



**SBA LIST CANDIDATE FUND**  
VOTER FUND FOR 240-OFF-WORK EMPLOYEES

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July 20, 2001

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Antoinette Kitchen  
Senior Report Analyst  
Reports Analysis Division  
Federal Election Commission  
999 E Street  
Washington, DC 20463

Dear Antoinette,

The enclosed letter from our attorney is in response to your letter dated July 3 in regards to the 30 Day Post-General Report (10/19/00-11/27/00) and the Year End Report (11/28/00-12/31/00).

This is in reference to the SBA List Candidate Fund doing Independent Expenditures.

Please feel free to contact Rich Coleson or me if you have any questions.

Sincerely,

Jennifer Bingham  
Executive Director and Assistant Treasurer

Enclosures

JAMES BOFF, JR.<sup>1</sup>

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July 19, 2001

Antoinette Kitchen, Senior Reports Analyst  
Reports Analysis Division  
Federal Election Commission  
Washington, DC 20463

Re: Susan B. Anthony List Candidate Fund, ID #C00332296

Dear Ms. Kitchen:

We represent the above-referenced Fund and write on its behalf in response to two letters sent by you to the Susan B. Anthony List Candidate Fund (the "Fund"), both dated July 3, 2001, with the following reference lines:

- "30 Day Post-General Report (10/19/00-11/27/00)" (the "30 Day Letter")
- "Year End Report (11/28/00-12/31/00)" (the "Year End Letter").

Thank you for advising Richard Coleson by phone on July 15, 2001, that the 15-day response period mentioned in the letters does not include weekends, so that by your calculation this response is due on July 23, 2001.

### *Issue*

Your letters (1) note that the Fund has made both independent expenditures and in-kind contributions with respect to certain candidates, (2) suggest that "[t]he coordination involved in making an in-kind contribution to a candidate may preclude [the Fund] from making an independent expenditure in support of the same candidate," and (3) request amendment of independent expenditures to in-kind contributions or additional clarifying information.

Your letters raise other issues that will be dealt with separately by the Fund. The present letter will clarify the relevant legal standards and demonstrate how the Fund has correctly reported its activity with respect to independent expenditures and in-kind contributions.

### *Law*

The federal courts have recognized the threat posed by vague and overreaching efforts to classify political communications as "coordinated" expenditures subject to regulation as contributions, and therefore allow such regulation only in the presence of substantial coordina-

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tion and prearrangement.<sup>1</sup> Current law provides that "coordination" with a candidate means that the citizen group has an actual prior communication about a specific expenditure for a specific project that results in the expenditure being under the control of a candidate or being based on information provided by the candidate about the candidate's plans or needs. The District of Columbia District Court articulated the rule as follows:

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

*FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

Coordination may not be presumed on the basis of some relationship. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 617-18 (1996), the Supreme Court emphatically rejected the FEC's position that a political party expenditure may be presumed coordinated with the party's federal candidate. The Court declared the proper test to be whether the specific expenditure was in fact the subject of communication between those making the expenditure and the candidate. ("We therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution" because, the Court said, "the summary judgment record shows no actual coordination as a matter of fact.")

The District of Columbia District Court's test, quoted above, has become the pattern for the FEC's newest regulation governing coordination:

(b) Treatment of expenditures for general public political communications as expenditures and contributions. Any expenditure for general public political

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<sup>1</sup>See, e.g., *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617-18 (1996); *NGPAC*, 470 U.S. at 498; *Iowa Right To Life Comm., Inc. v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999); *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997); *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490-91 (D. Vt. 2000); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999); *FEC v. Public Citizen*, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999); *Republican Party of Minn. v. Pauly*, 63 F. Supp. 2d 1008, 1015 (D. Minn. 1999); *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993), *rev'd on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 518 U.S. 604 (1996).

communication that includes a clearly identified candidate and is coordinated with that candidate, an opposing candidate or a party committee supporting or opposing that candidate is both an expenditure under 11 CFR 100.8(a) and an in-kind contribution under 11 CFR 100.7(a)(1)(iii).

(c) Coordination with candidates and party committees. An expenditure for a general public political communication is considered to be coordinated with a candidate or party committee if the communication—

(1) Is paid for by any person other than the candidate, the candidate's authorized committee, or a party committee, and

(2) Is created, produced or distributed—

(i) At the request or suggestion of the candidate, the candidate's authorized committee, a party committee, or the agent of any of the foregoing;

(ii) After the candidate or the candidate's agent, or a party committee or its agent, has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication; or

(iii) After substantial discussion or negotiation between the creator, producer or distributor of the communication, or the person paying for the communication, and the candidate, the candidate's authorized committee, a party committee, or the agent of such candidate or committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement. Substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.

