



Ariel Moyer <Ariel@rpum.com> on 09/25/2003 05:43:13 PM

To: "mailinglists@fec.gov" <mailinglists@fec.gov>  
cc:

Subject: mailinglist final.doc

Attached are connects on Rulemaking on Mailing List of Political Candidates.

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September 25, 2003

Ms. Mia T. Dinh  
Acting Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: Notice of Proposed Rulemaking 2003-17

Dear Ms. Dinh:

We are submitting these comments in response to the above cited Notice of Proposed Rulemaking on Mailing Lists of Political Candidates. These comments are submitted by the undersigned attorneys at Ryan, Phillips, Utrecht and MacKinnon and not on behalf of any of the Firm's clients.

At the outset, it is important to note that lists developed or acquired by political campaigns are unique lists whose value is often subject to sharp variations, depending on media coverage of a particular issue, event, or candidate. Also, political lists usually include a broad spectrum of individuals from many walks of life and all income levels. They are not like commercial lists which provide classifications whose value is based on potential economic benefit, such as all doctors in an area, or all window manufacturer representatives in an area. Rather, political committee mailing lists include adherents to specific causes or political philosophy. Thus, using standard commercial techniques to value a political list is not an appropriate solution for determining whether a contribution has occurred.

Valuation of List

The Commission is asking for comments on a proposed regulation allowing political committees to rent or sell their mailing lists, as well as how such lists should be valued for determining whether the sale or rental is a transaction for equal value, or results in a prohibited contribution. The Commission proposes relying on the SRDS Direct Marketing List Source for establishing the value of political lists, or an

independent appraiser. This method may be appropriate for establishing the value of a commercial list, but should not be used to determine the value of a political committee list. In fact, it may not be possible to find an independent entity qualified to appraise the value of a political committee list.

Rather, the Commission in its Regulations should use a reasonable fair market value standard for establishing the usual and normal charge of political committee lists. The value of a list should be the amount that potential buyers are willing to pay for it at the time of sale or rental. Many political lists are sold through a list broker, who advises committees on what price can be expected for a particular list. While the Commission should not require committees to rent or sell lists only through such a broker, the valuation of a list should be based on what amount a list broker would be able to obtain for a list.

#### Establishing Value Prior to Rental or Sale

The Commission's proposed regulations would require that the usual and normal charge of a mailing list be established prior to the rental or sale. If a political committee fails to do so, regardless of the fee paid, the condition will not be met and the proceeds of the sale will be treated as a contribution. This is nonsensical approach. If a political committee charges the usual and normal fee to rent or sell its list, no contribution should result, regardless of when the committee calculated the fee. The Commission would lack legal authority to charge a committee with violating the contribution limits when it received the usual and normal fee, but simply did not calculate it in advance. Any violation of the contribution limits should be based on the actual amount paid, not the timing of the calculation of what should be paid.

#### Burden of Establishing Fair Market Value

The Commission should not specify who has the burden of establishing the usual and normal rental charge for a list. Rather, the Commission should specify that political committees must rent mailing lists at the usual and normal charge in order to avoid a contribution from the buyer or seller of a list. At the end of the process, the issue should be was the sale or rental price at the fair market value.

#### Additional Services

It is not necessary for the Commission to list additional services, such as providing labels, that a committee may provide. The requirement for a committee to charge fair market value for what it provides to the renter or buyer is sufficient, as that charge would include any additional services.

#### Arm's Length Transaction

The Commission should not require that lists be sold or rented only in *bona fide* arm's length transactions in order to avoid a presumption that the exchange was not at fair market value. The Commission should look only at whether amount charged was at

fair market value – the relationship between the parties should not matter. Similarly, rental or sale of lists should not be limited between committees of the same candidate, committees of the same party, or a candidate’s committee and that candidate’s leadership PAC. Exchanges of lists should be accorded the same treatment as the sale or rental of lists.

#### Terminating and Ongoing Committees

The Commission should not distinguish between terminating and ongoing committees. Both should be permitted to sell lists at the fair market value.

#### Amount of Contribution

The Commission seeks comment on how to value a contribution which results from a sale or rental at more than fair market value. The Commission should value it as the amount by which the payment exceeds fair market value, not at the entire amount paid for the list.

#### Candidate Use of Mailing List

The Commission seeks comment on a proposed rule that would ban candidate conversion of lists to personal use and bar a candidate from retaining proceeds of the sale or rental of a list from an authorized committee. The Commission also seeks comment on whether a candidate should be able to purchase the list of his or her principal campaign committee. It is our view that both the candidate and his or her authorized committees share ownership of any lists of the authorized committees. Hence, both the candidate and his or her authorized committees should have full access to any mailing list of those committees, and each should be considered to have a complete ownership interest in such list. Lists of authorized committees are usually started from a candidate’s personal list and thereafter enhanced through the candidate’s own efforts. No limitations should be placed on the candidate’s use of such a list.

#### NOCO/NOQCE Statements

The Commission is proposing a change in rules governing publicly financed candidates and the treatment of their mailing lists for NOCO/NOQCE purposes. It is our view that, under no circumstances, should the Commission make any changes to current regulations governing candidates participating in this election cycle. Any changes at this time would be completely disruptive and unfair.

As to the substance of the proposal, the Commission should not require publicly financed committees to include mailing lists as an asset on their NOCO/NOQCE statements. Many of these lists will have little value, particularly if the candidate loses. Moreover, if the list is sold or rented, it would in most cases merely provide funds for a candidate to pay off debts, and therefore have a positive effect. Including mailing lists as an asset on NOCO/NOQCE statements would undoubtedly consume hours of audit time necessary for determining the value of such lists. Moreover, there are situations in which

other candidates may want to purchase the list of a former candidate and the candidate may not know this in advance. The candidate whose list is sought is barred from donating that list, so the only avenue for providing it to the other candidate would be a sale, and this should not be prohibited. In addition, transfers of list between authorized committees of the same candidate should never be limited. Hence, the transfer of a mailing list from a publicly financed primary candidate to that candidate's general election committee or GELAC should not result in a contribution or be prohibited in any way.

Sincerely,

Lyn Utrecht  
Eric Kleinfeld  
James Lamb  
Pat Fiori