



**Republican  
National  
Committee**

Counsel's Office

April 13, 2010

**VIA ELECTRONIC MAIL**

Ms. Darlene Harris  
Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Comments on Alternative Draft Policies on the Volunteer Materials  
Exemption**

Dear Ms. Harris:

The Republican National Committee (“RNC”) submits the following comments on the alternative draft Policies on the Volunteer Materials Exemption codified at 2 U.S.C. §§ 431(8)(B) and (9)(B) and 11 C.F.R. §§ 100.87 and 100.147. The Commission’s four draft policy proposals seek to clarify the Commission’s enforcement approach to the volunteer materials exemption, specifically with regard to volunteer mail. We commend the Commission for acknowledging the need to provide clearer guidance in this area of the law, especially in light of state and local parties’ implementation of new technologies in the production, preparation and distribution of such volunteer mailings. We also laud the Commission for addressing these policies in view of its own concession that the volunteer materials exemption has a “complicated history” with a “patchwork of guidance that might not be entirely consistent.” Draft D at 3.

As the governing body of the Republican Party, the RNC works closely with state, district and local party committees throughout every election cycle to support candidates for local, state and federal office. Every Republican state party chairman is a member of the RNC, and the state and local party committees form the backbone of our collective efforts to elect Republican candidates at every level of government. While the alternative draft policies on the volunteer materials exemption bear directly on the RNC, which of course is not eligible for the exemption, your interpretation of the exemption

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will have significant consequences for Republican state parties and their affiliated local party committees, and we write to represent their interests – and the interests of the volunteers who form the lifeblood of these grassroots organizations

We believe there are persuasive and valuable aspects of each of the Commission's four drafts, but with simple, consistent and straightforward guidance as an end goal, we support the Commission's "interpretation" of the volunteer mail exemption set forth in Draft D. That being said, we are not wedded so much to any particular draft as to some core principles to which we believe should guide the Commission in determining which policy to adopt.

### **Guiding Principles**

***The Commission's primary goals in drafting this policy must be clarity and consistency.***

As the Commission notes, the primary purpose of this policy pronouncement is to elucidate an area of law that has experienced a "complicated history," resulting in "guidance that might not be entirely consistent," since Congress passed the amendments to the Federal Election Campaign Act (the "Act") in 1979. One needs to look no further than the Commission's recent decision in MUR 5598 (Swallow for Congress) to conclude that the law and the Commission's guidance concerning the volunteer mail exemption is hazy at best. Accordingly, it is in the Commission's best interests to fashion an enforcement policy that is clear, simple, and devoid of ambiguities or vagueness.

Throughout the cloudy history of the volunteer materials exemption, the Commission's treatment of various activities falling under the exemption and the tests it has used in making those determinations have been far from consistent. This inconsistency is clearly exemplified in the matters cited in Draft C's helpful "Attachment A." The tests the Commission has used since 1990 have ranged anywhere from determining "significant volunteer participation" or "sufficient involvement" to "substantial volunteer involvement" and modified versions of the "but for" test. The only thing consistent about these interpretations is that neither we nor – and more importantly – the state and local parties we represent – know for sure what any of them mean.

Such variation in tests to establish exempt activity can only serve to confuse the regulated community as to what is and what is not permissible under the law. The Commission should use this opportunity to create uniformity and consistency in its treatment of volunteer activities falling under the volunteer mail exemption.

***Lack of clarity will deter grassroots political participation and contravene Congressional intent.***

In drafting the volunteer materials exemption in 1979, Congress' purpose was to "encourage volunteers to work for and with local and state political party organizations."

H.R. Rep. No. 422, 96th Cong., 1st Sess. at 9. Volunteers do the bulk of the work for our state and local parties and at the grassroots levels throughout the country, as they play a pivotal role in the production and distribution of campaign materials and mailers. If the Commission's guidance regarding a major component of that participation is vague or ambiguous, state and local parties will be deterred from having volunteers get involved in the first place. Such a consequence is in direct contravention to the explicit intent of Congress when it drafted this exemption. Although it can be said that technology has changed the way in which state and local parties do business and get their mail out, it surely has not eliminated the need for meaningful volunteer participation altogether, and it most certainly has not changed the language and intent of the statute, as written in 1979. We urge the Commission to consider the plain language of the statute and Congress' intent in crafting it when adopting a final enforcement policy.

The best way to do that is make clear exactly what activity qualifies for the volunteer exemption through a non-exhaustive list of examples. We have never been comfortable advising our state and local parties on what qualifies as "substantial" or "significant" involvement of volunteers unless the Commission has explicitly said in the context of an enforcement procedure that a certain kind of activity is covered. State and local parties simply cannot be guided by a subjective standard because, in practice, that is no standard at all. And the lack of a meaningful standard will lead to the lack of volunteer participation in the political process.

***Lack of clarity and consistency also will invite an influx of meritless complaints.***

As the Commission knows from experience, unclear or confusing guidance not only deters political participation, but it also leads to an increased volume of complaints. Naturally, if a particular regulation or Commission policy lacks clarity, consistency and uniform treatment in enforcement matters, it is incentive for the political opponent of an alleged violator of that regulation to file a complaint and see what happens.

In the enforcement context, state and local parties are primarily concerned about three things when dealing with the Commission: having a complaint filed against them, being investigated, and ultimately, having some sort of liability. The last of these is often the least worrisome, as liability is virtually always assessed long-after an election. However, the first two concerns can often become politically toxic during the last few months of a campaign. For example, a newspaper headline such as, "Local Party Allegedly Uses Illegal Soft Money on John Doe Federal Candidate's Mailer!" is never a welcome read in the morning paper for the local party chair or the federal candidate. In other words, party committees refrain from engaging in allowable activity out of concern that a subjective enforcement standard will result in a politically damaging complaint, even if the complaint lacks merit. Accordingly, we urge the Commission to craft a policy interpretation that does not add unnecessarily to its workload with an influx of meritless complaints.

