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May 22, 2006

The Honorable Michael E. Toner
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments on AOR 2006-19

Dear Chairman Toner:

We are writing to provide comments regarding the Office of General Counsel's ("OGC") Draft Advisory Opinion 2006-19. These comments are being submitted by our law firm, not on behalf of any specific client, but based on our experience, expertise and views developed as counsel to more than 30 state Democratic Party Committees with respect to federal campaign finance law.

In this request the Commission is presented with the question of whether proposed communications that are being undertaken by a local party committee registered with the Commission are considered "federal election activity" as defined by Commission regulations at 11 C.F.R. § 100.24(a)(3). Specifically, the local party asks whether three communications, two phone scripts, and one mail piece, would be considered "get-out-the-vote" ("GOTV") activity for purposes and within the meaning of the Commission's regulations, 11 C.F.R. § 100.24(a)(3), and consequently regulated as a "Levin" activity, merely because such communications mention the date of the election.

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FACTS

As a general matter, the three communications expressly advocate the election of only non-federal candidates who are running in a general election for local offices on June 6, 2006 in California. On the same day, in addition to these local general elections, there will be primary elections for federal offices, most of which will, in fact, be uncontested. Consequently, the window for Type II "federal election activities" will be in effect during this election. 11 C.F.R. § 100.24(a)(1).

The three communications supplied by the requestor are similar in nature. The two phone scripts provided by the requestor exhort the listener to vote for a specific non-federal candidate and each reference the Election Day. The phone scripts neither make a generic appeal to vote for the Democratic ticket nor do they refer to any federal candidate. Similarly, the proposed mailer exhorts the reader to vote for a slate of non-federal candidates without reference to the Democratic ticket or a federal candidate. The mailing does mention that Election Day is on June 6th. The requestor also asks whether the inclusion of information of when the polls are open and the location of polling places would affect the Commission's analysis.

QUESTION PRESENTED

The question presented in the Advisory Opinion Request is whether the above referenced communications are "get-out-the-vote" activity, and consequently, a "federal election activity" as defined by Commission regulations. 11 C.F.R. § 100.24(a)(3). If the answer is in the affirmative, the requestor would be required to pay for the communications with either 100% federal funds, or with a combination of 21% federal funds and 79% "Levin" funds (non-federal funds raised in increments of \$10,000). 11 C.F.R. § 300.33. These requirements of the Commission's regulations are based on the Bipartisan Campaign Act of 2002 ("BCRA"). 2 U.S.C. § 431(2)(A)(ii) & 441i(b).

The Commission's regulations define "get-out-the-vote" activity as follows:

Get-out-the-vote activity means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity includes, but is not limited to:

- (i) Providing to individual voters information such as the date of the election, the times when polling places are open, and the location of particular polling places; and

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- (ii) Offering to transport or actually transporting voters to the polls.

11 C.F.R. § 100.24(a)(3).

Thus, in order for a campaign activity to be considered a "get-out-the-vote" ("GOTV") activity, it must meet three requirements:

- (1) The activity must be undertaken within the time period prescribed by the Commission's regulations at 11 C.F.R. § 100.24(a)(1);
- (2) The activity must be undertaken by contacting a registered voter by telephone, in person or through other individualized means; *and*
- (3) The activity must assist the voter in engaging in the act of voting.

DRAFT OPINION OF THE OFFICE OF THE GENERAL COUNSEL

The draft opinion offered by the Office of the General Counsel ("OGC") concludes that each of the three communications provided by the requestor is, in fact, "federal election activity" merely because each communication refers to the date of the election, even without providing any other information that would assist the reader or listener in voting. We believe that this conclusion is based on a manifestly incorrect interpretation of the Commission's regulations and an overbroad intrusion into activity that should be regulated exclusively by state campaign finance laws.

With respect to the three-pronged analysis described above, although the phone activity does meet the first two prongs of the analysis, the mere inclusion of the date of the election does not "assist the voter in engaging in the act of voting." With respect to the mailer, while the first prong of the GOTV analysis is met, neither the second nor the third prong of this analysis appears to be met. We will first consider the third prong, and then the second prong of the GOTV analysis.

