



FEDERAL ELECTION COMMISSION
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June 3, 2004

MEMORANDUM

AGENDA ITEM
For Meeting of: 6-10-04

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

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Deputy General Counsel

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Subject: Draft AO 2004-14

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 10, 2004.

Attachment

DRAFT

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6 ADVISORY OPINION 2004-14
7

8
9 The Honorable Tom Davis
10 U.S. House of Representatives
11 2348 Rayburn House Office Building
12 Washington, DC 20515
13

14 Dear Representative Davis:
15

16 This responds to your letter dated April 19, 2004, as supplemented by your letter dated
17 April 21, 2004, requesting an advisory opinion concerning the application of the Federal Election
18 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to your appearance
19 in two public service announcements (“PSAs”) to benefit the National Kidney Foundation (“the
20 Foundation”) by promoting the Cadillac Invitational Golf Tournament.
21

22 ***Background***

23 You state that you are seeking re-election to the House of Representatives from
24 Virginia’s Eleventh Congressional District in the November 2, 2004, general election, and that
25 you are running unopposed in the upcoming Republican primary election on June 8, 2004.¹ You
26 state that in each of the past three years you have appeared, at the request of the National Kidney
27 Foundation, in two different PSAs promoting the Cadillac Invitational Golf Tournament. You
28 indicate that the tournament is “strictly a charitable fundraising event” held annually to benefit
29 the Foundation, which does not engage in any activity in connection with an election, including
30 voter registration, voter identification, get-out-the-vote activity, and generic campaign activity.

¹ Tom Davis for Congress, your principal campaign committee, filed its Statement of Candidacy for the 2003-04 election cycle with the Commission on January 1, 2003.

1 You indicate that you will appear in PSAs for the April 26th tournament this year, and that you
2 intend to appear annually in PSAs for this tournament in the future.² You state that both PSAs,
3 one thirty-second spot and one sixty-second spot, will air on cable systems in Northern Virginia,
4 including in the Eleventh Congressional District.

5 You indicate that the PSAs will not expressly advocate your election nor make any
6 reference to your status as a candidate in the Republican primary or the general election, nor will
7 any signs, banners, or activities related to your re-election be visible in the background of the
8 PSAs. You have provided the following scripts for past PSAs as representative examples of the
9 scripts for the current and future PSAs:

10 *[30 second spot:]*

11 *Hi, I'm Congressman Tom Davis inviting you to join me on April Twenty-Sixth for the*
12 *Fourth Annual Cadillac Invitational Virginia Golf Classic Benefiting the National*
13 *Kidney Foundation. Compete for great prizes and support a worthy cause. And the*
14 *winning foursome will win a trip to Pebble Beach to play in the national finals! For*
15 *more information, call [omitted], or visit www.kidneywdc.org.*

16 *[60 second spot:]*

17 *Hi, I'm Congressman Tom Davis. Did you know that the Washington, DC metropolitan*
18 *area has the highest prevalence of kidney disease in the nation? Nearly five thousand*
19 *area residents are on dialysis and more than 1,700 await a life-saving kidney transplant.*
20 *But there's something you can do to help. Join me and WUSA9 sports anchor Frank*
21 *Herzog for the Fourth Annual Cadillac Invitational Golf Classic, benefiting the National*
22 *Kidney Foundation. The tournament will take place on Monday, April 26, at Lowes*

² Insofar as you, a Federal officeholder, intend to appear in the future PSAs promoting the event, your request constitutes a proper request for an advisory opinion. 11 CFR 112.1(b).

1 *Island Club in Potomac Falls, Virginia. To find out more, call [omitted] or visit*
2 *www.kidneywdc.org. Come out and support the National Kidney Foundation in its*
3 *commitment to making lives better for Washington area kidney patients.*

4 Although you state that the Foundation is responsible for the creation of the PSAs, you
5 indicate that your congressional office will pay for taping the two PSAs. You state that neither
6 you, the Foundation, nor anyone else will pay for the airtime that will be used to cablecast these
7 PSAs.

8

9 ***Legal Analysis and Conclusions***

10 Your request raises two separate questions concerning the application of the Act to your
11 appearance in these PSAs. The first question involves the funds raised through the PSAs, and
12 the second involves the resources expended to produce them. For the reasons set forth below,
13 you may appear in the PSAs without incurring any obligations under the Act or Commission
14 regulations.

