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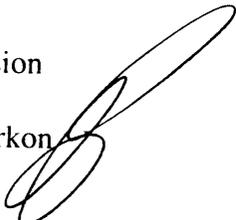
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March 3, 2004

MEMORANDUM

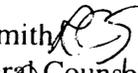
AGENDA ITEM
For Meeting of: 03-11-04

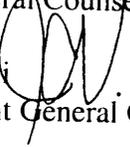
TO: The Commission

THROUGH: James A. Pehrkon
Staff Director 

FROM: Lawrence H. Norton
General Counsel 

James A. Kahl
Deputy General Counsel 

Rosemary C. Smith
Associate General Counsel 

John C. Vergelli
Acting Assistant General Counsel 

Jonathan M. Levin
Senior Attorney 

Subject: Draft AO 2004-03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 11, 2004.

Attachment

1 ADVISORY OPINION 2004-03

2
3 Stephen J. Kaufman, Esq.
4 Joseph M. Birkenstock, Esq.
5 Smith Kaufman, LLP
6 777 S. Figueroa Street
7 Suite 4050
8 Los Angeles, CA 90017-5864
9

DRAFT

10 Dear Messrs. Kaufman and Birkenstock:

11
12 This responds to your letter dated January 13, 2004, on behalf of Dooley for the Valley,
13 requesting an advisory opinion concerning the application of the Federal Election Campaign Act
14 of 1971, as amended (“the Act”), and Commission regulations to the conversion of a principal
15 campaign committee into a multicandidate committee.

16 ***Background***

17 On September 2, 2003, Representative Calvin M. Dooley announced his decision to retire
18 from Congress as of January 2005. On September 30, 2003, Dooley for Congress filed a Form
19 1M (Notification of Multicandidate Status) and, on October 2, it filed an amended Statement of
20 Organization reflecting the new status as a multicandidate committee and denoting a committee
21 name change to Dooley for the Valley (“the Committee”).

22 Since then, the Commission has issued two advisory opinions about the permissible uses
23 of the funds of a principal campaign committee under 2 U.S.C. 439a, as amended by the
24 Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-155 (Mar. 27, 2002)) (“BCRA”). *See*
25 Advisory Opinions 2003-30 and 2003-26. You ask whether, based on these advisory opinions, 2
26 U.S.C. 439a(a) may be interpreted as restricting the Committee’s ability to transition into a
27 multicandidate committee. You assert that, since the issuance of these advisory opinions, the
28 Committee has “voluntarily restricted its activities to those which would be consistent with the

1 status of a principal campaign committee, and will proceed on that basis during the pendency of
2 this Advisory Opinion Request.”

3 *Legal Analysis and Conclusions*

4 *(1) May the Committee maintain its current status as a multicandidate committee?*

5 Yes, the Committee may maintain its multicandidate committee status. The Act defines a
6 “multicandidate committee” as a political committee that has been registered under 2 U.S.C. 433
7 for a period of not less than 6 months, which has received contributions from more than 50
8 persons, and, except for any State political party organization, has made contributions to 5 or
9 more candidates for Federal office. 2 U.S.C. 441a(a)(4). Nothing in the Act or Commission
10 regulations explicitly addresses the conversion of an authorized committee of a candidate into a
11 multicandidate committee. However, in past advisory opinions, the Commission has explicitly
12 permitted the transition of a principal campaign committee into a multicandidate committee.
13 Advisory Opinions 1994-31, 1993-22, 1988-41, 1987-11, 1985-30, 1985-13, 1983-14, 1982-32,
14 and 1978-86. After the adoption of the personal use regulations (11 CFR Part 113) in 1995,
15 however, the Commission has referred to such a transition but has not explicitly permitted or
16 prohibited the transition. *See* Advisory Opinion 2000-12.

17 Because Representative Dooley is no longer a Federal candidate, and because on
18 September 30, 2003, the Committee was converted to an unauthorized committee, it became a
19 multicandidate committee at that point because it had already met the requirements for
20 multicandidate committee status set out at 2 U.S.C. 441a(a)(4). *See, e.g.,* Advisory Opinions
21 1993-22, 1988-41, and 1985-30.

1 Accordingly, the Committee may accept contributions of up to \$5,000 per contributor
2 per calendar year.¹ 2 U.S.C. 441a(a)(1)(C). The Commission further concludes that the
3 amendments made by BCRA to 2 U.S.C. 439a do not *per se* bar the transformation of an
4 authorized committee into a multicandidate committee.

