



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
ACTING STAFF DIRECTOR
ACTING GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: OFFICE OF THE COMMISSION SECRETARY *(signature)*

DATE: November 16, 2010

**SUBJECT: Comment on Draft AO 2010-24
Republican Party of San Diego County**

Transmitted herewith is a timely submitted comment from Neil P. Reiff of Sandler, Reiff & Young, P.C. regarding the above-captioned matter.

Draft Advisory Opinion 2010-24 is on the agenda for Thursday, November 18, 2010.

Attachment

SANDLER, REIFF & YOUNG, P.C.

November 17, 2010

The Honorable Matthew S. Petersen
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments on AOR 2010-24

Dear Chairman Petersen:

We are writing to provide comments regarding Draft Advisory Opinion Request 2010-24. These comments are being submitted by our law firm, not on behalf of any specific client, but based on our experience and perspective as federal election law counsel to more than 35 Democratic State Party committees and numerous local Democratic Party committees. . .

Advisory Opinion Request 2010-24 poses a relatively straight forward question: How should a local party committee pay for services provided by a committee employee who works exclusively on that committee's voter registration program? We believe that none of the drafts accurately reflect the intent of the statutory and regulatory regime governing this issue. Once again, the requestor appears to ask a relatively simple question, how should it pay for the "services" provided by an employee that engages in the oversight of a voter registration program.

We believe the proper analysis should begin with FEC Advisory Opinion 2003-11. In that opinion, the Commission advised that all state and local party committee expenses for salaries, wages and benefits are governed exclusively by 2 U.S.C. § 431(20)(a)(iv). At the time of the opinion, the Commission's regulations provided that such expenses were either paid exclusively with non-federal dollars if the employee spent 25% or less of their time on federal activity and exclusively with federal dollars if the employee's time was spent on federal activities. 11 C.F.R. § 300.33(c)(2).

For purposes of this statute and regulation, the concept of "federal activities" has two different meanings. Section 431(20)(a)(iv) limits its scope to activities "in connection with a federal election." However, section 300.33(c)(2) also includes, erroneously, contrary to the

express language of the statute, and without any explanation, the term "federal election activities." Our firm has pointed out this error, on at least two occasions, but the Commission has left the language in its regulations. See Comments of Association of State Democratic Chairs, May 29, 2002, p. 15, in response to Notice of Proposed Rulemaking, 67 Fed. Reg. 35654 (May 20, 2002) & Comments of Joseph E. Sandler & Neil P. Reiff, June 3, 2005, p. 8, in response to Notice of Proposed Rulemaking, 70 Fed. Reg. 23072 (May 4, 2005).¹

Subsequent to Advisory Opinion 2003-11, the Commission amended its regulations to provide that the salaries, wages and benefits of employees who spend less than 25% of their time on federal activity, but more than zero percent of their time on federal activity, should be paid for on an federal/non-federal ratio as set forth at 11 C.F.R. § 106.7(d)(2). 11 C.F.R. § 106.7(d)(1)(i).

It is within this statutory and regulatory framework that the Commission must analyze this request. Using this framework, based upon the facts provided by the requestor, the Commission must conclude either that (1) the employee may be paid exclusively with non-federal dollars (11 C.F.R. § 106.7(d)(1)(iii); or (2) that the employee's compensation may be allocated between federal and non-federal dollars in accordance with section 106.7(d)(1)(i).

Thus, the threshold question the Commission must address here is whether the amount spent on salaries, wages and benefits for this particular employee exceeds 25% of their time in a given month on activities "in connection with a federal election." The Commission should not count (and need not analyze) whether the employee spends their time on "federal election activities" since this term is not included in 2 U.S.C. § 431(20)(A)(iv).²

Based upon the information provided by the requestor, it appears that the materials prepared and used by the committee do not reference any federal or state candidate, nor does the requestor indicate that the activity is coordinated with any federal or state candidate. Therefore, the Commission must conclude that none of the activity undertaken by the employee is "in connection with a federal election." Based upon the statutory limitation set forth in section 431(20)(A)(iv), the Commission cannot take any activity undertaken in connection with "federal election activities" into account and the Commission should amend its regulations to conform to the language of the statute and its own definition found at 11 C.F.R. § 100.24(b)(4).³

1 The United States Court of Appeals for the District of Columbia Circuit recently struck down Commission regulations that exceeded statutory authority to regulate the administrative, voter registration and get-out-the-vote expenses of non-party political committees. Emily's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009). In this instance, the addition of "federal election activities" likewise exceeds the Commission's authority where Congress gave explicit instructions in its statute as to what types of activities were to be covered in section 431(20)(A)(iv).

2 For purposes of our comments, we assume that the requestor is only asking about salary, wage and benefit costs and are not requesting guidance as to programmatic costs.

3 Contrary to the conclusion in Draft Opinion C, the activities described in the request cannot be considered "in connection with a federal election." The Supreme Court has limited this term to those activities that expressly advocate the election or defeat of a federal candidate. Massachusetts Citizens for Life v. FEC, 479 U.S. 238, 248-250 (1986).

Ultimately, the Commission must apply the rule found at 11 C.F.R. § 106.7(d)(1) (limited only to those activities that are "in connection with a federal election" as explained above) to answer this request. Under that rule, it appears that the committee should be permitted to pay for the salaries, wages and benefits of those employees exclusively with non-federal funds. 11 C.F.R. § 106.7(d)(2)(iii). In the alternative, the Commission could decide that the generic nature of the activity would require it be paid for under 11 C.F.R. § 106.7(d)(2)(i) as a party administrative expense.⁴ However, under no circumstances can the Commission determine that any portion of the employee's salary, wages and benefits, as described in the request, constitute "federal election activity."

It is telling that such a relatively simple request has generated four different draft advisory opinions for consideration by the Commission. This serves to underscore the incoherent regulatory regime that party committees face on a daily basis in carrying out their operations. The Commission must find a common ground in this matter based upon the directives provided to it by Congress and the Courts and also provide party committees with rational guidance that it can utilize in similar situations. It is our experience, not unlike that of the requestor in this matter, that party committees commonly take conservative approaches to these complicated rules and commonly use federally permissible funds in situations where it is likely that it is not required, while the current regulatory scheme permits outside organizations to freely utilize unlimited unregulated funds to pay for their communications and voter contact activities. We urge the Commission to apply the law properly as described above, in responding to this advisory opinion request.

If you would like to discuss the matters addressed in this letter, or any other issues regarding these opinion, feel free to contact our office at (202) 479-1111.

Sincerely yours,



Joseph E. Sandler
Neil P. Reiff

⁴ This result would appear to comport more with the spirit of the Court's directives in Shays v. FEC, 447 F.Supp.2d 28 (D.D.C. 2004), aff'd 414 F.3d 76 (D.C. Cir. 2005). However, if the facts represented by the requestor stated that only non-federal candidates were referenced in the voter-registration activity, the Commission would be compelled to conclude that the employee may be paid exclusively with non-federal funds.