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FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 5, 1998

MEMORANDUM

AGENDA ITEM
For Meeting of: 11-12-98

TO: The Commission

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1998-22

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 12, 1998.

Attachment

DRAFT

1 ADVISORY OPINION 1998-22

2
3 Leo Smith
4 1060 Mapleton Avenue
5 Suffield, CT 06078
6

7 Dear Mr. Smith:

8
9 This refers to your letters dated September 18, September 23, and October 2,
10 1998, which request advice concerning the application of the Federal Election Campaign
11 Act of 1971, as amended ("the Act"), and Commission regulations to the creation of a
12 web site which supports the election of a Federal candidate.

13 **FACTUAL BACKGROUND**

14 You state that you are registered as an independent voter in Suffield, Connecticut.
15 You are also the sole owner of Capital Ventures Group, LLC ("CVG") and have been
16 involved in creating web sites for different clients as well as one for your own
17 enterprises.¹ You also indicate that, in order to protest House Republican efforts against
18 President Clinton, you have created an Internet web site advocating the defeat of the
19 Republican candidate, Representative Nancy Johnson, in the Sixth Congressional District
20 of Connecticut. The site also advocates the election of her opponent, Democratic
21 candidate Charlotte Koskoff.² You state that the web site is currently active and has been
22 up since September 17, 1998.

¹ You have in the past created web sites for such organizations as the Connecticut State Dental Association and the Connecticut Dental Hygienist Association.

² The web site address is <http://www.e-source.com/koskoff>.

1 You assert that no funds were received or expended to create the Web site. The
2 site is administered and maintained by you personally from your computer.³ You also
3 state that, as a result of a prior business transaction, you pay no cost for your Internet
4 connection.⁴ The domain name web site is E-SOURCE.COM and is registered with
5 InterNIC in 1996 for a fee of \$100 for the first two years. You state that the fees are now
6 \$35 per year.⁵

7 You have provided documentation depicting the content of the web site. As you
8 originally constructed it, the site urged viewers to “defeat Nancy Johnson” and “Work to
9 elect Koskoff for Congress.” The site also offered the choice to contribute money or
10 volunteer time to the Koskoff campaign by choosing options on the screen. The option to
11 contribute would lead to an additional screen with the address of the Koskoff campaign to
12 which contributions would be sent. An additional screen also included a form that would
13 allow the viewer to state the amount of the contribution he or she would like to make, as
14 well the type of volunteer work the viewer could choose. When filled out, the form could
15 be sent directly from your web site to the official Koskoff campaign.⁶ Your site also
16 contained the statement: “This web site is posted by a registered Independent voter in the
17 Sixth District. This site is not affiliated with or supported by the official Koskoff for

³ You state that you and CVG, the business entity through which you conduct various enterprises, jointly own the computer hardware used to create the site. All of the necessary coding was done by you directly using software that was included with the general “Windows” software package.

⁴ In exchange for promoting the services of JavaNet, as the officially recommended Internet service of the Connecticut State Dental Association and the Connecticut Chiropractic Association, you were provided a free Internet hook-up.

⁵ You explain that E-SOURCE.COM was originally established in 1996 as a web site address for overseeing the web sites constructed by you for several trade associations within Connecticut. Later, each association purchased their own URL. Currently the E-SOURCE is used by CVG to display information regarding its services. The \$35 fee to InterNIC for 1998 was paid by CVG. You state that there is no cost or charge for any additional sublistings off the E-SOURCE.COM URL.

1 Congress campaign.” The web site also has a link to the electronic mail (“e-mail”)
2 address of Friends of Charlotte Koskoff (“the Koskoff Committee”), the principal
3 campaign committee of Ms. Koskoff.