5 When the Committee transitioned from a principal campaign committee, however, it had
6 a large amount of cash-on-hand, *i.e.*, money raised by the Committee when it was a principal
7 campaign committee.² The Act's restrictions on the use of campaign funds apply expressly to
8 "contributions accepted by a candidate." 2 U.S.C. 439a(a).

9 Under the Act, as amended by BCRA, there are four categories of permissible uses of
10 contributions received by a Federal candidate: (1) otherwise authorized expenditures in
11 connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses
12 incurred in connection with the duties of the individual as a holder of Federal office; (3)
13 contributions to organizations described in 26 U.S.C. 170(c); and (4) transfers, without
14 limitation, to national, State or local political party committees. 2 U.S.C. 439a(a); *see also* 11
15 CFR 113.2(a), (b), and (c). Such uses must not, however, result in the conversion of the
16 campaign funds to "personal use" by any person. 2 U.S.C. 439a(b)(1). Since 1995, the
17 Commission's regulations have defined "personal use" as "any use of funds in a campaign
18 account of a present or former candidate to fulfill a commitment, obligation, or expense of any
19 person that would exist irrespective of the candidate's campaign or duties as a Federal
20 officeholder." 11 CFR 113.1(g); *see* 2 U.S.C. 439a(b)(2).

¹ From the Committee's 2003 Year End Report and 2004 Pre-Primary Report, it appears that the Committee does not have a non-Federal account. Your request for an advisory opinion does not ask about, and thus this advisory opinion does not address, fundraising by the Committee under 2 U.S.C. 441i(e).

² The 2003 July Quarterly Report, the last report filed before the transition, indicates that the Committee had \$332,538 cash-on-hand, and the 2003 Year End Report, the first report filed after the conversion, indicates that the

1 In BCRA, Congress deleted “any other lawful purpose” from the list of permissible uses
2 of campaign funds in section 439a. The Explanation and Justification for the post-BCRA
3 personal use rules, discussed the significance of this deletion:

4 The Commission ... is removing and reserving paragraph (d) of former section
5 113.2, which referred to “any other lawful purpose.” With this revision, it is now
6 clear that in addition to defraying expenses in connection with a campaign for
7 federal office, campaign funds may be used only for the enumerated non-
8 campaign purposes identified in paragraphs (a), (b) and (c) of section 113.2, and
9 that *this listing of permissible non-campaign purposes is exhaustive.*

10
11 *Explanation and Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and*
12 *Personal Use of Campaign Funds*, 67 Fed. Reg. 76962, 76975 (Dec. 13, 2002) (emphasis added).
13 *See also* Advisory Opinions 2003-30 and 2003-26.

14 The funds received by Committee when it was a principal campaign committee must be
15 spent only for one or more of the four permissible uses enumerated in 2 U.S.C. 439a(a), and must
16 not be converted to the personal use of any individual (2 U.S.C. 439a(b)).

17 In addition, any contributions that the Committee makes to other Federal candidates
18 using funds received while it was a principal campaign committee must be limited to \$1,000 per
19 election. 2 U.S.C. 432(e)(3)(B). The Act and regulations provide that no political committee
20 that supports more than one candidate may be designated as a principal campaign committee or
21 authorized committee of a candidate (except in limited circumstances not relevant here). 2
22 U.S.C. 432(e)(3)(A); 11 CFR 102.12(c)(1) and 102.13(c)(1). The term “support,” however, does
23 not include contributions by an authorized committee to an authorized committee of another
24 Federal candidate in amounts aggregating \$1,000 or less per election. 2 U.S.C. 432(e)(3)(B); 11
25 CFR 102.12(c)(2) and 102.13(c)(2). Nothing in 2 U.S.C. 439a(a) bars principal campaign

Committee had \$247,688 cash-on-hand. Each report indicates that the Committee owed no debts at the end of the reporting period.

