



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For meeting of July 13, 2017

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther *STW*
Chairman

RE: Proposed Interim Enforcement Policy on "Volunteer Materials"
Exemption

DATE: July 11, 2017

Attached for the July 13, 2017 open meeting agenda is a proposed interim enforcement policy on the "volunteer materials" exemption.

FEDERAL ELECTION COMMISSION

11 CFR Part 100

[NOTICE 2017-XX]

“Volunteer Materials” Exemption

AGENCY: Federal Election Commission

ACTION: Interim Enforcement Policy

SUMMARY: The Commission is issuing an interim enforcement policy regarding the exemption from the definition of “contribution” and “expenditure” for the payment by a State or local committee of a political party of the costs of certain campaign materials used by such committee in connection with volunteer activities on behalf of nominees of such party.

DATES: Effective [upon publication in the Federal Register].

**FOR FURTHER
INFORMATION**

CONTACT: [], Assistant General Counsel, or [], Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

I. Background

The Federal Election Campaign Act, 52 U.S.C. 30101 *et seq.*, as amended (“FECA” or “the Act”) limits the amount that a State or local political party committee may contribute to or make an expenditure on behalf of a federal candidate. See 52 U.S.C. 30116(a)(2)(A), 30116(d). However, the Act exempts certain activities from the definition of “contribution” and “expenditure.” See 52 U.S.C. 30101(8)(B) and (9)(B). As a result of these exemptions, State and local party committees may spend unlimited amounts on costs associated with the production and dissemination of certain campaign materials distributed in connection with volunteer activities on behalf of the nominees of such a party (hereinafter “volunteer materials exemption”). See 52 U.S.C. 30101(8)(B)(ix) and (9)(B)(viii); 11 CFR 100.87 and 100.147. Under the volunteer materials exemption, the term “campaign materials” generally refers to items such as pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs.

To qualify for the volunteer materials exemption, a State or local party committee must satisfy certain conditions: (a) the committee's "payment may not be made for the costs incurred in connection with any broadcasting, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising;" (b) the portion of the cost of the campaign materials allocable to a Federal candidate must be paid with funds subject to the Act's limitations and source prohibitions; (c) the committee's payment may not be made from contributions to the committee that have been designated by the donor for use on behalf a particular Federal candidate; (d) the campaign materials must be "distributed by volunteers" and not by commercial or for-profit operations; (e) the committee must report the payment as a disbursement; and (f) the campaign materials may not be purchased either directly by a national party committee or with funds donated by a national party committee for the purchase of such materials. 11 CFR 100.87 and 100.147.

During the past several election cycles, questions have arisen as to the applicability of the volunteer materials exemption, and specifically the application of the requirement that campaign materials must be "distributed by volunteers" and not by commercial or for-profit operations with respect to mailings distributed through the United States Postal Service.

Thus, the Commission is issuing an interim enforcement policy to provide guidance to the regulated community regarding the Commission's application with respect to mail, in light of technological advancements and other changes to the mail industry that have arisen since the inception of the volunteer materials exemption.

II. "Volunteer Materials" Exemption

A. The History of the Volunteer Materials Exemption

In the 1979 amendments to the Act, which were passed, *inter alia*, to "increas[e] the role of state and local political parties," Congress established an exemption from the definition of "contribution" and "expenditure" for the cost of campaign materials purchased by a State or local party political party committee which support a Federal nominee and which are used by the State or local party committee in connection with volunteer activity. H.R. Rep. No. 422, 96th Cong., 1st Sess. at 9. Congress explained that its purpose in creating this exemption was to "encourage volunteers to work for and with local and State political party organizations." *Id.*

As noted above, however, the statute specifically excludes "direct mail, or similar type[s] of general public communication or political advertising" from the exemption. 52 U.S.C. 30101(8)(B)(ix)(1). The section by section analysis explains that the "term 'direct mail' as used in this provision refers to mailing[s] by commercial vendors or to mailings made from lists which were not developed

by the candidate. *Id.* at 10. In promulgating implementing regulations, the Commission adopted much of the language of the House Report accompanying the 1979 amendments, including the “direct mail” provisions. See generally Amendments to the Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15080 (Mar. 7, 1980).

As a review of prior applications of the exemption reflects, over the past thirty eight years, the procedures for the production, preparation and distribution of mailings have changed and, as a result, the State and local political party committee volunteer programs have also changed with respect to volunteer materials. Some activities that were previously done by volunteers are now automated, thereby making volunteer involvement in those activities unnecessary and obsolete. For example, address labels and postage no longer have to be affixed by hand because that process has been automated by advances in technology.

