AGENDA DOCUMENT NO. 00-78

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 16, 2000

AGENDA ITEM
For Meeting of: 8-24-00

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli
Attorney

SUBJECT: Request for Reconsideration of Advisory Opinion 2000-08

Background

On June 14, 2000, the Commission issued Advisory Opinion 2000-08 which concluded that the gifts which the requester, Philip D. Harvey, wished to make to Federal candidates would be treated as contributions under the Act and Commission regulations. On July 14, 2000, the requester submitted a timely request for reconsideration of that opinion pursuant to 11 CFR 112.6. A copy of the requester's letter was circulated to the Commission on July 24, 2000. This memorandum sets forth the basis of the request for reconsideration and recommends that the Commission deny the request.

Requester's arguments

The requester makes two arguments in his request for reconsideration both of which were also presented in his original request. He argues, first, that his proposed gifts cannot be viewed as contributions since he does not intend them to be "for the purpose of

influencing an election." Related to this assertion is his second argument that, since he is offering to make his gifts anonymously, his gifts cannot be considered as contributions since they would not "give rise even to the appearance of corrupting influence." This memo addresses each argument in turn.

Regarding the requester's intentions, this office notes that the requester's original stated desire in making the gifts (as attested to in Mr. Harvey's request letter) was to applaud the decision of an Federal candidate to run for office and to provide that candidate with funds to be used for that candidate's personal expenses. This desire to assist the candidate is sufficient, this office believes, to constitute a purpose to influence a Federal election campaign, as defined in 2 U.S.C. §431(8)(A). Further, as noted in Advisory Opinion 2000-08, the Act and Commission regulations would not treat, as part of a candidate's personal funds, the gifts given by the requester and used to pay the candidate's living expenses under these circumstances. Instead, these funds would have to be treated by the candidate as contributions subject to the limitations of the Act and Commission regulations.

Regarding the issue of anonymous contributions, arguments similar to the requesters were rejected in *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1989). In *Goland*, the defendant had given funds to various individuals to make contributions to a candidate, the candidate thus not knowing who was the ulimate source of the contributions. The defendant then argued that, since his identity was unknown to the candidate, there was no danger of a *quid pro quo* or the appearance of corruption. The court noted that "simply withholding one's identity does not eliminate the opportunity for securing some sort of exchange with the recipient." With regard to anonymous contributions the 9th Circuit court also noted that:

> As the Commission points out, even if a donor's name is not directly communicated to the candidate, there are indirect ways of ensuring that the candidate is aware of the identity of the benefactor, or at least of the special interest he represents. Third, even if the donor genuinely desires to keep his identity secret, there is no assurance he will succeed as is evident from the happenings in this case. Finally, even if it were theoretically possible to devise a system to seal hermetically a donation so as to keep its source truly secret forever, thereby making the state interest in preventing corruption inapplicable to anonymous donations, Goland's position is still untenable. Even truly anonymous donations over [$50] are prohibited. *Buckley* affirmed FECA's disclosure and reporting requirements, which serve the independent goal of providing voters with information regarding the source of candidates' support.
>
> *Goland* at 1258.

The *Goland* court repeatedly stressed the dangers to the disclosure and reporting requirements if anonymous contributions were permitted:

> The third purpose behind the disclosure and record-keeping provisions is to gather the data necessary to detect violations of the contribution limits. *Buckley*, 424 U.S. at 67-68, 96 S. Ct. at 657-58. Adopting the position advocated by Goland would create a loophole so large all could pass through. To avoid the contribution limit, one need only make an anonymous donation, wait for the election, and then reveal one's identity. As the Commission also points out, if the candidate as well as the Commission and the public are ignorant of the identity of a large contributor, there would be no way to determine that the contributor is actually an individual as opposed to a corporation or labor union, a public contractor, a representative of a foreign government or a member of a foreign cartel (None may make contributions under FECA. See 2 U.S.C. § 441b, 441c(a), 441e(a)).
>
> *Goland* at 1260.

The Office of General Counsel believes that the policy and statutory arguments made in *Goland* are applicable to the requester's situation. For example, if a candidate were permitted to accept Mr. Harvey's gifts, then the disclosure provisions of the Act would be frustrated since the public would be unaware of the source of a significant portion of the financial support being given to the candidate (for his personal expenses) anonymously by the requester. Further, Commission regulations which limit the acceptance of anonymous contributions of currency could be frustrated.[1] Finally, after the campaign concludes, the requester having evaded the contribution limits of the Act, could simply make his identity known to the candidate .

General Counsel's Recommendation

The Office of General Counsel recommends that the Commission deny the request to reconsider Advisory Opinion 2000-08 and notify the requester by letter (including a copy of this memorandum) of the Commission's decision.

Attachments

1. Request for reconsideration from Mr. Harvey
2. Proposed letter to Mr. Harvey

[1] Under 2 U.S.C. §441g, contributions in currency may not exceed $100. *See also* 11 CFR 110.4(c). A candidate or committee receiving a cash contribution in excess of $50 is required to dispose of the amount over $50 by disbursing it for any lawful purpose unrelated to any Federal election, campaign, or candidate. 11 CFR 110.4(c)(3).

FEDERAL ELECTION COMMISSION
Washington, DC 20463

Philip D. Harvey
DKT International
1120 19th Street, N.W.
Washington, DC 20036

Re: Reconsideration of Advisory Opinion 2000-08

Dear Mr. Harvey:

On July 14, 2000, this Office received your letter requesting reconsideration of Advisory Opinion 2000-08 pursuant to 11 CFR 112.6(a). The letter was circulated on July 24, 2000 to the Commission. On August 24, 2000, the Commission voted to accept the recommendation made by the Office of General Counsel that your request be denied. Enclosed are a copy of the memo to the Commission prepared by this Office and a copy of the official certification of the Commission vote.

