



FEDERAL ELECTION COMMISSION
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2004 JAN 28 A 10:46


January 28, 2003


MEMORANDUM


TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Mai T. Dinh 
Acting Assistant General Counsel

J. Duane Pugh Jr. 
Senior Attorney

SUBJECT: Advisory Opinion 2003-40: U.S. Navy Veterans' Good Government Fund

AGENDA ITEM
For Meeting of: 02-05-04

Attached is a draft of Advisory Opinion 2003-40, which was requested by Mr. Bill Meyers, on behalf of U.S. Navy Veterans' Good Government Fund. We request that this draft be placed on the Commission's agenda for February 5, 2004.

Attachment

2004 JAN 28 A 10: 46

DRAFT

1 ADVISORY OPINION 2003-40

2 Mr. Bill Meyers
3 Treasurer
4 U.S. Navy Veterans' Good Government Fund
5 1628 East 17th Avenue
6 Tampa, Florida 33605

7 Dear Mr. Meyers:

8 This responds to your letter dated November 29, 2003, which you supplemented
9 by an electronic mail message dated December 20, 2003, requesting an advisory opinion
10 on behalf of the U.S. Navy Veterans' Good Government Fund ("the Committee"), a
11 Federal political committee, concerning the reporting obligations that would arise from
12 proposed independent expenditures by the Committee. You describe nine independent
13 expenditures contemplated by the Committee and ask whether the Federal Election
14 Campaign Act of 1971, as amended ("the Act"), would require the Committee to file
15 reports that are known as "48-hour Reports" with regard to any of the described
16 independent expenditures.

17 *Questions Presented*

18 Your request and supplement describe nine independent expenditures for print
19 communications that would be distributed on the date of the expenditures. Your request
20 also states that the Commission should assume that the described independent
21 expenditures are the only expenditures during the relevant time periods, which means the

1 2004 calendar year. 11 CFR 104.4(f). The nine examples of independent expenditures
2 that the Committee intends to make are:

3 (1) \$9,000 on February 15, 2004 for Candidate X in connection with the
4 November 2, 2004 general election for United States Senator from Alaska;

5 (2) \$9,000 on February 17, 2004 for Candidate Y in connection with the
6 November 2, 2004 general election for United States Representative from Florida;

7 (3) \$9,000 on February 26, 2004 for Candidate Z in connection with the
8 November 2, 2004 general election for United States Senator from Kentucky;

9 (4) \$9,000 on February 1, 2004 for Candidate A in connection with the
10 March 2, 2004 New York Democratic Presidential Primary;

11 (5) \$9,000 on February 3, 2004 for Candidate A in connection with the
12 March 2, 2004 California Democratic Presidential Primary;

13 (6) \$9,000 on February 5, 2004 for Candidate A in connection with the June 8,
14 2004 New Jersey Democratic Presidential Primary;

15 (7) \$4,000 on February 1, 2004 for Candidate B in connection with the
16 March 2, 2004 California Democratic Presidential Primary;

17 (8) \$9,000 on July 1, 2004 in Arizona for electors pledged to Candidate C in
18 connection with the November 2, 2004 Presidential general election; and

19 (9) \$9,000 on July 6, 2004 in Arkansas for electors pledged to Candidate C in
20 connection with the November 2, 2004 Presidential general election.

21 *Legal Analysis and Conclusions*

22 The independent expenditures described in scenarios numbered 5 and 9 above are
23 the only expenditures that would require 48-hour reports. All of the other independent

1 expenditures would be disclosed on the Committee's regularly scheduled reports.
2 11 CFR 104.4(b)(1).

3 The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155,
4 116 Stat. 81 (2002), amended the Act to require that persons (including political
5 committees) that make or contract to make independent expenditures aggregating \$10,000
6 or more at any time up to and including the 20th day before the date of an election shall
7 file a report describing the expenditures within 48 hours. See 2 U.S.C. 434(g)(2)(A);
8 BCRA, section 212(a)(2), 116 Stat. at 93. The Commission's regulation implementing
9 this requirement refers to these reports as "48-hour reports." See 11 CFR 104.4(b)(2).
10 The regulation specifies that a political committee must aggregate all independent
11 expenditures "with respect to a given election" during the relevant time period to
12 determine if the \$10,000 threshold for the 48-hour report filing requirement has been
13 equaled or surpassed. *Id.* The regulation also requires aggregation of all disbursements
14 during the calendar year for independent expenditures, and all enforceable contracts,
15 either oral or written, obligating funds for disbursements during the calendar year for
16 independent expenditures, where those independent expenditures are made with respect
17 to the same election for Federal office. 11 CFR 104.4(f).

18 (1) \$9,000 on February 15, 2004 for Candidate X in connection with the
19 November 2, 2004 general election for United States Senator from Alaska;

20 (2) \$9,000 on February 17, 2004 for Candidate Y in connection with the
21 November 2, 2004 general election for one of the members of the United States House of
22 Representatives from Florida; and

1 (3) \$9,000 on February 26, 2004 for Candidate Z in connection with the
2 November 2, 2004 general election for United States Senator from Kentucky.