In fact, as one commenter noted, the postal service discourages hand stamped or labeled mail pieces because they are more difficult to process through sorting machines. The Commission has attempted to take these technological changes into account, rather than rigidly applying outdated standards to volunteer activities. However, the Commission has also insisted that volunteer involvement be “substantial” to qualify for the exemption. New technologies that require no more than token volunteer involvement do not materially advance the exemption’s goal of encouraging volunteer participation in party activities.

The numerous prior Commission audits and enforcement matters regarding volunteer participation in preparing mailers may have rendered the Commission’s interpretation of the Act’s volunteer materials exemption less than clear.¹ Four Commissioners acknowledged this situation by issuing a 2009 Statement of Reasons, following a dismissal of a complaint involving volunteer materials, noting that the “complicated history of the volunteer materials exemption,” and announced their plan to “issue more detailed guidance to clarify the volunteer materials exemption and the circumstances in which it applies.”²

¹ See e.g., Matters Under Review (MUR) 5598 (Swallow for Congress), 5824 and 5825 (Pennsylvania Democratic State Committee), 5837 (Missouri Democratic State Committee), 4851 (Michigan Republican State Committee), 4754 (Republican Party of New Mexico), 4538 (Alabama Republican Party), 4471 (Montana State Democratic Committee), 3248 (New York Democratic Party), 3218 (Blackwell for Congress Committee), 2994 (Wyoming State Democratic Party), 2559 (Oregon Republican Party), 2337 (Texas Republican Congressional Committee), 2288 (Shimizu for Congress). All MURs can be accessed through the Enforcement Query System available on the Commission’s website at <http://www.fec.gov/em/em.shtml>.

² MUR 5598 (John Swallow for Congress, Inc.), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Cynthia Bauerly, Caroline Hunter, and Ellen Weintraub at 4 (Apr. 9, 2010). See also id., Certification dated Feb. 11, 2009 (The Commission voted 4-1 to dismiss MUR 5598. Chairman Steven Walther dissented. Commissioner Donald McGahn was recused.). Statements of Reasons can also be accessed through the Enforcement Query System available on the Commission’s website at <http://www.fec.gov/em/em.shtml>.

B. The Commission's Interpretation of the Volunteer Materials Exemption, as Applied to Mail

1. The funding restrictions:

Because it is an exemption to the Act's definitions of "contribution" and "expenditure," there is no limit to the amount of money that a State or local party committee may spend on qualified volunteer materials. However, there are several applicable funding restrictions. First, the portion of the cost of campaign materials allocable to Federal candidates must be paid with funds subject to the Act's limitations and source prohibitions. 11 CFR 100.87(b); 11 CFR 100.147(b).³ Second, any funds raised by the State or local party committee but designated by a donor to be spent on behalf of a particular Federal candidate or candidates may not be spent on volunteer materials. 11 CFR 100.87(c); 11 CFR 100.147(c). Third, a national party committee may not directly purchase and deliver the materials used by the State or local party committee; and, fourth, similarly, a national party committee may not donate funds specifically earmarked for the purchase of such materials.⁴ 11 CFR 100.87(g); 11 CFR 100.147(g).

2. The standard for a mail program to qualify for the elements of an exempt volunteer materials exemption:

First, payment for costs incurred in connection with "direct mail," is excluded from the exemption. 11 CFR 100.87(a); 11 CFR 100.147(a). Direct mail means "any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists." *Id.* As indicated above, because the procedures for the production, preparation and distribution of mailings have changed over the last thirty eight years, the Commission has permitted the exemption for mailings bearing commercially printed labels and commercial postage stamps so long as the name and address information for the mailing labels was not obtained from commercial mailing lists, and provided that volunteer involvement in distributing the mailing remains substantial.⁵ Accordingly, consistent with prior Commission interpretation of this provision, involvement of a commercial vendor in the production of campaign materials does not automatically disqualify a mailing from the exemption.⁶

³ The costs of qualified campaign materials distributed in conjunction with non-Federal activity may be allocated between a State or local party committee's Federal and non-Federal accounts. 11 CFR 106.7(c).

⁴ See MUR 5575 (Tony Knowles for U.S. Senate, et al.), Statement of Reasons of Vice Chairman Matthew Petersen, and Commissioners Cynthia Bauerly, Caroline Hunter, and Donald McGahn at 4.

⁵ See Statements of Reasons in MURs 5824 and 5825 (Pennsylvania Democratic State Committee) and 5837 (Missouri Democratic State Committee).

