

July 8, 2004

AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-18 is available for public comments under this procedure. It was requested by counsel, Cassandra Lentchner, on behalf of Friends of Joe Lieberman.

Proposed Advisory Opinion 2004-18 is scheduled to be on the Commission's agenda for its public meeting of Thursday, July 15, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern) on July 14, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-18, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 8, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Cheryl A.F. Hemsley
Staff Attorney

Subject: Draft AO 2004-18

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 15, 2004.

Attachment

1 ADVISORY OPINION 2004-18

2

3 Cassandra Lentchner, Esq.

4 Perkins Coie, LLP

DRAFT

5 607 Fourteenth Street, NW

6 Washington, DC 20005-2011

7

8 Dear Ms. Lentchner:

9 This refers to your letters dated May 13, 2004, and June 2, 2004, on behalf
10 of Friends of Joe Lieberman (the “Committee”) requesting an advisory opinion
11 concerning the application of the Federal Election Campaign Act of 1971, as
12 amended (the “Act,”) and Commission regulations to the Committee’s purchase
13 of remainder copies of Senator Lieberman’s book, *In Praise of Public Life: The
14 Honor and Purpose of Political Science*.

15 ***Background***

16 The Committee is Senator Joseph Lieberman’s principal campaign
17 committee for his re-election in 2006 to the United States Senate. In 1999
18 Senator Lieberman contracted with Simon and Schuster (“Publisher,”) a major
19 publisher, to write a book entitled, *In Praise of Public Life: The Honor and
20 Purpose of Political Science*. You indicate that the Senator’s book was published
21 “pursuant to a publishing agreement through which Senator Lieberman received a
22 royalty advance” and that the Publisher would not be required to make royalty
23 payments to the Senator until “royalty earning sales” exceeded a certain threshold.
24 You also indicate that the publishing contract provides that the Publisher may
25 determine that copies of the Senator’s book “are not readily saleable at regular
26 prices within a reasonable time,,” and that the Publisher can then sell copies of the

1 book as “remainder copies” at a steep discount or can “dispose of the copies as
2 surplus at the best obtainable price.” However, the book contract provides that
3 the “Publisher shall make no remainder sale without first offering copies to the
4 [Senator] at the estimated remainder price.” You state that the provision
5 concerning “remainders” is “customary in the publishing industry.”

6 Senator Lieberman’s book has been in publication for several years and
7 has been sold in hardcover, paperback and e-book formats. You state that the
8 Publisher has now notified Senator Lieberman that “it has determined that the
9 book is no longer readily saleable and that it intends to dispose of its remaining
10 inventory.” You state that the Publisher has offered the Senator the opportunity to
11 purchase copies at the remainder price of \$3.40 per copy. You further state that
12 the Publisher intends to (but has yet to) offer the book to other potential
13 purchasers at that remainder price.

14 You state that the Publisher has “thousands of additional copies” of
15 Senator Lieberman’s book, of which the Committee intends to purchase a “few
16 hundred copies” at the remainder price to “be used solely for distribution to
17 campaign supporters and contributors and will not be either sold or promoted by
18 the campaign.” Further, you state that “quantities purchased would not exceed the
19 number needed for those campaign purposes.”

20 Your letter of May 13, 2004, indicates that “[n]o royalties would accrue to
21 Senator Lieberman” from the sale of books to the Committee. Your letter of June
22 2, 2004, further clarifies that the Senator will contract with the Publisher “to
23 waive any potential royalties or royalty credit.”

1 ***Question Presented***

2 Under the facts and circumstances presented in the request, may the
3 Committee purchase remainder copies of Senator Lieberman’s book for \$3.40, to
4 use as gifts to campaign supporters and contributors?

5 ***Legal Analysis and Conclusions***

6 Yes. Under the facts and circumstances presented, the Committee may
7 make the proposed purchase of copies of Senator Lieberman’s books as an
8 authorized expenditure in connection with the Senator’s campaign for Federal
9 office.

10 ***In-Kind Contributions***

11 The Committee’s purchase of the books at a discounted rate raises the
12 issue of whether the Publisher is making an in-kind corporate contribution in
13 connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b). The
14 term “contribution” includes giving “anything of value” for the purpose of
15 influencing an election. 2 U.S.C. 431(8)(A)(i) and 441b(b)(2); 11 CFR 100.52(a)
16 and 114.1(a)(1). The term “anything of value” includes the provision of goods or
17 services at less than the usual and normal charge. 11 CFR 100.52(d)(1). The
18 “usual and normal charge” for goods means the price of those goods in the market
19 from which they ordinarily would have been purchased at the time of the
20 contribution. 11 CFR 100.52(d)(2). In the past, the Commission has concluded
21 that the purchase of goods or services at a discount does not result in a
22 contribution when the discounted items are made available in the ordinary course
23 of business and on the same terms and conditions to the vendor’s other customers

1 that are not political committees. *See* Advisory Opinions 2001-08, 1996-02,
2 1995-46, and 1994-10.