3 None of these independent expenditures would require the Committee to file a 48-
4 hour report. No 48-hour report would be required until the Committee's aggregate
5 independent expenditures "with respect to a given election" equals or exceeds \$10,000,
6 and all of these expenditures would be below that threshold. The Committee would not
7 be required to aggregate any of these expenditures because each office sought is the
8 subject of a separate election, even though the general election for each seat in the United
9 States House of Representatives and one-third of the Senate will be held on the same day,
10 November 2, 2004.¹

11 (4) \$9,000 on February 1, 2004 for Candidate A in connection with the
12 March 2, 2004 New York Democratic Presidential Primary.

13 (6) \$9,000 on February 5, 2004 for Candidate A in connection with the
14 June 8, 2004 New Jersey Democratic Presidential Primary.

15 Neither of these independent expenditures would require the Committee to file a
16 48-hour report because the Committee's aggregate independent expenditures "with
17 respect to a given election" would not equal or exceed \$10,000. The Committee would
18 not be required to aggregate any of these expenditures because, as explained below, each
19 State's Presidential primary election is a separate election.

¹ For purposes of this Advisory Opinion, the Commission accepts the Committee's representation that these independent expenditures would be in connection with the general election. No 48-hour reports would be required for these expenditures if they were in connection with the primary elections for the three offices, which will be held in Alaska on August 24, 2004, in Florida on August 31, 2004, and in Kentucky on August 18, 2004. Nor would 24-hour reports be required because the independent expenditures would not be made within 20 days of the election. 2 U.S.C. 434(g)(1)(A) and 11 CFR 104.4(c).

1 Section 104.4 of Commission regulations sets forth the reporting requirements of
2 independent expenditures. In 11 CFR 104.4(f), aggregation of independent expenditures
3 is triggered when the first communication that is an independent expenditure is “publicly
4 distributed or otherwise publicly disseminated.” According to the Explanation and
5 Justification for this section, “publicly distributed” has the same meaning as provided in
6 11 CFR 100.29(b)(3). *Bipartisan Campaign Reform Act of 2002 Reporting; Final Rules*,
7 68 Fed. Reg. 404, 407 (Jan. 3, 2003) (11 CFR 100.29 defines “electioneering
8 communications”). Under 11 CFR 100.29(b)(3)(ii), each State’s Presidential primary is
9 considered a separate election. *Electioneering Communications; Final Rules*, 67 Fed.
10 Reg. 65190, 65194 (Oct. 23, 2002) (Explanation and Justification for 11 CFR
11 100.29(b)(3)(ii) discussing State Presidential primaries). Consequently, each State’s
12 Presidential primary is considered a separate election for purposes of aggregating
13 independent expenditures also.

14 (5) \$9,000 on February 3, 2004 for Candidate A in connection with the
15 March 2, 2004 California Democratic Presidential Primary; and

16 (7) \$4,000 on February 1, 2004 for Candidate B in connection with the
17 March 2, 2004 California Democratic Presidential Primary.

18 The independent expenditure described in scenario number 7 would not require
19 the Committee to file a 48-hour report for reasons stated above. The independent
20 expenditure described in scenario number 5, however, would require the Committee to
21 file a 48-hour report because it would be related to the same election as the \$4,000
22 expenditure described in scenario number 7. Although this expenditure would be related
23 to a different candidate than the expenditure in scenario 7, the Committee must aggregate

1 the expenditures because they both are related to the same election. The Explanation and
2 Justification for the regulation on this issue makes this point clear by including an
3 example of independent expenditures related to two different candidates in a Senate
4 primary that met the \$10,000 threshold only if aggregated. *See Bipartisan Campaign*
5 *Reform Act of 2002 Reporting; Final Rules*, 68 Fed. Reg. 404, 406 (Jan. 3, 2003)
6 (Explanation and Justification for 11 CFR 104.4(b)(1)). The Committee's 48-hour report
7 must disclose both independent expenditures described in scenario numbers 5 and 7.

8 (8) \$9,000 on July 1, 2004 in Arizona for electors pledged to Candidate C in
9 connection with the November 2, 2004 Presidential general election; and

10 (9) \$9,000 on July 6, 2004 in Arkansas for electors pledged to Candidate C in
11 connection with the November 2, 2004 Presidential general election.

12 The Committee would be required to file a 48-hour report after it makes the
13 independent expenditure described in scenario 9 because the Committee must aggregate
14 the expenditures in scenario 8 and 9. Both expenditures would relate to the general
15 election for a single office, President of the United States. The \$10,000 threshold would
16 be surpassed with the expenditure in scenario 9, and the expenditure would occur more
17 than 20 days before the general election.² Therefore, the criteria of 2 U.S.C. 434(g)(2)(A)
18 and 11 CFR 104.4(b)(2) would be fulfilled, and the Committee would be required to file a
19 48-hour report. The 48-hour report must disclose both independent expenditures
20 described in scenario numbers 8 and 9.

21

² Both independent expenditures would occur after the respective State's Presidential primary election, which are scheduled for February 3, 2004 in Arizona and May 18, 2004 in Alaska.