⁶ In several prior MURs where the exemption has been found to apply, a commercial vendor has been involved in the production of the materials. See, e.g., MURs 2377 (Texas Republican Congressional Committee), 3281 (Blackwell for Congress), 3248 (New York Democratic Party), 4538 (Alabama Republican Party), 4471 (Montana State Democratic Committee), 4851 (Michigan Republican State Committee), 4754 (Republican Party of New Mexico), 5824 and 5825 (Pennsylvania Democratic State Committee), 5837 (Missouri Democratic State Committee). Moreover, the Commission has never found that the mere involvement of a commercial vendor *per se* rendered a mailing ineligible for the exemption.

Second, materials must be “distributed by volunteers and not by commercial or for-profit operations.” 11 CFR 100.87(d); 11 CFR 100.147(d). The term “distributed” has never been defined explicitly by the Commission. However, in prior enforcement matters, the Commission has interpreted “distributed” by volunteers to mean that there must be “substantial volunteer involvement”⁷ in the distribution of the mailing.

C. Safe Harbor

The Commission has concluded that the following activities are the minimum requirements in order to establish “substantial volunteer involvement” for a mailer to qualify for the Volunteer Materials Exemption. This policy does not impose new legal requirements or standards; rather it creates a safe harbor. If volunteers engage in the activity described below, the costs of the mailer will qualify for the Volunteer Materials exemption.

Volunteers sort each piece of mail by postal code and appropriately bundle the mailers into mail bags or trays as required for delivery by the Post Office, and undertake all activities involved with transporting the mailers and delivering them to the appropriate location at the Post Office.

In addition to the safe harbor provided above, party committees can also qualify for the Volunteer Materials Exemption where there is “substantial volunteer involvement” in a mailing due to volunteer participation. The following activities are examples of the types of activities volunteers may engage in, which, when taken together, provide substantial volunteer involvement:

- Feeding the mailers into label-affixing machines, or affixing address labels or stamping the return address or bulk mail indicia on mailers.
- Loading mailers into trucks for delivery to the Post Office or unloading mailers at the Post Office or other weigh-in location approved by the Post Office (and, if required, signing-in of mailers at the Post Office or other weigh-in location), provided that such activity is required by the Post Office in order for the committee to send the mailer under the applicable postage rate.
- Developing a new mailing list or enhancing a mailing list that was developed by the candidate, such as through door-to-door address collection or confirmation via telephone or other means.

⁷ See Factual and Legal Analysis in MUR 5841 (Arizona Democratic Party) (describing past enforcement matters as examining whether there was “substantial volunteer involvement” in the distribution of the materials); Statement of Reasons in MUR 5837 at 4 (Missouri Democratic State Committee) (observing that in past matters the Commission has emphasized that “substantial volunteer involvement” is required for the exemption to apply); Statement of Reasons in MURs 5824/5825 at 5-6 (Pennsylvania Democratic State Committee) (observing that the exemption applied where there was “substantial amount of volunteer involvement”).

Each of these examples of volunteer activity will be considered by the Commission in its determination of whether or not there has been “substantial volunteer involvement” in order to satisfy the “distribution by volunteers” aspect of the volunteer materials exemption. However, this list is not exhaustive, and other activities may be considered by the Commission in its determination of whether or not a State or local party has satisfied the test. Moreover, no inference will be drawn from the absence of any of these activities.

In considering evidence of volunteer participation, the Commission has previously considered, and will continue to consider various types of evidence respecting the extent to which, if at all, the volunteer materials exemption is applicable. Some of these types of evidence include photographs of the volunteer activity, volunteer sign-in and sign-out sheets (showing time expended), payment of travel or subsistence for, or customary token payments to volunteers, affidavits attesting to the scope of volunteer activities, and the State or local party committee’s written policies regarding volunteer materials.

III. Conclusion

With this interim enforcement policy, the Commission intends to provide guidance to the regulated community regarding the Commission’s current application of the exemption from the definition of “contribution” and “expenditure” for the payment by a State or local committee of a political party of the costs of certain campaign materials used by such committee in connection with volunteer activities on behalf of nominees of such party. This policy is not intended to bind the Commission or any member of the public, or to create or remove any rights or duties, nor is it intended to affect any other aspect of 11 CFR Part 100, the Act, or the Commission’s regulations. See 5 U.S.C. 553(b)(A).

IV. Operative Period of Interim Enforcement Policy

This interim policy will remain in effect until modified by four or more votes of the Commission.

Steven T. Walther
Chairman
Federal Election Commission