4 Your September 23 letter includes a copy of a September 22 letter to you from the
5 campaign manager of the Koskoff Committee requesting that, since you have no
6 connection to the campaign, you should honor its previous request to remove the web
7 site. A letter (and e-mail) was sent to Commission staff by the Koskoff Committee,
8 which referenced this request. Your response to the Koskoff Committee letter denies that
9 any previous request to remove the web site was made. Instead, your response letter
10 indicates that you were asked to do only two things: correct the spelling of the
11 candidate’s name and remove a credit card option for contributions to the Koskoff
12 campaign. You state that you complied with these requests.⁷

13 Given the above factual background, your request poses two questions:

- 14 1) Do the Act and Commission regulations require that you file a report of your expenses
15 or costs, whether direct or indirect, to establish and maintain the web site?
16 2) Do the Act and Commission regulations require that you include a statement on your
17 web site that identifies you as the sponsor of the web site or the payor of costs related to
18 the site?

⁶ Since your first submission, the form regarding the level of monetary or voluntary support has been removed.

⁷ The correspondence between you and the Koskoff Committee indicates that you initiated contact with the committee following the creation of the web site. There is no information regarding any contact between you and the committee prior to or during your preparation of the web site. The Commission makes no finding that such contacts did or did not occur. Such a question would have to be addressed in the enforcement process. See 2 U.S.C. §437g and 11 CFR Part 111.

1 The Commission will address these questions in reverse order since the answer to
2 question two represents the legal basis for addressing question one. In summary, the
3 response to question two is yes, a statement disclosing your sponsorship of the web site is
4 required to be placed on the site itself. A definitive response to question one is not
5 possible, given the status of factual representations made at this time.

6 **ACT AND COMMISSION REGULATIONS**

7 The definition of "expenditure" in 2 U.S.C. §431(9) includes "any purchase,
8 payment, distribution, loan, advance, deposit, or gift of money or anything of value, made
9 by any person for the purpose of influencing any election for" Federal office. See also 11
10 CFR 100.8(a)(1). The definition of "contribution" in 2 U.S.C. §431(8) includes "any
11 gift, subscription, loan, advance, deposit, or gift of money or anything of value, made by
12 any person for the purpose of influencing any election for" Federal office. See also 11
13 CFR 100.7(a)(1).

14 An independent expenditure is defined at 11 CFR 109.1(a) as an expenditure by a
15 person for a communication expressly advocating the election or defeat of a clearly
16 identified candidate which is not made with the cooperation or with the prior consent of,
17 or in consultation with, or at the request or suggestion of, a candidate or any agent or
18 authorized committee of such candidate. See also 2 U.S.C. §431(17).

19 An expenditure which does not meet the above standard is considered an in-kind
20 contribution. 11 CFR 109.1(c). The regulations provide that the clause: "Made with the
21 cooperation or with the prior consent of, or in consultation with, or at the request or
22 suggestion of, a candidate or any agent or authorized committee of the candidate," means
23 any arrangement, coordination, or direction by the candidate or his or her agent prior to

1 the publication, distribution, display, or broadcast of the communication. 11 CFR
2 109.1(b)(4). Under section 109.1(b)(4)(i), an expenditure will be presumed to be so made
3 when it is:

- 4 (A) Based on information about the candidate's plans, projects, or
5 needs provided to the expending person by the candidate, or by the
6 candidate's agents, with a view toward having an expenditure made; or
7 (B) Made by or through any person who is, or has been, authorized
8 to raise or expend funds, who is, or has been, an officer of an authorized
9 committee, or who is, or has been, receiving any form of compensation or
10 reimbursement from the candidate, the candidate's committee or agent.

11
12 When, however, an individual merely requests and receives from a candidate the
13 Commission's guidelines on independent expenditures, he/she is not considered to have
14 coordinated, cooperated or consulted with the candidate. 11 CFR 109.1(b)(4)(ii).

15 Under 11 CFR 109.2, persons other than a political committee who make
16 independent expenditures aggregating in excess of \$250 during a calendar year shall file a
17 signed statement or report on FEC Form 5 with the Commission (or Secretary of the
18 Senate) in accordance with 11 CFR 104.4(c). If such a signed statement is submitted,
19 the statement shall include: (i) the reporting person's name, mailing address, occupation
20 and the name of his or her employer, if any; (ii) the identification (name and mailing
21 address) of the person to whom the expenditure was made; (iii) the amount, date and
22 purpose of each expenditure; (iv) a statement which indicates whether such expenditure
23 was in support of, or in opposition to a candidate, together with the candidate's name and
24 office sought; (v) a notarized certification under penalty of perjury as to whether such
25 expenditure was made in cooperation, consultation or concert with, or at the request or
26 suggestion of any candidate or any authorized committee or agent thereof; and (vi) the
27 identification of each person who made a contribution in excess of \$200 to the person

1 filing such report, which contribution was made for the purpose of furthering the reported
2 independent expenditure.