(1) Prong 3 – Assisting the Voter in the Act of Voting

The General Counsel's draft opinion concludes that the proposed activity constitutes "federal election activity" because "providing the date of the election is one of the GOTV activities, regardless of whether they indicate the times when the polls are open or the voter's particular polling location." OGC Draft, p. 4, Lines 17-20. This conclusion is overbroad, inconsistent with prior pronouncements regarding the scope of the Commission's regulation, and

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would bring most ordinary non-federal activity of party committees, non-federal political committees and associations of state and local candidates within the scope of the Commission's regulations.

As described below, the Commission has taken great care to assure the regulated community that only activities intended to "assist" the voter in the act of voting would be subject to the Commission's definition of get-out-the vote. In both the Explanation and Justification of its regulations, the Commission's regulations, as well as in representations made to the District Court in *McConnell v. FEC*, 251 F. Supp. 176 (D.D.C.), aff'd in part, rev'd in part, 540 U.S. 93 (2003), it is clear that the Commission did not intend that the mere reference to an Election Day, without more, converts a communication expressly advocating the election of non-federal candidate into a "federal election activity."

In the Explanation and Justification of the promulgation of the regulations implementing the definition of "get-out-the vote", the Commission explained:

...the Commission has concluded that it must define GOTV in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity.

...GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law. The Commission understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate.

Explanation and Justification, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg., 49064 at 49067 (July 29, 2002).

More specifically, in the *McConnell* case the Commission assured the District Court that that the mere mention of Election Day in a non-federal communication that does not otherwise constitute "federal election activity" and does not convert a communication into a GOTV activity:

Plaintiffs exaggerate the breadth of the definition of "Federal election activity" in a number of important respects. For example, throughout their briefs, plaintiffs contend that the inclusion as Federal election activity of GOTV keeps them from advertising

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support for ballot initiatives and state candidates if a federal candidate is on the ballot, even if the federal candidate is not mentioned in the advertisement. The FEC's regulations, however, define GOTV to mean "contacting registered voters by telephone, in person, or other individualized means, to assist them in engaging in the act of voting," which includes "[p]roviding to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and the location of particular polling places" and "[o]ffering to transport or actually transporting voters to the polls. [citation omitted]....

Similarly, plaintiffs' contention that a state party committee could not use soft money to pay for the printing and mailing of a flyer that reads "Vote Republican; John Smith for Dogcatcher on November 6," [citation omitted] is entirely incorrect. The printing and mailing of the flyer would not be GOTV activity because it is not "individualized... [see discussion below regarding "individualized contacts"] And *because it only mentions a state candidate, it is not the type of communication that constitutes "Federal election activity" under 2 U.S.C. § 431(20)(A)(iii).*

McConnell v. FEC, No. 02-0582 (D.D.C (CKK, KLH, RJI)), Redacted Opposition Brief of Defendants at 28, 31 (emphasis added and in original) (hereinafter referred to as "Opposition Brief")

Thus, faced with an almost identical fact pattern, the Commission denied to a United States District Court that the mere reference to an election date in a mailing would constitute GOTV. Yet, in the draft AO, the OGC concludes that the inclusion of the election date "is one of the GOTV activities" identified in 11 C.F.R. § 100.24(a)(3)." The OGC relies specifically on the illustration of GOTV set forth in the Commission's regulations at 11 C.F.R. § 100.24(a)(3)(i): "Providing to individual voters information such as the date of the election, the times when polling places are open, *and* the location of particular polling places...." (emphasis added). Based upon the plain language of the regulation, as well as the Commission's representations made to the regulated community (in the E&J) and to the courts, this example must be read conjunctively; it cannot be interpreted to mean that each element, in isolation, without more, could transform a particular communication into GOTV. This is particularly so in the case of the date of the election, which is commonly included in most ordinary campaign communications and is of limited utility in "assisting" the voter in the act of voting.

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Ultimately, the overbroad interpretation contained in the OGC draft will have far reaching implications and will result in a considerable federalization of non-federal campaign communications by legislative caucus committees and state PACs¹. In our comments to the Commission during its recent rulemaking procedure regarding proposed revisions to the GOTV definition, we warned:

