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2009 NOV -3 P 4:49

AGENDA ITEM
For Meeting of: 11-05-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Robert M. Knop *NFS (for RMK)*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

Subject: Draft AO 2009-26 (State Representative Elizabeth Coulson)

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the agenda for November 5, 2009.

Attachment

1 ADVISORY OPINION 2009-26

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William J. McGinley, Esq.
Kathryn Biber Chen, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037

DRAFT A

10 Dear Mr. McGinley and Ms. Chen:

11 We are responding to your advisory opinion request on behalf of Illinois State
12 Representative Elizabeth Coulson, Coulson for Congress, and Representative Coulson's
13 State Campaign Committee concerning the application of the Federal Election Campaign
14 Act of 1971, as amended (the "Act"), and Commission regulations to Representative
15 Coulson's use of State Campaign Committee and officeholder funds while a candidate for
16 Federal office.

17 The Commission concludes that Representative Coulson may use State Campaign
18 Committee funds or State officeholder funds to sponsor a seniors fair and to mail
19 postcards publicizing that event because those activities are not in connection with any
20 Federal or non-Federal election. The Commission also concludes that Representative
21 Coulson may use either of those State accounts to pay for the "health care legislative
22 update" letter because the letter is not in connection with any Federal or non-Federal
23 election. Furthermore, the Commission concludes that neither the postcards nor the
24 letter would constitute in-kind contributions to Coulson for Congress if paid for by either
25 of the State accounts.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on
3 September 9, 2009, email received on September 16, 2009, and telephone conversation
4 on October 29, 2009.

5 Elizabeth Coulson is an Illinois State Representative and a candidate for the
6 United States House of Representatives in 2010. She has served the 17th State legislative
7 district of Illinois since 1997. On August 22, 2009, Representative Coulson declared her
8 candidacy to represent the 10th Congressional district of Illinois. She will continue
9 serving in the Illinois State legislature while she campaigns for Federal office.
10 Representative Coulson is not a candidate for State office.

11 Coulson for Congress (“Federal Committee”) is Representative Coulson’s
12 principal campaign committee. The Coulson Campaign Committee (“State Campaign
13 Committee”) is Representative Coulson’s State campaign committee. Illinois law allows
14 State and local candidates to raise funds from individuals without limits and from
15 corporations and labor organizations. *See generally* 10 Illinois Compiled Statutes
16 5/Article 9. At least some of the donations in the State Campaign Committee account
17 were raised from sources prohibited by the Act or exceed the Act’s amount limitations.
18 Since becoming a Federal candidate, she has not solicited any donations to the State
19 Campaign Committee. Under Illinois law, Representative Coulson also receives an
20 office allowance (“State Office Account”) for the purpose of defraying official office,
21 personnel, and constituent services expenses. *See* 25 Illinois Compiled Statutes
22 115/Article 4. Illinois law allows her to use State campaign funds for these expenses.
23 *See* 10 Illinois Compiled Statutes 5/Article 9-8.10(c).

1 Representative Coulson plans to undertake three activities. She plans (1) to
2 organize a seniors fair; (2) to mail a postcard publicizing the seniors fair; and (3) to mail
3 a “health care legislative update” letter to health care professionals in her State legislative
4 district.

5 *1. Seniors Fair*

6 Representative Coulson plans to organize a seniors fair at a local seniors’
7 community center in her State legislative district. The community center does not charge
8 a fee for its use. The purpose of the event is to promote health and safety programs
9 available to seniors in Representative Coulson’s State legislative district. A variety of
10 local business organizations are expected to participate at the event. These organizations
11 will set up exhibit booths at the community center and provide information to the
12 participants about their goods and services. Some organizations may distribute free
13 samples and water bottles that display company logos, none of which will reference
14 Representative Coulson. A local hospital may provide free flu shots and cholesterol
15 screening to attending seniors. Representative Coulson, in her role as a State
16 officeholder, has sponsored such “seniors fairs” for the past eight years.

17 Representative Coulson states that this event will not be used to expressly
18 advocate her election, or to promote or support her Federal candidacy, or to attack or
19 oppose any of her Federal election opponents. The seniors fair will not include any
20 Federal election activity as defined in 2 U.S.C. 431(20) and 11 CFR 100.24. The event
21 also will not be used by Representative Coulson or her agents to solicit any contributions.
22 Nor will Representative Coulson provide any information about the participants to her
23 Federal Committee.

1 2. *Promotional Postcard*

2 Representative Coulson will mail approximately 12,000 postcards to seniors
3 residing in her State legislative district publicizing the “seniors fair.” The postcard will
4 be sent approximately two weeks before the event.¹ The mailing will not be distributed
5 outside her State legislative district.

