FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Concurring Opinion of Commissioner Scott E. Thomas
Re: Advisory Opinion 2003-24

In this opinion, the Commission concluded that the requestor, National Center for Tobacco-Free Kids, could not undertake its planned mailings using contributor names and addresses reported by committees to the Commission. I write this concurrence only to clarify my own analysis in reaching this conclusion.

The underlying statute provides that "any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes . . . ." 2 U.S.C. § 438(a)(4). I believe the proposed use of these names and addresses to generate mailings to influence the tobacco industry and influence legislation can plausibly be construed a use "for commercial purposes." In my mind, there is a distinction between using such information to send mail urging recipients to support a political candidate or party and using such information to send mail urging the public to change the practices of an industry. The latter can be considered 'commercial' in nature, whereas the former cannot. Therefore, I would not read § 438(a)(4) to preclude the use of names on FEC filings to issue purely campaign-related mailings. This is consistent with the position I took in connection with Citizens for a Sound Economy's request to use FEC filings to generate mailings for its grassroots lobbying efforts. *See* Minutes of FEC Meeting of April 2, 1992, pp. 3-5 (reflecting 3-3 vote, myself against, on OGC draft that would have permitted proposed use).

Section 438(a)(4) is not the only governmental attempt to restrict the harassment of individuals. The FTC and FCC are grappling with implementation of the Telephone Consumer Protection Act of 1991 (TCPA) which contains 'do not call' and 'do not fax' provisions. It is worth noting that in those areas, Congress has been a little clearer about what it means when regulating 'commercial' messages. The FTC's 'do not call' regulations, for example, treat as "abusive" acts or practices certain calls "made by or on behalf of [a] seller whose goods or services are being offered" and "to induce the purchase of goods or services." *Telemarketing Sales Rule; Final Rule*, 68 Fed. Reg. 4669, 4672 (Jan. 29, 2003 (16 CFR 310.4(b)(1)(iii)(A) and (B)). The FCC's 'do not call' regulations specifically exempt prerecorded voice calls for a "commercial purpose" if they do not include an "unsolicited advertisement" or constitute a "telephone solicitation," and the latter terms are defined, respectively, as "advertising the commercial availability or quality of any property, goods, or services . . ." and a "message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services . . . ." *Rules and Regulations Implementing [TCPA]; Final*

Rule, 68 Fed. Reg. 44177, 44179 (Jul. 25, 2003) (47 CFR 64.1200(a)(2)(iii), (f)(9) and (10). The FCC's 'do not fax' regulations restrict an "unsolicited advertisement" which is defined as just described. *Id.* (47 CFR 64.1200(a)(3), (f)(10)).

The FEC recently submitted a comment to the FCC urging it to clarify in its implementation of the 'do not fax' rules that political campaign advocacy, as well as political campaign solicitation and grassroots lobbying messages, ought not be regulated. Letter of FEC General Counsel Lawrence W. Norton to FCC, dated October 14, 2003. A keen observer would note some inconsistency in treating grassroots lobbying messages as 'noncommercial' in the 'do not fax' context, but as 'commercial' in the § 438(a)(4) context. I would have preferred to limit the comment to the FCC to a suggestion that political campaign advocacy be exempted from the 'do not fax' rule. In my view, the FCC is free to regulate at least some lobbying messages differently because it plausibly could conclude they advertise the "commercial availability or quality of any property, goods, or services." In any event, the fact that the FTC and FCC 'anti-harassment' provisions seem not to restrain messages for pure political campaign advocacy supports my assessment that the FEC should not interpret § 438(a)(4) to restrict the use of FEC filings for similar purposes.[1]

On a different point, at the meeting I expressed some concern about the reference in the approved opinion to "the legitimate interests of the owners of the mailing lists used to solicit the political contributions that resulted in the disclosure of the individuals' information in the FEC reports." I simply prefer relying on the interests of the individuals whose names must be disclosed by reporting committees. The legislative history cited in the opinion makes clear that this was the interest Congress had in mind when approving § 438(a)(4). I acknowledge that the FEC's attorneys successfully defended the constitutionality of § 438(a)(4) before the D.C. Circuit by arguing, among other things, that it protected the property interests of the list owners. *FEC v. International Funding Institute, Inc.*, 969 F.2d 1110, 1116-1118 (D.C. Cir. 1992). I am more comfortable relying on the expressed rationale of Congress, nonetheless.[2]

10/31/03
Date

Scott E. Thomas
Commissioner

[1] If I were writing on a blank slate, I would take a consistent approach across-the-board with § 438(a)(4), the 'do not call' rule, and the 'do not fax' rule. I would either say no contact can be made, regardless of whether it relates to solicitation, advertising, political campaign advocacy, or grassroots lobbying, *or* simply strike from the books all the 'anti-harassment' rules. My guess is that millions of Americans would prefer the former approach.

[2] Interestingly, the D.C. Circuit's opinion offers a construction of § 438(a)(4) suggesting that names on file at the FEC can be used freely "to seek popular support for a particular policy, or to solicit signatures on a petition, or to urge recipients not to contribute to a rival cause. . . ." 969 F.2d at 114, 115. If the Commission were to give meaning to this construction, the holding of the advisory opinion perhaps should have been much different.