15 *1. Does your appearance in the PSAs constitute a solicitation of impermissible funds?*

16 No. Federal candidates and officeholders are generally prohibited from soliciting funds
17 in connection with a Federal election that are not subject to the limitations, prohibitions and
18 reporting requirements of the Act and Commission regulations. 2 U.S.C. 441i(e); 11 CFR
19 300.61. In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether the
20 funds your appearance in the PSAs will generate for the Foundation will be raised or spent in
21 connection with a Federal or non-Federal election under 2 U.S.C. 441i(e)(1). *See* Advisory
22 Opinion 2003-20. If not, then the funds do not fall within the scope of section 441i(e). *See*
23 Advisory Opinion 2003-20 (concluding that funds are not raised or spent in connection with a

1 Federal or non-Federal election within the meaning of 2 U.S.C 441i(e) if used wholly for student
2 scholarships). Because the funds raised through the tournament are solely for charitable
3 purposes and are not in connection with any Federal or non-Federal election, your appearance in
4 these PSAs does not constitute a solicitation of funds in connection with an election.³

5
6 2. *Do the PSAs constitute "coordinated communications" as a result of your participation in*
7 *their creation, thus triggering payment or reporting obligations on your behalf?*

8 No. The Act and Commission regulations define contributions as “any gift, subscription,
9 loan, advance, or deposit of money or anything of value made by any person” for the purpose of
10 influencing any election for federal office. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). The
11 phrase “anything of value” includes all in-kind contributions, including the provision of goods or
12 services without charge or a charge that is less than the usual and normal charge for such goods
13 or services. 11 CFR 100.52(d)(1), 100.111(e)(1); *see also* Advisory Opinion 2004-06. Congress
14 has defined one type of in-kind contribution as an expenditure made by any person “in
15 cooperation, consultation, or concert with, or at the request or suggestion of” a candidate, his or
16 her authorized committees, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). The Commission’s
17 “coordinated communication” regulation at 11 CFR 109.21 sets forth a three-pronged test to
18 determine whether an expenditure for a communication becomes an in-kind contribution as a
19 result of coordination between a person making an expenditure and a candidate: 1) the
20 communication must be paid for by a “person” other than that Federal candidate, the candidate’s
21 authorized committee or political party committee, or any agent of any of the foregoing, 11 CFR
22 109.21(a)(1); 2) one or more of the four content standards set forth in 11 CFR 109.21(c) must be

³ In light of the Commission’s conclusion that the PSAs do not constitute a solicitation of funds prohibited under 2 U.S.C. 441i(e)(1), there is no need to examine whether the exceptions in 2 U.S.C. 441i(e)(2) through (e)(4) apply.

1 satisfied; and 3) one or more of the five conduct standards set forth in 11 CFR 109.21(d) must
2 also be satisfied. A payment for a communication satisfying all three prongs is made for the
3 purpose of influencing a Federal election and therefore constitutes an in-kind contribution. *Final*
4 *Rules and Explanation and Justification for Coordinated and Independent Expenditures*, 68 Fed.
5 Reg. 421, 426 (Jan. 30, 2003); *see also* Advisory Opinion 2003-25. If one or more of the three
6 prongs are not met, then the communication is not a coordinated communication. If, however,
7 the PSAs in which you appear satisfy all three prongs, the unreimbursed costs incurred would
8 qualify as a contribution to your candidacy for re-election to the House under 2 U.S.C.
9 441a(a)(7)(B)(i).⁴

10 The Commission concludes that the contemplated PSAs are not coordinated
11 communications because they do not meet the first prong of the three-part test, the payment
12 standard.⁵ You state that your congressional office will pay for taping the announcements, the
13 only costs that you have identified for the two PSAs. The Act, however, specifically exempts the
14 Federal government or any of its authorities from the definition of “person.” “The term ‘person’
15 includes an individual, partnership, committee, association, corporation, labor organization, or
16 any other organization or group of persons, but such term does not include the Federal
17 Government or any authority of the Federal Government.” 2 U.S.C. 431(11); *see also* 11 CFR
18 100.10. Because the use of Federal government resources by your congressional office does not
19 qualify as a payment by a “person” for a communication within the meaning of 11 CFR
20 109.21(a)(1), these PSAs fail the three-pronged test and do not qualify as coordinated

⁴ Under 11 CFR 109.21(b)(3), a candidate, authorized committee, or political party committee with whom or with which a communication paid for by another person is coordinated receives an in-kind contribution that must be reported as both a receipt and an expenditure in accordance with 11 CFR 104.13.

⁵ Because all three prongs must be satisfied to constitute a “coordinated communication,” the Commission need not examine the other two prongs for the purposes of your request.

1 communications. Accordingly, no in-kind contribution results and you do not incur any
2 obligations pursuant to the Act from your participation in these PSAs.

3 Similarly, because neither you, the Foundation, nor anyone else will pay to cablecast
4 these communications, the PSAs could not qualify as “electioneering communications,” which
5 are limited to communications “disseminated for a fee.” 11 CFR 100.29(b)(3)(i). Moreover,
6 these PSAs could only be electioneering communications if they were publicly distributed within
7 thirty days of your primary election or within sixty days of the general election. *Id.* at
8 100.29(a)(2). Consequently, 2 U.S.C. 441a(a)(7)(C), which specifies that coordinated
9 electioneering communications are in-kind contributions, does not apply to these PSAs.

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

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Sincerely,

Bradley A. Smith
Chairman

24 Enclosures (AO 2004-06, 2003-25, and 2003-20)

⁶ The Commission notes that the use of Federal funds is governed by general appropriations law and is subject to congressional oversight. The Commission expresses no opinion on the potential application of the rules of the House of Representatives to the proposed transactions.