6 The postcard will state the date, time, and location of the “seniors fair.”
7 Representative Coulson provides a sample of a postcard she mailed to her constituents in
8 a previous year.² The sample postcard identifies Representative Coulson as a State
9 Representative and contains her picture. One side of the postcard states: “You’re Invited
10 to State Representative Elizabeth Coulson’s Senior Expo [Year].” The other side states:
11 “State Representative Elizabeth Coulson’s Senior Expo [Year]. Free Admission! Free
12 refreshments! Representatives of state and local organizations will be on hand to
13 promote senior citizen’s health and safety programs and services that are available. This
14 is an opportunity for senior citizens to visit various booths and gather information.” It
15 also includes Representative Coulson’s district office telephone number that the
16 recipients may call for more information.

17 The contents, timing, and distribution of the planned mailing will be the same in
18 all material respects as in previous years when Representative Coulson was not a Federal
19 candidate. Representative Coulson plans to pay for the mailing with funds from her State
20 Office Account or the State Campaign Committee's account.

21 3. *Legislative Update Letter*

¹ Representative Coulson plans to mail the postcard sometime after November 4, 2009.

² The Commission assumes that the postcard at issue in this request will be the same in all material respects as the sample postcard that Representative Coulson submitted with her advisory opinion request.

1 Representative Coulson plans to mail a letter to approximately 4,000 health care
2 professionals in her State legislative district. The mailing will not be distributed outside
3 her State legislative district. Representative Coulson has mailed such a “legislative
4 update” letter for the past four years. Representative Coulson provides a copy of one
5 such letter.³ In relevant part the letter states:

6 “As both your State Representative and a colleague in the health care
7 field, I have made every effort to ensure that Illinois offers a climate
8 where doctors can thrive. As many of you know, our state is facing
9 immense challenges to survive, recover and grow in today’s daunting
10 economic conditions. Despite the volatile climate that has plagued
11 Springfield during this past legislative session, I have remained committed
12 to making progress for the residents of this State.

13
14 To bring necessary improvements and resources to the medical industry, I
15 am proud to have supported several initiatives, all Illinois State Medical
16 Society priorities, which have passed both chambers and await action by
17 the Governor.”

18
19 The letter then lists and describes health care legislative proposals being
20 considered by the Illinois legislature. It also describes a state health care bill that
21 Representative Coulson co-sponsored and explains why she supports the bill. The letter
22 further states: “I will continue to look for innovative ideas to help improve the health care
23 system in Illinois, as well as help improve the lives of those who need our care. As
24 always, I welcome your ideas and input as many of my best proposals originate from
25 constituents in the 17th district.” The letter is signed “Beth Coulson[,] State
26 Representative.”

³ Like the seniors fair postcard, Representative Coulson plans to mail the legislative update letter sometime after November 4, 2009. The Commission assumes that the letter at issue in this request will be the same in all material respects as the sample letter that Representative Coulson submitted with her advisory opinion request.

1 The contents, timing, and distribution of the planned mailing will be the same in
2 all material respects as in previous years when Representative Coulson was not a Federal
3 candidate. Representative Coulson plans to pay for the mailing with funds from her State
4 Office Account or the State Campaign Committee account.

5 ***Questions Presented***

- 6 1. *May Illinois State Representative Coulson sponsor the seniors fair as a service to*
7 *constituents in her State legislative district?*
- 8 2. *May Illinois State Representative Coulson pay for postcards publicizing the*
9 *seniors fair using funds in her State Office Account or her State Campaign*
10 *Committee's account?*
- 11 3. *May Illinois State Representative Coulson pay for the "health care legislative*
12 *update" letter using funds in her State Office Account or her State Campaign*
13 *Committee's account?*
- 14 4. *If the Commission determines that the activities described in questions 1, 2, and 3*
15 *are not permissible, may the State Campaign Committee instead use a reasonable*
16 *accounting method to identify donations permissible under the Act, Commission*
17 *regulations and Illinois law to pay for all of the activities described above?*
- 18 5. *If the Commission determines that the activities described in questions 1, 2, 3, and*
19 *4 are not permissible, may her Federal Committee pay for the activities described*
20 *above?*

21 ***Legal Analysis and Conclusions***

- 22 1. *May Illinois State Representative Coulson sponsor the seniors fair as a service to*
23 *constituents in her State legislative district?*

1 Yes, Representative Coulson may sponsor the event because the seniors fair is not in
2 connection with any Federal or non-Federal election, and it does not involve making any
3 "public communications" as defined in 2 U.S.C. 431(22). Nor would it result in the
4 making of any contributions to Representative Coulson. The Commission does not
5 address whether relevant state law permits Representative Coulson to use funds from her
6 State Campaign Committee's account for this event.