1 committees from contributing up to \$1,000 per election. This \$1,000 contribution limit would
2 apply to contributions made by the Committee using funds it received while it was a principal
3 campaign committee.³

4 The Committee, however, may use its other funds (i.e., those *not* attributable to
5 contributions received while it was a principal campaign committee) in a manner consistent with
6 lawful uses by any other multicandidate committee.⁴ Therefore, contributions and other funds
7 received after the date of conversion to a multicandidate committee (September 30, 2003) may be
8 spent for purposes that are not restricted by 2 U.S.C. 439a or 432(e)(3)(B), so long as they are
9 spent for purposes consistent with the other provisions of the Act and Commission regulations.

10 If the Committee makes disbursements that, in total, exceed the amount it received since
11 the conversion, then it will be considered to be spending funds it received as a principal
12 campaign committee.⁵ The spending of amounts exceeding its receipts after its conversion on
13 September 30, 2003, will be subject to the restrictions of 2 U.S.C. 439a and 432(e)(3)(B).

14 When the Committee spends funds that came from the funds that were on hand on
15 September 30, 2003, that cash-on-hand figure will be reduced by the amount of the
16 disbursements of such funds that are lawful under sections 439a and 432(e)(3)(B). As a practical
17 matter, this means that, once a permissible disbursement of pre-conversion funds has been
18 determined to have been made, that disbursement will not be included in total post-conversion

³ In the Explanation and Justification for the post-BCRA rulemaking on the use of campaign funds, the Commission specifically notes that 2 U.S.C. 432(e)(3)(B) permits contributions of up to \$1,000 by one authorized committee to another. 67 Fed. Reg. at 76975. This is a specific permission granted by the Act, and the Commission also construes it as consistent with 2 U.S.C. 439a(a)(1).

⁴ To identify the funds subject to 2 U.S.C. 439a and 432(e)(3)(B), the Committee must determine its cash on hand as of the date of its conversion.

⁵ The Committee should be prepared to show, upon the request of the Commission, that any disbursements it has made outside the restrictions of 2 U.S.C. 439a and 432(e)(3)(B) were made from funds received after the conversion.

1 disbursements for the purposes of determining the source (i.e., pre-or post-conversion) of any
2 subsequent disbursement.

3 *(2) If not, may the Committee become an unauthorized, non-multicandidate committee?*

4 Given the response to question (1), this question is moot.

5 *(3) If options 1 and 2 are not permissible activities, must the Committee revert to its status as a*
6 *principal campaign committee and seek refunds of any contributions made by it that exceed 2*
7 *U.S.C. 432(e)(3)(B)?*

8 The Committee does not have to revert back to a principal campaign committee in light
9 of the answer to question (1).

10 As you have suggested, however, the Committee must seek refunds of any contributions
11 made by it from funds it received as a principal campaign committee that are not in accord with
12 the requirements of 2 U.S.C. 439a and 2 U.S.C. 432(e)(3)(B) and 11 CFR 102.12(c). Donations
13 by the Committee, after the September 30, 2003, conversion, to non-Federal candidates and other
14 non-party committees for State and local elections from funds its received as a principal
15 campaign committee are not permissible under 2 U.S.C. 439a. In the Explanation and
16 Justification for the regulations at 11 CFR Part 113, the Commission explained that such
17 donations are permissible “[i]n furtherance of a Federal candidate’s election.” 67 Fed. Reg. at
18 76975. Representative Dooley, however, was no longer a candidate for re-election to Federal
19 office after the conversion date, and such uses would not fit into any of the categories of
20 permitted uses in 2 U.S.C. 439a(a).

21 The amounts of any refunds received by the Committee will not count toward total post-
22 conversion receipts in determining whether total post-conversion disbursements exceed post-
23 conversion receipts. However, any permissible portion of a disbursement after the receipt of a

1 refund (e.g., \$1,000 of a \$5,000 contribution to a Federal candidate after \$4,000 has been
2 refunded) will draw down the pre-conversion cash-on-hand, as described above in response to
3 question 1.

4 This response constitutes an advisory opinion concerning the application of the Act and
5 Commission regulations to the specific transaction or activity set forth in your request. *See*
6 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
7 assumptions presented and such facts or assumptions are material to a conclusion presented in
8 this advisory opinion, then the requester may not rely on that conclusion as support for its
9 proposed activity.

10 Sincerely,

11
12
13 Bradley A. Smith
14 Chairman
15
16
17

18 Enclosures (AOs 2003-30, 2003-26, 2000-12, 1994-31, 1993-22, 1988-41, 1987-11, 1985-30,
19 1985-13, 1983-14, 1982-32, and 1978-86)