 U.S.C. §§ 431(8)(B)(v), (9)(B)(v) and 11 C.F.R. §§ 100.80 and 100.140.

LEGAL BACKGROUND

As a result of the Bipartisan Campaign Reform Act of 2002, the Act clearly requires state parties to use federal funds when paying for slate cards, when used as part of Federal election activity. The Act states that an amount expended or disbursed by a state party for Federal election activity "shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(b). "Federal election activity" includes a party's get-out-the-vote activities within a certain time period. See 2 U.S.C. § 431(20)(A)(ii) and 11 C.F.R. § 100.24. It also includes "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. § 431(20)(A)(iii). A "public communication" is defined to include, among other things, a "mass mailing," which in turn is defined as "a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 2 U.S.C. § 431(22), (23).

The costs of creating and distributing public communications of a state party that contain express advocacy and are coordinated with a federal candidate, within the meaning of 11 C.F.R. § 109.37, are treated as in-kind contributions unless an exemption from the definition of "contribution" or "expenditure" applies. The Act exempts the following type of party committee activity from the definition of contribution and expenditure:

the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising.

2 U.S.C. §§ 431(8)(B)(v), (9)(B)(v).

Similarly, FEC regulations contain the following exemption for party slate cards:

The payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card, sample ballot, palm card, or other printed listing(s) of three or more candidates for any public office for which an election is held in the State in which the committee is organized is not a contribution. The payment of the portion of such costs allocable to Federal candidates must be made from funds subject to the limitations and prohibitions of

the Act. If made by a political committee, such payments shall be reported by that committee as disbursements, but need not be allocated in committee reports to specific candidates. This exemption shall not apply to costs incurred by such a committee with respect to the preparation and display of listings made on broadcasting stations, or in newspapers, magazines, and similar types of general public political advertising such as billboards. But see 11 CFR 100.24, 104.17(a) and part 300, subpart B for exempt activities that also constitute Federal election activity.

11 C.F.R. § 100.80. For the parallel exemption from the definition of expenditure, *see* 11 C.F.R. § 100.140

Except for a few cosmetic changes to 11 C.F.R. §§ 100.80 and 100.140 to cross-reference the Federal election activity regulations that resulted from the Bipartisan Campaign Reform Act of 2002, very little about the FEC's regulatory guidance on party slate cards has evolved since the Commission considered slate cards in the late 1970s. *See, e.g.*, FEC Advisory Opinion 1978-09.

QUESTIONS PRESENTED

1. In recognition of the advances in graphic design and the proliferation of direct mail and flyers in the past 30 years with which the Committee must compete, the Committee seeks to work with its commercial vendors to develop a more visually compelling slate card than the traditional slate card, which has only the candidates' head shots breaking up the otherwise monotonous image of printed text.

Specifically, the Committee would like to confirm that the Act and FEC regulations do not restrict the Committee from including the following images on its exempt slate cards (in addition to the express advocacy and other content already approved by the Commission in Advisory Opinion 1978-09):

- Abstract designs or colors to enhance the visual appeal of the slate card;
- An American flag;
- Scenery from the Commonwealth of Virginia;
- Photographs of citizens of Virginia; or
- Photographs of the candidates featured in the slate card with any of the aforementioned images.

Thomasenia Duncan, Esq.
Federal Election Commission
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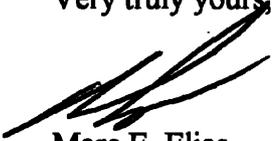
2. Given that the Committee's workers will be distributing some of its party slate cards door-to-door or in other locations where potential voters might be found (such as a Metro, train, or bus stop), the Committee also wishes to confirm that there are no restrictions on the political speech in which the Committee's workers, both paid and volunteer, may engage in while distributing the party slate cards. For example, if a passerby wished to learn more about a particular candidate on the slate card, would there be any restriction on the party worker conversing with that individual? Would the use of Committee talking points or other guidelines in talking to the individual be treated differently than a free-flowing conversation? Would it matter who initiated the topic of conversation? If so, what would be the statutory or regulatory basis for such a restriction?

CONCLUSION

The Committee respectfully requests issuance of an advisory opinion confirming that the Act and FEC regulations do not restrict the Committee from preparing and distributing its party slate cards in the manner described above under the Act's and FEC regulations' exemptions for party slate cards.

Thank you for your prompt consideration of this important matter concerning party communications.

Very truly yours,



Marc E. Elias
Caroline P. Goodson
Counsel to the Democratic Party of Virginia

MEE:gh



"Elias, Marc (Perkins Coie)"
<MEllas@perkinscoie.com>

06/30/2008 10:26 PM

To <jlevin@fec.gov>, Caroline Goodson
<CGoodson@perkinscoie.com>
cc <rknop@fec.gov>, <DAdkins@fec.gov>

Subject Re: Democratic Party of VA

It is accurate. Thank you.