7 Federal candidates, their agents, and entities directly or indirectly established,
8 financed, maintained, or controlled by, or acting on behalf of, Federal candidates, may
9 not raise or spend funds in connection with an election for Federal office, including any
10 funds for Federal election activity, unless the funds are subject to the Act's limitations,
11 prohibitions, and reporting requirements. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.
12 Persons subject to Section 441i(e) also may not raise or spend funds in connection with
13 any election other than an election for Federal office unless the funds are raised within
14 the Act's contribution limits and are not from prohibited sources. 2 U.S.C. 441i(e)(1)(B);
15 11 CFR 300.62.

16 Representative Coulson is a Federal candidate, and her State Campaign
17 Committee is an entity that is directly established, financed, maintained, or controlled by
18 her and is acting on her behalf. Accordingly, Section 441i(e) would apply here if the
19 activity involved were in connection with any Federal or non-Federal election. *See*
20 *Advisory Opinions 2003-20 (Reyes), 2004-14 (Davis), and 2003-12 (Flake)*. As the
21 Commission previously stated, "[i]f the funds are not raised or spent in connection with
22 an election, then the funds do not fall within the scope of Section 441i(e)." *See Advisory*
23 *Opinion 2003-20 (Reyes) at 2.*

1 Representative Coulson plans to sponsor an event for seniors residing in her State
2 legislative district, and the core issue is whether this event is in connection with any
3 Federal or non-Federal election. The Commission concludes that it is not. Although
4 Representative Coulson is a Federal candidate, there is no indication that this event is in
5 connection with her Federal election. The seniors fair will not be used to solicit any
6 contributions to Representative Coulson’s Federal Committee, nor will any information
7 about the participants at the event be provided to Representative Coulson’s Federal
8 Committee. The event will not involve any express advocacy of Representative
9 Coulson’s election or the defeat of her opponents. Nor will the seniors fair be used for
10 any Federal election activity as defined in 2 U.S.C. 431(20) and 11 CFR 100.24.

11 Similarly, there is no indication that the seniors fair is in connection with any
12 election other than an election for Federal office. Representative Coulson is not a
13 candidate for State office and the seniors fair will not be used to solicit any donations to
14 Representative Coulson’s State Campaign Committee. Instead, this event is a service to
15 Representative Coulson’s constituents, to be held as part of her State officeholder duties
16 and in a manner consistent with similar events she held in previous years when she was
17 not a Federal candidate. Because the seniors fair is not in connection with any Federal or
18 non-Federal election, Section 441i(e) would not apply to it.

19 In addition to being a Federal candidate, Representative Coulson is currently an
20 Illinois State Representative. State officeholders and their agents⁴ may spend only
21 Federal funds for a public communication that refers to a clearly identified Federal
22 candidate and that promotes or supports, or attacks or opposes (“PASO”) any candidate

⁴ The State Campaign Committee is an agent for purposes of section 441i(f) because it raised and spent funds in connection with Representative Coulson’s election to State office. *See* 11 CFR 300.2(b)(3).

1 for that Federal office. 2 U.S.C. 441i(f); 11 CFR 300.70 and 300.71.⁵ Federal funds are
2 defined as “funds that comply with the limitations, prohibitions, and reporting
3 requirements of the Act.” 11 CFR 300.2(g). Based upon the facts as presented by
4 requestor, the seniors fair will not PASO any Federal candidate

5 There is no indication that Representative Coulson or her agents will make any
6 communications at the event that would constitute public communications. A “public
7 communication” is “a communication by means of any broadcast, cable, or satellite
8 communication, newspaper, magazine, outdoor advertising facility, mass mailing, or
9 telephone bank to the general public, or any other form of general public political
10 advertising.” 2 U.S.C. 431(22) and 11 CFR 100.26. Any communication made at the
11 event would not be made by the means listed in this definition. Accordingly, the
12 Commission concludes that 2 U.S.C. 441i(f) would not apply to the “seniors fair.”⁶

13

14 2. *May Illinois State Representative Coulson pay for postcards publicizing the*
15 *seniors fair from funds in her State Office Account or her State Campaign*
16 *Committee's account?*

17 Yes, Representative Coulson may pay for the postcards publicizing the seniors
18 fair using funds in her State Office Account or her State Campaign Committee account
19 because the postcards are not in connection with any Federal or non-Federal election and
20 because the postcards would not be coordinated communications. The Commission does

⁵ The Commission currently is considering options for a regulatory definition of PASO. *See* Notice of Proposed Rulemaking on Coordinated Communications, 74 Fed. Reg. 53,893 (Oct. 21, 2009).