3 In your request, you state that the practice of discounting books when they
4 are no longer saleable at the regular price is standard in the publishing industry.
5 Additionally, you state that the Publisher set the remainder price for Senator
6 Lieberman's book in the ordinary course of its business based on its estimation of
7 the fair market value of the book as a remainder. Further, you state that the
8 Publisher intends to offer the book to all other potential purchasers at the same
9 remainder price. Accordingly, based on the facts contained in your request, the
10 Committee will pay the usual and normal charge for this type of remainder
11 inventory purchase and therefore would not receive an impermissible in-kind
12 corporate contribution from the Publisher.

13 *Personal Use*

14 Under the Act, as amended by the Bipartisan Campaign Reform Act of
15 2002 ("BCRA") Pub. L. No. 107-155, 116 Stat. 81 (2002), there are four
16 categories of permissible uses of contributions received by a Federal candidate:
17 (1) otherwise authorized expenditures in connection with the candidate's
18 campaign for Federal office; (2) ordinary and necessary expenses incurred in
19 connection with the duties of the individual as a holder of Federal office; (3)
20 contributions to organizations described in 26 U.S.C. 170(c); and (4) transfers,
21 without limitation, to national, State or local political party committees. 2 U.S.C.
22 439a(a); *see also* 11 CFR 113.2(a), (b), and (c). Such uses must not, however,
23 result in the conversion of campaign funds to "personal use" by any person.

1 2 U.S.C. 439a(b)(1). Commission regulations define “personal use” as “any use
2 of funds in a campaign account of a present or former candidate to fulfill a
3 commitment, obligation or expense of any person that would exist irrespective of
4 the candidate’s campaign or duties as a Federal officeholder.” 11 CFR 113.1(g);
5 *see* 2 U.S.C. 439a(b)(2); *see also* Advisory Opinions 2004-03, 2003-30, and
6 2003-26.

7 Although the facts presented in your request indicate that Committee
8 funds will be used as an otherwise authorized expense in connection with the
9 candidate’s campaign for Federal office, in accordance with 2 U.S.C. 439a(a)(1)
10 and 11 CFR 113.2, the Commission must also determine whether this use of
11 Committee funds would exist irrespective of the candidate’s campaign and
12 thereby constitute a prohibited personal use. 11 CFR 113.1(g)(1)(ii).

13 The facts, as presented in your request, indicate that the Committee’s
14 funds will be used to defray an expense that would not exist irrespective of
15 Senator Lieberman’s campaign. The Commission bases its conclusion on several
16 key facts. The books purchased by the Committee will be used solely for
17 distribution to the Committee’s contributors and supporters and thus will be used
18 by the Committee only for the purpose of influencing Senator Lieberman’s re-
19 election to Federal office. In addition, the quantity of books that the Committee
20 intends to purchase will not exceed the number needed for the described
21 distribution.¹ Further, Senator Lieberman will not receive any royalties or royalty

¹ Any books that are surplus to the Committee’s current needs must be treated as Committee assets, which cannot be converted to a personal use.

1 credits as a result of the sale of these books to the Committee, and the sale will
2 not increase the Senator's opportunity to receive future royalties. Although the
3 regulations on personal use permit a candidate to rent space, equipment, or other
4 items to his principal campaign committee at the usual and normal charge,
5 Senator Lieberman's waiver of royalties and royalty credits that would otherwise
6 result from the sale of copies of his book to the Committee precludes the use of
7 the sale as a device to use the Committee to benefit him financially.² See 11 CFR
8 113.1(g)(1)(i)(E); see also Advisory Opinions 2001-08 and 1995-46.³

9 Based on the foregoing analysis, the proposed activity is permissible under
10 the Act and Commission regulations. The amounts spent by the Committee for
11 the purchase of copies of Senator Lieberman's book should be reported as
12 operating expenditures for the 2006 election cycle. 2 U.S.C. 434(b)(4)(A) and
13 (5)(A); 11 CFR 104.3(b)(2)(i) and (b)(4)(i).

14 The Commission expresses no opinion regarding the application of any
15 rules of the United States Senate or any tax law ramifications of the proposed
16 activity because those issues are not within its jurisdiction.

17 This response constitutes an advisory opinion concerning the application
18 of the Act and Commission regulations to the specific transaction or activity set
19 forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if

² Although the Senator's waiver of royalties and royalty credits will provide a benefit to the Publisher, this benefit comes directly from Senator Lieberman's personal funds and not from Committee expenditures. The Publisher is receiving only the usual and normal charge for the books from the Committee. Accordingly, the waiver of royalties would not constitute a personal use by the Publisher of the Committee's funds.

³ We note that in these Advisory Opinions, the candidates arranged for any royalties resulting from sales of their books to their campaign committees to be paid directly to charity.

1 there is a change in any of the facts or assumptions presented, and such facts or
2 assumptions are material to a conclusion presented in this advisory opinion, then
3 the requestor may not rely on that conclusion as support for its proposed activity.

4 Sincerely,

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6
7
8 Bradley A. Smith
9 Chairman

10
11 Enclosures (AOs 2004-03, 2003-30, 2003-26, 2001-08, 1996-02, 1995-46, 1994-
12 10)