In addition to being difficult to interpret and apply, the example set forth in §100.24(a)(3)(i) sweeps too broadly in terms of the activity brought within the scope of the GOTV activity definition. Information about the date of the election, polling places and hours have been standard information to be included in persuasion communications on behalf of candidates for years, and does not necessarily "assist" someone in engaging in the act of voting. Further, now that the Commission will be required by the *Shays* decision to include individualized communications by association of state and local candidates—including, in particular, state legislative caucuses—in the definition of GOTV activity, the definition will result in requiring such legislative caucuses to pay for a broad range of activities with federally-regulated funds. Thus, applying the example of §100.24(a)(3)(i), it would appear that, under the new regulation, state legislative caucuses may have to use federal funds to pay for state-candidate specific communications if those communications merely included information about the day of the election: "Vote for Jones for State Senate on November 3." Obviously, many state legislative caucuses do not have federally permissible funds because they are, by definition, state political committees and therefore raise funds not subject to the prohibitions and limitations of the Federal Election Campaign Act. Thus state legislative caucuses may be barred altogether from referencing Election Day even in state candidate specific communications. This could not be what Congress had intended in enacting BCRA.

Comments of Joseph E. Sandler and Neil P Reiff, p.3, Notice of Proposed Rulemaking, Definition of Federal Election Activity, 70 Fed. Reg. 23068 (May 4, 2005).

Based upon the above, we urge the Commission to reject the OGC Draft's conclusion that merely referencing the date of an election in a communication that otherwise consists solely of express advocacy for non-federal candidates, meets the definition of GOTV as defined by 11 C.F.R. § 100.24(a)(3).

¹ State and local party committees are prohibited from contributing non-federal funds or soliciting funds in the same two-year election cycle for a state PAC that engages in a "federal election activity." 11 C.F.R. § 300.51(a)(3)(iv). Therefore, a contribution by a state or local party committee of non-federal funds to a state PAC would potentially be criminalized if that PAC merely included the election date in communications that expressly advocated the election of state and local candidates.

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(2) Prong 2 – "Contacting registered voters by telephone, in person or by other individualized means"

Although we acknowledge that the two telephone scripts explicitly meet the second prong of the GOTV definition as described above, it appears as though the mailing would not be considered a communication through "individualized means" within the Commission's GOTV definition. The OGC draft concludes that the proposed mailing "is also a form of "individualized means."" OGC Draft, p. 4, Lines 12-14. However, this conclusion is also in contradiction to representations made by the Commission to the United States District Court during the *McConnell v. FEC* litigation:

The FEC's regulations, however, define GOTV to mean "contacting registered voters by telephone, in person, or by other *individualized means*".... This excludes from regulation as GOTV all of a party committee's television or radio advertising for state candidates or ballot initiatives and, apparently, even *mass mailings* and Internet appeals. Only "individualized" assistance must be paid with federal funds (or Levin funds).

Opposition Brief at 28 (emphasis in original).

The Commission further stated that "[t]he printing and mailing of [a] flyer would not be GOTV activity because it is not "individualized" [citation omitted], particularly if it is a "mass mailing" of over 500 pieces [citation omitted]." *Id.* at 31.

Therefore, the Commission should clearly acknowledge that the proposed mailing in this Advisory Opinion Request is not a communication through an "individualized means" and therefore not GOTV activity, regardless of the communication's content.

CONCLUSION

The Commission cannot have it both ways. It cannot represent to a United States District Court that its regulations are designed to have a modest scope and then turn around and tell the regulated community that what the Commission told the Court is simply untrue and that the regulation actually encompasses virtually all phone and mail communications expressly advocating only non-federal candidates because they refer to the date of the election.

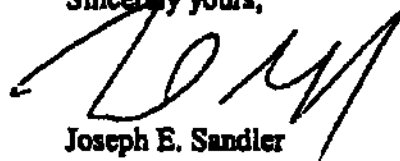
Therefore, the Commission must conclude that the three communications proposed by the requestor do not "assist" the voter merely because they include the date of the election. Furthermore, the Commission must conclude that a "mass mailing" is not an "individualized means" in accordance with its representations to the court.

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Finally, it should be noted that the Commission is scheduled to consider this matter solely on a tally vote, without any consideration whatsoever in an open meeting. We object to such a procedure for this request and we implore that the Commission to consider this request in open session so that the regulated community is provided with guidance as to the Commission's approach in this matter.

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

Sincerely yours,



Joseph E. Sandler
Neil P. Reiff

cc: Robert D. Lenhard, Vice Chair
David M. Mason, Commissioner
Hans A. von Spakovsky, Commissioner
Stephen T. Walther, Commissioner
Ellen L. Weintraub, Commissioner
Mary Dove, Commission Secretary