⁶ In addition, although the Act and Commission regulations govern the use of real estate and personal property for “candidate-related” and “party-related” events, as explained above, here, the community center is not being used for either purpose. Accordingly, the Commission does not analyze the use of the community center free-of-charge for the seniors fair. *See* 2 U.S.C. 431(8)(B)(ii) and 11 CFR 100.76.

1 not address whether relevant state law permits Representative Coulson to use funds from
2 her State Campaign Committee's account for these postcards.

3 The postcards will promote an event that the Commission determined above is not
4 in connection with any Federal or non-Federal election under 2 U.S.C. 441i(e). The
5 Commission similarly concludes that the postcards publicizing that event are not in
6 connection with either a Federal or non-Federal election under 2 U.S.C. 441i(e).

7 Additionally, a state officeholder may not spend funds for a public
8 communication that clearly identifies a federal candidate and promotes or supports a
9 candidate "unless the funds are subject to the limitations, prohibitions, and reporting
10 requirements of [the] Act." 2 U.S.C. 441i(f); 2 U.S.C. 431(20)(A)(iii).

11 The postcards clearly identify a Federal candidate because they identify
12 Representative Coulson by name and include her photograph. 2 U.S.C. 431(18); 11 CFR
13 100.17. The postcards, moreover, would be "public communications" under the Act. 2
14 U.S.C. 431(22) and 11 CFR 100.26. The definition of a "public communication"
15 includes any communication by means of a mass mailing. *Id.* A "mass mailing," in turn,
16 is defined as "a mailing...of more than 500 pieces of mail matter of an identical or
17 substantially similar nature within any 30-day period." 2 U.S.C. 431(23); 11 CFR
18 100.27. Representative Coulson plans to mail an identical or substantially similar
19 postcard to 12,000 persons approximately two weeks before the seniors fair occurs. The
20 postcards, thus, would be a mass mailing and public communications.

21 The question, then, is whether the postcards PASO a candidate for Federal office.
22 Based on the description of the postcards, the Commission concludes that they do not.
23 Although the postcards clearly identify Representative Coulson, the Commission has

1 previously determined that the mere identification of an individual who is a Federal
2 candidate does not, in itself, promote, support, attack or oppose that candidate. *See*
3 Advisory Opinions 2007-34 (Jackson), 2007-21 (Holt), 2006-10 (Echostar), and 2003-25
4 (Weinzapfel). Because the postcards merely identify Representative Coulson, without
5 more, the postcards do not PASO Representative Coulson. Nor do the postcards PASO
6 any other candidate because no other candidate is clearly identified. Accordingly,
7 Representative Coulson is not required to pay for the costs of creating and mailing the
8 postcards with Federal funds.

9 The Commission further concludes that payment for the postcard by the State
10 Campaign Committee would not constitute an in-kind contribution to Representative
11 Coulson's Federal campaign because the communication would not constitute an
12 expenditure. The Act provides, in relevant part, that in-kind contributions consist of
13 "*expenditures* made by any person in cooperation, consultation, or concert with, or at the
14 request or suggestion of, a candidate, his authorized political committees, or their
15 agents." 2 U.S.C. 441a(a)(7)(B)(i) (emphasis added). The Act defines an expenditure, in
16 relevant part, as "any purchase, payment, distribution, loan, advance, deposit, or gift of
17 money or anything of value, made by any person *for the purpose of influencing any*
18 *election for Federal office.*" 2 U.S.C. 431(9)(A)(i) (emphasis added).

19 As discussed above, the postcards for the seniors fair are not in connection with
20 Representative Coulson's Federal election, and they will not solicit any contributions to,
21 or provide any information about, her Federal election, nor will they contain any express
22 advocacy or PASO. For the same reasons, the Commission determines that the postcards
23 are not being disseminated for the purpose of influencing any election for Federal office.

1 Accordingly, Representative Coulson may use her State Office Account or State
2 Campaign Committee to pay for the postcards without such payment being treated as an
3 in-kind contribution to, or an expenditure by, Representative Coulson's Federal
4 campaign.

5

6 3. *May Illinois State Representative Coulson pay for the "health care legislative*
7 *update" letter from funds in her State Office Account or her State Campaign*
8 *Committee's account?*

9 Yes, Representative Coulson may use funds in either of these accounts to pay for
10 the "health care legislative update" letter because the letter is not in connection with any
11 Federal or non-Federal election and it does not PASO any Federal candidate. As above,
12 the Commission does not address whether relevant state law permits Representative
13 Coulson to use funds from her State Campaign Committee's account for the letter.

