AGENDA DOCUMENT NO. 04-22

FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 3, 2004

AGENDA ITEM
For Meeting of: 03-11-04

MEMORANDUM

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
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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

ADVISORY OPINION 2004-03

Stephen J. Kaufman, Esq.
Joseph M. Birkenstock, Esq.
Smith Kaufman, LLP
777 S. Figueroa Street
Suite 4050
Los Angeles, CA 90017-5864

DRAFT

Dear Messrs. Kaufman and Birkenstock:

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

Background

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

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

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

Legal Analysis and Conclusions

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

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

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

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

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

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

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[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

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

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

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

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

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

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

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

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

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

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

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[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.

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

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

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

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

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

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

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

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

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

Sincerely,

Bradley A. Smith
Chairman

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