(d) Exception. A candidate's or political party's response to an inquiry regarding the candidate's or party's position on legislative or public policy issues does not alone make the communication coordinated.

(e) Definitions. For purposes of this section:

(1) General public political communications include those made through a broadcasting station (including a cable television operator), newspaper, magazine, outdoor advertising facility, mailing or any electronic medium, including the Internet or on a web site, with an intended audience of over one hundred people.

(2) Clearly identified has the same meaning as set forth in 11 CFR 100.17.

(3) Agent has the same meaning as set forth in 11 CFR 109.1(b)(5).

11 C.F.R. § 100.23 (effective Dec. 6, 2000).

### ***Facts***

The Fund identifies and endorses viable, pro-life candidates (especially women), then solicits contributions for the candidates from Fund members and bundles and delivers the contributions to the candidates. This is typical of how a number of similar organizations operate,

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e.g., EMILY's List (see <[www.emilyslist.org](http://www.emilyslist.org)>, endorsing and raising contributions for candidates that favor abortion rights) and The Wish List (see <[www.thewishlist.org](http://www.thewishlist.org)> endorsing and raising contributions for Republican candidates favoring abortion rights).

To identify candidates as strongly pro-life, Fund staff members research likely candidates. Then a representative of the Fund interviews likely candidates in person or by telephone and requests a packet of campaign material (e.g., position papers).

Candidates found to be both viable and ideologically compatible are endorsed. After the initial interview, there is little or no further personal contact between the Fund and endorsed candidates. Candidates are requested to add the Fund to their mailing lists to receive press releases and campaign update reports, and the Fund sends collected contributions to the campaigns.

The Fund spends money to print and mail solicitations to its members for contributions to endorsed candidates. These expenditures are listed on Schedule B forms attached to FEC reports as in-kind contributions to the candidates. As noted in your letters, such in-kind contributions were made to the six candidates you list (as well as others): Jennifer Carroll, Melissa Hart, Mike Rogers, Dennis Rehberg, Mike Ferguson, and Ric Keller. The reports filed also indicate that monetary contributions were made to these and other candidates, which were funds received from members as a result of these solicitations for the Fund. The last such solicitation requesting "bundled" checks was mailed to members in early September.

In addition to these in-kind and monetary contributions, the Fund also made independent expenditures for get-out-the-vote mailings and radio advertisements. You have attached to your letters pages from filed reports that indicate such independent expenditures on behalf of the same six candidates for whom in-kind contributions were made.

These expenditures were not discussed with any candidate or his or her agents (collectively "candidate"), were not based on any request or suggestion by a candidate that they be made, and were not based on any information about campaign plans or wishes received from a candidate. They were listed as independent expenditures in the reports because they were not coordinated with the candidates in any way under the measures of coordination set out in the *Law* section above, as more fully explained in the following *Application* section.

#### ***Application***

As noted above, the United States Supreme Court in *Colorado Republican* held that coordination may not be presumed. It must be actual. Therefore, the mere fact that in-kind contributions were made does not foreclose independent expenditures, as you acknowledge in your letters by requesting the present explanation. See FEC Advisory Opinion 1996-1.

For an independent expenditure to be considered coordinated, there must first be communication between the Fund and a candidate concerning that particular expenditure. In this

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case, there was no discussion at all of the independent expenditures by representatives of the Fund with any candidate.

Even where there is discussion about the particular independent expenditure, which there was not here, the discussion would have to meet the legal guidelines for coordination. Applying the facts to the law indicates that there is no coordination in this case because at the initial meeting with candidates described above and at any subsequent meetings none of the criteria for coordination were met:

- No candidate requested or suggested that the independent expenditure communications be made;
- No candidate exercised any control over the independent expenditure communications;
- No candidate had any substantial discussion or negotiation with the Fund over any communication's contents, timing, location, mode, intended audience, or volume;
- There was no substantial discussion or negotiation from which any candidate and the Fund emerged as partners or joint venturers in the independent expenditure communication;
- The independent expenditure communications were not based on any information from the candidates about campaign plans, strategy, or needs derived from communications between the Fund and any candidate; and
- The communications between the Fund and the candidates to establish the candidates' positions on the issues fall precisely within the exception established at 11 C.F.R. § 100.23(d).

**Conclusion**

The independent expenditures were appropriately reported as such.

If we can be of any further assistance, please contact Richard Coleson.

Sincerely,

BOPP, COLESON & BOSTROM



James Bopp, Jr.  
Richard E. Coleson

Federal Election Commission

**ENVELOPE REPLACEMENT PAGE  
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