14 As explained in Question 2 above, 2 U.S.C. 441i(e) would only apply to
15 Representative Coulson if the activity involved were in connection with any Federal or
16 non-Federal election, including any Federal election activity. The activity at issue here –
17 the "health care legislative update" letter – would not be in connection with any election.

18 The letter describes Illinois State legislative developments to health care
19 professionals residing in Representative Coulson's State legislative district.
20 Representative Coulson indicates that this communication would be made solely as part
21 of her State officeholder duties. The letter does not solicit any donations, nor does it
22 expressly advocate Representative Coulson's election, or the defeat of her opponents.

1 As discussed above, a State officeholder may not spend funds for a public
2 communication that clearly identifies a candidate for Federal office and PASOs a
3 candidate for that office “unless the funds are subject to the limitations, prohibitions, and
4 reporting requirements of [the] Act.” 2 U.S.C. 441i(f); 2 U.S.C. 431(20)(A)(iii).

5 The “health care legislative update” letter clearly identifies a Federal candidate
6 because it mentions Representative Coulson by name. 2 U.S.C. 431(18); 11 CFR 100.17.
7 The letter would be a public communication because Representative Coulson plans to
8 mail the letter to 4,000 persons. 2 U.S.C. 431(22) and 431(23); 11 CFR 100.26 and
9 100.27. However, the Commission concludes that the letter would not PASO
10 Representative Coulson or any of her Federal opponents.

11 Over the proposed two-page letter, only two clauses approach language that could
12 be construed to PASO Representative Coulson: (1) “I have remained *committed to*
13 *making progress* for the residents of this State” and (2) “I will *continue to look for*
14 *innovative ideas to help improve* the health care system in Illinois, as well as help
15 improve the lives of those who need our care” (emphasis added). The adjectives,
16 however, address Representative Coulson's past and ongoing legislative actions as a state
17 officeholder. Moreover, the letter's opening sentence states that Representative Coulson
18 is sending the letter “as both your State Representative and a colleague in the health care
19 field.”

20 In addition to the language of the letter, Requestor states that the letter will be sent
21 to 4,000 health care professionals in her State district, but will not be sent beyond the
22 State district. She also states that she sent this letter last year and that its scope and
23 frequency will not be altered. The Commission previously has recognized that a State

1 officeholder’s declaration of Federal candidacy does not automatically alter the character
2 of the candidate’s activities routinely engaged in as a State officeholder. In Advisory
3 Opinion 1999-11 (Byrum), the Commission found that a State senator’s disbursements
4 for billboards advertising weekly coffee meetings with constituents and the State senator
5 were not for the purpose of influencing her federal election. The Commission noted that
6 the State senator’s “continuation” of this practice would not alter the purpose of the
7 disbursements “simply because [she] has become a Federal candidate.” *Id.* at 3, n.6.⁷
8 Similarly, Representative Coulson is merely continuing activities she had previously
9 undertaken as a State officeholder prior to her federal candidacy. Accordingly, the
10 Commission concludes that the Act does not prohibit Representative Coulson from using
11 non-Federal funds to pay for the “health care legislative update” letter.

12 The Commission further concludes that the payment for the “health care
13 legislative update” letter by the State Campaign Committee would not constitute an in-
14 kind contribution to Representative Coulson’s Federal campaign for the same reasons
15 discussed above with respect to the postcards in Question 2. Specifically, the letter is not
16 being disseminated for the purpose of influencing an election for Federal office. 2 U.S.C.
17 441a(a)(7)(B)(i); 431(9)(A)(i).

18

19 4. *If the Commission determines that the activities described in questions 1, 2 and 3*
20 *are not permissible, may the State Campaign Committee instead use a reasonable*

⁷ Although this Advisory Opinion was issued prior to the enactment of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), the analysis to which this Opinion refers is unchanged by BCRA’s amendments to FECA.

1 *accounting method to identify donations permissible under the Act, Commission*
2 *regulations and Illinois law to pay for all of the activities described above?*

3 This question is moot given the answers to Questions 1, 2, and 3 above.

4

5 5. *If the Commission determines that the activities described above in questions 1, 2,*
6 *3, and 4 are not permissible, may her Federal Committee pay for the activities*
7 *described above?*

8 This question is moot given the answers to Questions 1, 2, and 3 above.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
18 conclusions in this advisory opinion may be affected by subsequent developments in the
19 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
20 The cited advisory opinions are available on the Commission's Web site at
21 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman