

**VIA ELECTRONIC MAIL**

April 13, 2010

Matthew S. Petersen  
Chairman  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Dear Chairman Petersen:

We very much appreciate the opportunity to provide comments regarding the various draft volunteer mail enforcement policy statements currently being considered by the Commission. We represent a number of Republican and Democratic state party committees across the country. We are submitting these comments in our personal capacities and not on behalf of any particular client.

The Federal Election Campaign Act of 1971, as amended (“FECA” or “Act”) exempts from the definition of contribution and expenditure payments by state and local party committees for the cost of campaign materials used in connection with volunteer activities on behalf of the party’s nominee. See 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii). See also 11 C.F.R. §§ 100.87 and 100.147. When Congress enacted the volunteer materials exemption in the 1979 amendments to FECA, Congress sought to encourage and facilitate greater volunteer involvement at the grassroots level in connection with federal elections. Moreover, when Congress passed the Bipartisan Campaign Reform Act in 2002 (“BCRA”), one key objective of the legislation was to increase the importance of federally permissible funds in federal elections, including with respect to the activities of state and local party committees. The Commission would help advance both of these statutory objectives by issuing a policy statement clarifying and confirming the scope of the volunteer materials exemption in general and the volunteer mail exemption in particular.

Over the years, the Commission has closed a number of enforcement cases in this area, many of which were extremely fact-intensive. We strongly support the Commission’s effort to issue a policy statement containing bright-line rules, including the creation of safe harbors, concerning the requirements that must be met for party committee activity to qualify under the volunteer materials exemption.

Our comments focus on the following four specific elements that we believe should be included in any policy statement that the Commission promulgates.

**I. Proposed “But For” Standard**

Neither FECA nor Commission regulations specify the amount of volunteer involvement that is necessary for state and local party committees to qualify for the volunteer materials exemption. See 2 U.S.C. § 431(8)(B) (ix) (exempting from the definition of contribution payments by party

committees for campaign materials “used by such committee in connection with volunteer activities on behalf of nominees of such party”); 11 C.F.R. § 100. 87(d) (requiring such materials to be “distributed by volunteers and not by commercial or for-profit operations”). In past enforcement cases, the Commission has indicated that “substantial volunteer involvement” is required for the volunteer materials exemption to apply. See e.g., Statement of Reasons of Chairman Lenhard, Vice Chairman Mason, Commissioner von Spakovsky and Commissioner Weintraub in MUR 5837 (Missouri Democratic Party et al.) at 4; Factual and Legal Analysis in MUR 5841 (Arizona Democratic Party) at 4 (noting that in a previous enforcement case “[t]he Commission concluded that the amount of volunteer activity involved constituted substantial volunteer involvement in distribution, sufficient to satisfy the requirements of sections 100.87(d) and 100. 147(d)”); Statement of Reasons of Chairman Lenhard, Vice Chairman Mason, and Commissioner Weintraub in MUR 5824/5825 (Pennsylvania Democratic Party) at 6 (indicating that the activity in question fell under the volunteer materials exemption “[g]iven the substantial amount of volunteer involvement”).

The various draft policy statements released by the Commission contain a proposed “but for” legal standard to determine whether activities are within the volunteer materials exemption. Under the proposed “but for” standard, as we understand it, party activities would fall under the volunteer exemption only if there were substantial volunteer involvement and the volunteers were engaged in activities but for which the distribution of the materials would not have been possible.

We believe the appropriate legal test in this area is the “substantial volunteer involvement” standard without an additional “but for” causation requirement. Previous Commission enforcement cases have identified and applied the “substantial volunteer involvement” standard to determine whether specific party committee activities were covered by the volunteer materials exemption. Using a substantial volunteer involvement standard is consistent with Commission precedent and would also allow party committees greater flexibility to use volunteers in various grassroots political activities while also talking advantage of recent technological innovations in the creation and production of public communications. It is also consistent with the purposes of FECA and BCRA – which seek to maximize hard money activities and volunteer involvement. Given that neither FECA nor Commission regulations mandate any particular degree of volunteer involvement that must be present for party committees to operate within the volunteer materials exemption, the Commission should refrain from adopting a more stringent volunteer standard than it has applied in past enforcement cases.

## **II. Safe Harbors**

We recommend that the Commission identify specific volunteer activities that will qualify for the volunteers materials exemption. Specifically, we recommend that the Commission make clear through the creation of safe harbors that the presence of any one of the bullet-point volunteer activities that are identified in the various draft policy statements will be sufficient in an of itself for a party committee to operate within the volunteer materials exemption. The Commission should also make clear that that other kinds of volunteer activities beyond the enumerated safe harbors can also satisfy the volunteer materials exemption, depending upon the circumstances. In order to lend greater clarity – and to encourage additional volunteer involvement in state and local party

committee grassroots political activities – we recommend that the Commission create specific safe harbors, rather than relying on a large number of factors in a totality-of-the-circumstances test, which can be highly subjective, challenging for party committees to discern, and difficult for the Commission to administer.

### **III. Recordkeeping Requirements**

Each draft policy statement notes that a state or local party committee must be able to show that volunteer activity took place which allows the party committee to treat the activity as exempt. Each draft policy statement also outlines certain evidence of volunteer participation that the Commission has considered in past enforcement cases.

However, in any Commission enforcement case, the burden of proof that a violation of the Act has occurred rests with the Commission. Accordingly, we recommend noting in the policy statement that, while the Commission recommends that party committees retain certain documentation regarding exempt volunteer activities, party committees are not required to maintain any additional records to operate within the volunteer materials exemption beyond those records that must otherwise be kept for all disbursements under 11 C.F.R. §§ 102.9 and 104.14.

### **IV. Sunset Provision**

Each draft policy statement notes that the policy statement will remain in effect until July 1, 2011. In order to promote greater stability in this area of the law for both the 2010 midterm elections and the 2012 presidential election, if a sunset provision is included in the policy statement we recommend that the Commission use a sunset date after the 2012 presidential election.

We greatly appreciate the opportunity to provide the Commission with these comments.

Respectfully submitted,

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