Sincerely,

Lawrence M. Noble
General Counsel

BY: _____
N. Bradley Litchfield
Associate General Counsel

Enclosures:
August 15, 2000 Memo to the Commission
Certification of August 24, 2000 Commission vote

FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 24, 2000

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
Public Records Branch
Press Office

FROM: N. Bradley Litchfield
Associate General Counsel

SUBJECT: Letter requesting reconsideration of Advisory Opinion 2000-8

The attached letter requesting reconsideration of Advisory Opinion 2000-8 was received at the Commission on July 14, 2000. It is timely submitted within the 30 calendar days period specified in 11 CFR 112.6(a). The requester received the cited advisory opinion on June 16, 2000.

The requester's letter is a public document, but is not a new advisory opinion request under 2 U.S.C. §437f. See 11 CFR 112.1, 112.2 and 112.6. Therefore, public comments will not be invited or accepted. The Office of General Counsel will submit a memorandum of legal analysis addressing the arguments made in the letter, and it will recommend that the Commission either grant or deny reconsideration.

The Commission is not subject to a 30 (or 60) day timetable for acting on this reconsideration request. This office expects, however, to circulate its memorandum no later than August 11, 2000.

Attachment

Philip D. Harvey
DKT International
1120 19th Street, N.W.
Washington, D.C. 20036

July 13, 2000

Federal Election Commission
Office of General Counsel
999 E. Street, N.W.
Washington, D.C. 20463

Re: Motion for Reconsideration

Dear Sir or Madam:

In accordance with 11 CFR 112.6, enclosed for filing please find a Motion for Reconsideration of AO 2000-8.

Sincerely,

Philip D. Harvey

FEDERAL ELECTION COMMISSION

In re AO 2000-08	MOTION FOR RECONSIDERATION OF ADVISORY OPINION OF JUNE 14, 2000

I, Philip D. Harvey, hereby move for reconsideration of Advisory Opinion 2000-08 ("AO 2000-08"), to the extent that it: (1) is inconsistent with the Federal Election Act of 1971, as amended (the "Act"), and (2) purports to subject me to prosecution by the Federal Election Commission ("FEC" or "Commission") for engaging in activity which does not violate the Act. AO 2000-08 was rendered by the Commission in response to a Request for Advisory Opinion that I submitted on February 18, 2000.

ARGUMENT

The Commission's decision in AO 2000-08 is inconsistent with federal election law and wrongfully subjects me to prosecution for activity not covered by the Act.

Both the Act and the Commission's regulations define a contribution as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing* any election for Federal office." 2 U.S.C.A. § 431(8)(A)(i); 11 C.F.R. 100.7(a) (Emphasis supplied.) In AO 2000-08, the Commission ignores this clear statutory and regulatory focus on the *intent* of the gift-giver, and substitutes a "but for" test that it is entirely inconsistent with the language of the statute and its own regulations. A gift which is "linked to the Federal election" is not equivalent to one that is made "for the purpose of influencing" that election. The Commission's reference to its own regulations defining "personal use," to the extent that they are inconsistent with the statutory definition of contribution and the regulation directly addressing the issue, do not support the decision in AO 2000-08.

The Commission's decision in AO 2000-01 does not support the conclusion reached in AO 2000-08. The public would have cause to fear that an attorney at a law firm, if elected, might be inclined to give special attention to the concerns of his former employer and its clients, especially if he remained on the payroll for the duration of his campaign. It is precisely this fear of "undue influence" that motivated the Supreme Court to uphold the constitutionality of the Act 24 years ago. *See Buckley v. Valeo*, 424 U.S. 1, 25, 96 Sup.Ct. 612, 638 (1976) (embracing appellees' argument that restrictions on contributions were justified in order to "prevent[] corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.") The other decisions cited in the AO 2000-08 are similarly inapposite. Clearly, friends and family members intend to help their friend or family member to win the election. There is no disputing that they are trying to "influence" the outcome of the election.

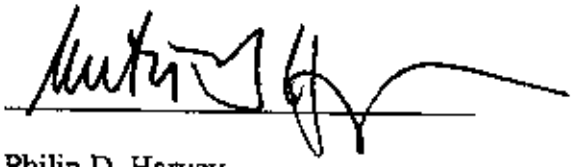
The Commission does not appear to have given any attention to the proposal at issue in AO 2000-08. An anonymous gift-giver, as opposed to an employer, whose gift is expressly conditioned on it not being used to defray campaign expenses, is not in a position to exert any influence whatsoever over the recipient of the gift. No candidate or elected official can feel any sense of loyalty to a gift-giver whose identity is unknown to them. Moreover, the gift at issue in AO 2000-08 is not one that would be motivated by an intent to see the recipient prevail in his or her election. It would be a gift in recognition of the giftee's willingness to stand for election, win or lose.

CONCLUSION

In AO 2000-08, the Commission refused to address the clear language in both the statute and the regulations which defines a contribution as a donation made "for the purpose of

influencing" a Federal election. The gift that I proposed to make in my Request for Advisory Opinion is not motivated by an intent to influence a Federal election, nor would any gift, under my proposal, give rise to even the appearance of corrupting influence. I, therefore, move the Commission to reconsider my request and find that it does not meet the threshold definition of "contribution" under either the Act or the Commission's regulations.

Respectfully submitted,



Philip D. Harvey
DKT International
1120 19th Street, N.W.
Washington, DC 20036
(202) 785-0094

Dated: July 13, 2000