

SANDLER, REIFF & YOUNG, P.C.

April 13, 2010

Via E-Mail

Honorable Darlene Harris, Acting Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Volunteer Mail Exemption: Interim Enforcement Policy: Requests for Comment

Dear Madame Secretary:

These comments are submitted in response to the Commission's request for comments on a proposed interim enforcement policy with regard to the scope of the "volunteer mail" exception from the definitions of "contribution" and "expenditure" in the Federal Election Campaign Act of 1971 as amended, 2 U.S.C §§431(8)(B), 431(9)(B). These comments are being submitted by our law firm and reflect our views as practitioners representing more than thirty-five state and local Democratic party committees. Our comments do not, however, necessarily reflect the views of any particular client of our firm.

By undertaking to adopt an enforcement policy with respect to these provisions, the Commission will be rendering a real service to state and local party committees across the nation and will be providing meaningful assistance to these committees in achieving compliance with the law. The lack of clarity in the scope of the exemption has created difficulties for state and local party committees over the years in determining exactly what they must do to avail themselves of the exemption.

As a general principle, we believe that, as the Commission undertakes this effort, it should rely to a very minimal extent, if at all, on audits and enforcement matters that relate back to activities prior to the 2004 election cycle, for two reasons. First, as most of the Drafts of the enforcement policy note, these audits and MURS have been inconsistent and confusing. Second, many of these audits and MURS were decided prior to the significant changes in technology that, as all the Drafts note, have automated activities that were typically performed by volunteers at the time (1979) the volunteer mail exemption was added to the Act, and for some years thereafter.

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All four Drafts are similar in a number of critical respects. In particular, all four of them set out five specific categories of activities which volunteers can perform that will be considered in some way in determining if the requirements of the volunteer exemption have been met. The inclusion of "developing or enhancing a mailing list" by volunteers is especially useful and realistic, because a substantial amount of volunteer activity in the 2008 campaign consisted of calling or contacting voters door to door, and posting information about the voter's candidate or issue preferences back to the voter file in a way that could be used in creating a list for mailing.

Of the four drafts, Drafts A and B appear to offer the best combination of fidelity to the statute with recognition of the current realities of volunteer involvement in state party mailing programs. Drafts A and B provide the Commission flexibility to consider the particular combination of circumstances, but also provide needed clarity by indicating that the requirements will be found to be met if volunteers were substantially involved in one or more of these activities and that the mailing would not have been distributed but for the undertaking of that activity by the volunteers.

In addition, Drafts A and B, represent the policy an "articulation of how the Commission intends to exercise its discretion." While the policy will not be binding on the Commission, this statement makes the policy more meaningful and significant than the statement, for example, in Draft C that the Commission merely "intends to provide guidance to the regulated community....." Further, by setting out a specific time period during which the policy will be in effect, Drafts A and B will enable state and local party committees to understand more clearly that they will be able to make use of this policy in structuring their mail programs at least through the end of the current cycle.

In addition, for the reasons noted above, we do not believe the Commission should use earlier MURS and audits as guidance in this area. Accordingly, the inclusion of summaries of these old cases as an attachment to the policy, as proposed in Draft C, would not be constructive.

We urge the Commission to adopt an interim policy, and suggest that the combination of elements in Draft A or B would afford the most practical guidance to state and local party committees while best reflecting the intention of the law.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "J E Sandler" followed by "N P Reiff".

Joseph E. Sandler
Neil P. Reiff