--

Marc E. Elias
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RECEIVED
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2008 JUL -1 P 12:19

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From: <jlevin@fec.gov>
Date: Mon, 30 Jun 2008 18:25:27 -0400
To: Marc Elias <MEllas@perkinscoie.com>, Caroline Goodson <CGoodson@perkinscoie.com>
Cc: <rknop@fec.gov>, <DAdkins@fec.gov>, <jlevin@fec.gov>
Subject: Democratic Party of VA

Caroline and Marc,

This email is to confirm our understanding of the information exchanged during our call of Tuesday, June 17, regarding a request for an advisory opinion (the "request letter") submitted by your client, the Democratic Party of Virginia (the "Committee") concerning the design and distribution of the Committee's slate cards. We requested the call for two reasons: (1) to better understand how the slate cards, as described in Question 1 of the request letter, will be designed and what specific images, designs, and photographs would be included on the slate cards, and (2) to clarify and understand the full scope of Question 2 of the request letter regarding any "political

speech" engaged in by "the Committee's workers, both paid and volunteer" while distributing the Committee's slate cards.

Please review the following description of our discussion and inform us by reply email if it is accurate and complete.

Content and Design of the Proposed Slate Cards:

The Committee has no intention of conceiving a facsimile of the slate card for the Commission to review in its consideration of the request letter; indeed, the Committee's primary reason for submitting the request letter is to learn how it should instruct vendors to design slate cards so that they still qualify under the expenditure/contribution exemptions at 11 CFR 100.80 and 11 CFR 100.140. Notwithstanding the lack of a slate card prototype, the Committee does have an idea of how these slate cards will be designed (*e.g.*, the specific types of images that will be used and the layout of those images), and your descriptions of those designs supplement those provided in the bulleted examples in Question 1 of the request letter .

For example, regarding the use of abstract designs or colors (bullet point one in Question 1 of the request letter), the Committee's intent is to make the slate card more "eye-catching" using graphics not unlike those that, for example, are featured on the Commission's public website. Regarding the use of pictures featuring scenery from the Commonwealth (bullet point three in Question 1 of the request letter), the Committee's intent is to feature photos evocative of Virginia (*e.g.*, the Shenandoah Mountains, Skyline Drive, or Virginia Beach). Images depicting citizens of Virginia (bullet point four in Question 1 of the request letter) would likely feature a diverse set of "fresh faces similar to the types of images found in campaign literature." You are unsure, however, whether the citizens pictured would be wearing campaign-related clothing or paraphernalia.

The Committee plans to place on its slate cards pictures of candidates that include the bulleted items in Question 1 of the request letter (an American flag, scenery from the Commonwealth of Virginia, and photographs of citizens of Virginia). For example, the Committee may place on its slate card a picture of a candidate (i) in front of the American flag; (ii) amongst a diverse group of Virginia citizens; (iii) against a backdrop of the Shenandoah Mountains; or any combination of (i) - (iii), as opposed to placing on the slate card separate pictures of the candidate, an American flag, Virginia citizens, and scenery of Virginia. The Committee has indicated that it is not seeking to supersede AO 1978-09 or 1978-89 with this request letter.

As far as layout is concerned, the Committee intends to place the above-described images on its slate cards in a way that is most aesthetically pleasing and balanced. Pictures featuring candidates will not, however, replace the traditional "mugshot" candidate pictures often featured on slate cards. For example, the Committee may design a slate card in a "door-hanger" format that on one side features candidate mugshots and on the other side includes pictures of the candidates with Virginians, Virginia scenery, and/or the American flag, as described above.

Distribution of the Proposed Slate Cards:

The Committee intends to distribute the proposed slate cards door-to-door and at Metro, train and

bus stops (as mentioned in the request letter), as well as at any other place where a high volume of persons are accessible, such as at a park, a parking lot, or a shopping center. The Committee has not indicated, however, whether it plans to have individuals distribute the slate cards together with campaign materials or in conjunction with the distribution by other individuals of campaign materials, or if the Committee plans to distribute the slate cards at party or candidate events. Distribution of the slate cards will be effected by Committee workers, both paid and volunteer, who will be encouraged by the Committee to engage and converse with the recipients of the slate cards. In that regard, the Committee seeks to clarify whether these workers must restrict their "political speech" in any way so as to not jeopardize the application of the slate card exemption.

Specifically, the Committee envisions three different scenarios in which such supplemental "political speech" may arise in the course of distributing a slate card: (1) a Committee worker engages in free-flowing conversation with the recipient of a slate card regarding a candidate and his/her stance on certain issues; (2) a Committee worker, guided by talking points provided by the Committee, engages in conversation with the recipient of the slate card regarding a candidate and his/her stance on certain issues; and (3) a Committee worker distributes slate cards while reciting a script provided by the Committee regarding a candidate and his/her stance on certain issues. Importantly, any conversation described above would be in addition to a general admonition from the Committee worker to the recipient of the slate card to "Vote for [the candidates featured on the slate card]", which you describe as a common practice. As a corollary issue, the Committee would like to know whether it makes a difference whether the Committee worker or the recipient of the slate card initiates such "political speech" or whether all such "political speech" is considered initiated by the worker by virtue of the slate card distribution.

Again, please review this message and inform us by reply email if our description is accurate and complete. If you feel it is not, please let us know so we can amend the above appropriately and quickly certify the request letter as a complete advisory opinion request.

Sincerely,

Jonathan Levin
David Adkins
Robert Knop