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2008 SEP 22 10:31 AM

... candidates ...
... primary election ...
... candidates ...
... and the candidate shall be ...

August 28, 2008

Robin Kelly
Federal Election Commission
Senior Campaign Finance Analyst
999 E Street, NW
Washington, DC 20463

Dear Ms. Kelly,

This letter is in response to your Request For Additional Information, dated July 29, 2008, regarding the submission on May 23, 2008, of a certain Form 9 disclosure by National Taxpayers Union. You ask that the National Taxpayers Union "clarify the circumstances regarding the untimely disclosure of the electioneering communication in question."

After consulting with counsel after the broadcast has aired, National Taxpayers Union filed the Form 9 disclosure that is the subject of the Request For Additional Information out of an abundance of caution. National Taxpayers Union did not then, and does not now, believe it was legally required to file a Form 9 for broadcast communications referencing Senator Johnson within 30 days of South Dakota's June 3 primary election.

National Taxpayers Union purchased air time to broadcast a radio communication titled "South Dakotans Know" from May 9 through May 16, 2008. This communication referenced Senator Tim Johnson.

South Dakota held its primary election on June 3, 2008. Senator Johnson ran unopposed, and in fact, did not appear on the primary election ballot. See <http://www.sd.gov/elections/SNDSCERS/results/resultsSW.aspx?type=sw>. Given this fact, National Taxpayers Union does not believe that it was required to file Form 9, as there was no "election" with respect to Senator Johnson on June 3.

Under FEC regulations, a "primary election" is "an election which is held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to Federal office in a subsequent election." 11 C.F.R. § 100.2(e)(1) (emphasis added).

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Under South Dakota law,

"A candidate for nomination to an office, or election to a party office, having no opposing candidate within his party, shall automatically become the nominee of his party or elected party official for said office, and his name shall not be printed on the primary election ballot. If there are no opposing candidates for nomination or election of either state or county candidates in any county, no primary election shall be held in that county, and the candidates shall be automatically nominated or elected."

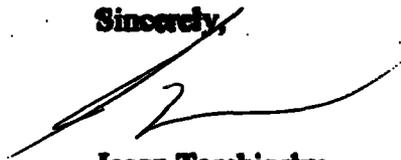
S.D. Codified Laws § 12-6-9. Upon the passing of the deadline for eligibility to appear on the primary ballot, Senator Johnson "automatically bec[a]me the nominee." He was not "elected" on June 3. Rather, he automatically became the nominee (and effectively won the June 3 election) on March 25, 2008, which was the last day that nominating petitions for the primary election ballot could be filed. See <http://www.sdsos.gov/electionsvoteregistration/2008CALENDAR.pdf>; S.D. Codified Laws § 12-6-4.

The June 3 primary election was utterly irrelevant to Senator Johnson as a matter of state law. Senator Johnson did not become his party's general election nominee by virtue of anything that occurred on June 3. With respect to Senator Johnson, no "election" took place on June 3. Accordingly, the communication at issue was not an "electioneering communication," because it was not distributed "within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate." 11 C.F.R. § 100.29(a)(2).

Finally, NTU has adopted an internal process to have any future broadcast advertisements that mention federal candidates or officeholders reviewed by counsel in advance of their public release for any electioneering communications reporting and disclaimer issues. NTU hopes that this process will avoid any confusion over electioneering communications reporting requirements in advance.

If you have any further questions, please do not hesitate to contact me.

Sincerely,



**Jason Torchinsky
Counsel to National Taxpayers Union**

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Federal Election Commission
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