***A sunset provision would be counterproductive.***

The Commission's volunteer mail exemption policy should not have an expiration date. We see no reason for the Commission to ultimately adopt a policy on volunteer mail with four or more Commission votes, and then require that very same policy to be re-voted on only a little over a year later. As a practical matter, many of our state and local parties will fashion their volunteer mail practices around the Commission's current policy adoption. Those parties will likely disseminate instructions and literature on how their volunteer mail programs should function and other logistical information. They will also provide training in this area of the law. It seems wasteful for our state parties to set those strategies and instructions in place if the Commission plans on changing its policy just a year down the road. We, therefore support a volunteer mail policy that does not include any sunset.

**The Drafts**

***We urge the Commission to adopt Draft D.***

Alternative Draft Policy D presents the clearest, most consistent approach to the volunteer mail exemption. Draft D offers an accurate and inclusive description of activities that will "satisfy the volunteer participation 'but for' standard for 'distributed' by volunteers" in satisfaction of 11 C.F.R. § 100.87(d). Moreover, Draft D's language that "each of these examples of volunteer activity is sufficient by itself to satisfy the 'distribution by volunteers' aspect of the volunteer materials exemption," will provide the regulated community an easily navigable list of activities which will, in and of themselves, constitute per se volunteer mail exemptions under the Act. We like to consider this a list of avenues of participation in the grassroots political process, which is the reason Congress carved out this exemption in the first place—to promote participation. This is exactly the type of clarity state and local parties deserve and desire.

Draft D explicitly pronounces that the "but for" test is now the correct standard of interpretation in determining whether mail has been "distributed" by volunteers. Moreover, Draft D is favorable in that it omits the "substantial volunteer involvement" component of the "but for" test. The RNC asserts that it is redundant to say, as it does in Drafts A and B, that in order to qualify for the exemption, a mailing must have "substantial volunteer involvement" but for which the distribution of the mailing would not have occurred." Draft A at 5. Rather, we contend that there will always be "substantial volunteer involvement" if the activities to produce a piece of volunteer mail pass the "but for" test. We therefore commend Draft D for omitting this language.

Draft D also conforms to our above-listed guiding principle of not including a sunset deadline, which is important to our state and local parties for purposes of long-term strategizing, as well as training volunteers to abide by the Commission's ultimate adopted policy.

***Drafts A and B do not provide enough clarity, but have constructive aspects.***

Both Drafts A and B have practical characteristics, but as a whole, they both fall short of the clarity and consistency that the Commission's ultimate policy adoption deserves. Practically, the language in each draft is nearly verbatim. The only significant difference comes in reference to the volunteer activities they list. Draft A states that, "[t]he Commission recognizes certain activities, any of which may be used to show that there has been 'substantial volunteer involvement' in the process of preparation and distribution of a mailing 'but for' which, the distribution of the materials would not have been possible," (Draft A at 5) whereas Draft B states that "[t]he Commission recognizes certain activities which will be considered by the Commission in its determination of whether or not there has been 'substantial volunteer involvement' in the process of preparation and distribution of a mailing 'but for' which, the distribution of the materials would not have been possible." Draft B at 5. We believe the language "may be used" in Draft A versus the language "will be considered" in Draft B is significant. We contend that Draft B's language will cause state and local parties to believe that their volunteers must participate in these activities in order to qualify for the exemption because those activities "will be considered." In light of the countless activities in which state and local parties currently partake in their volunteer mail programs, requiring participation in an explicitly stated list is not the message the Commission should be sending.

Secondly, for reasons mentioned above in our section supporting Draft D, we believe the "substantial volunteer involvement" language in Drafts A and B is an unnecessary and redundant addition to the test to determine whether a mailing has been "distributed" by volunteers in accordance with 11 C.F.R. 100.87(d).

Third, both Drafts A and B include a sunset provision where the Commission's volunteer mail policy adoption would last only until July, 2011. For reasons also stated above, we assert that such a provision is counterproductive and inefficient in light of the volunteer mail strategies and training guidelines state and local parties are likely to put in place as a result of this policy adoption.

Despite our concerns, however, we commend Draft A and B for at least providing a greater degree of clarity to the volunteer mail policy than what currently exists. Regrettably, we cannot say the same for the policy set forth in Draft C.

***Draft C will only add to the confusion and disorder to the volunteer mail exemption puzzle.***

Draft C fails to set forth any sense of clarity on this matter and merely flies in the face of the intent of the Commission to provide clear guidance on the volunteer materials exemption.

Draft C maintains that the "substantial volunteer involvement" test continues to be utilized in determining whether or not the exemption applies. However, this Draft

fails outright to provide any guidance for state, district or local parties and even goes so far as to state that the list of activities used to determine whether there has been "substantial volunteer involvement" is "not exhaustive...and other activities may also be considered." (Draft C at 5). As previously stated, the RNC asserts that this language is redundant and unnecessary and does nothing more than to muddy the water of the exemption.

Furthermore, Draft C contains numerous examples without specific guidelines and thus provides no additional clarity. While the attachment included in Draft C cites to multitudinous Matters Under Review, it does not so much as offer a suggestion much less guidance on applying the standards.

In closing, we thank the Commission for the opportunity to comment, and we encourage the adoption of an interpretation that encourages rather than chokes off volunteer opportunities.

Sincerely,

A handwritten signature in black ink, appearing to read "J.R. Phillippe Jr.", with a long horizontal flourish extending to the right.

John R. Phillippe Jr.  
Chief Counsel