3 Whenever any person makes an expenditure for the purpose of financing
4 communications expressly advocating the election or defeat of a clearly identified
5 candidate, or solicits any contribution through any broadcasting station, newspaper,
6 magazine, outdoor advertising facility, direct mailing, or any other type of general public
7 political advertising, such communication is required under 2 U.S.C §441d to clearly
8 state (1) if it has been paid for and authorized by a candidate, or the candidate's
9 authorized political committee, or (2) if paid for by other persons but authorized by a
10 candidate, an authorized political committee of a candidate, or its agents, it shall clearly
11 state that the communication is paid for by such other persons and authorized by such
12 authorized political committee. If the communication is not authorized by a candidate, an
13 authorized political committee of a candidate, or its agents, it shall clearly state the name
14 of the person who paid for the communication and state that the communication is not
15 authorized by any candidate or candidate's committee. 2 U.S.C §441d; see 11 CFR
16 109.3, 110.11(a)(1) and 110.11(a)(5).

17 **APPLICATION TO WEB SITE**

18 *Need for disclaimer*

19

20

Web site as expenditure

21 Because of the general availability of access to the Internet, the Commission has
22 concluded that communication via a web site would be considered a form of
23 communication to the general public. See Advisory Opinions 1997-16, 1996-16, 1995-
24 35, 1995-33 and 1995-9. In the past, the Commission has reviewed advisory opinion

1 requests which entailed the use of the Internet for the endorsement of candidates
2 (Advisory Opinion 1997-16) and the solicitation of political contributions (Advisory
3 Opinions 1995-33 and 1995-9).

4 The web site would be viewed as something of value because it urges supports of
5 a Federal candidate and it is designed to influence a Federal election. Therefore, it meets
6 the requirements of 2 U.S.C. §431(9) and 11 CFR 100.8(a)(1). Therefore, the
7 Commission concludes that the costs associated with the creation and maintaining of the
8 web site described in your request, would be considered an expenditure under the Act,
9 and Commission regulations.

10 Disclaimer requirements

11 The Commission has required political advertisements located on a web site to
12 have the proper disclaimer as required by the Act and Commission regulations. See
13 Advisory Opinions 1995-35 and 1995-9. Under 11 CFR 109.3, your web site both
14 expressly advocates the candidacy of Ms. Koskoff and solicits contributions on her
15 behalf. Therefore, it is required to have a disclaimer that meets the requirements of 2
16 U.S.C §441d and 11 CFR 110.11. As part of this disclaimer your statement must indicate
17 your full name. Your statement on the web site that identifies that you as an
18 “independent voter” is insufficient and must be modified to include your full name. It
19 must also include a truthful statement as to whether or not your communication via the
20 web site is authorized by any candidate.

21 Constitutional considerations

22 You cite the United States Supreme Court decision in *McIntyre v. Ohio Elections*
23 *Commission*, 515 U.S. 334 (1995) which, you state, “offered no support for any FEC

1 requirement that disallows anonymous political publications.” Generally, Federal
2 administrative agencies are without power or expertise to pass upon the constitutionality
3 of legislative action. Advisory Opinions 1998-20 and 1992-35 (citing court decisions).
4 The Commission may, however, respond to your contention by explaining its view of the
5 cited opinion and its relevance to the Act or Commission regulations.

6 *McIntyre* is distinguishable in several ways from your situation. The *McIntyre*
7 Court ruled unconstitutional a broadly written Ohio statute banning the distribution of all
8 but handwritten anonymous campaign literature. While the decision contains broad
9 language on the constitutional protections afforded campaign-related speech, the case
10 involved issue, rather than candidate advocacy. The Court was careful to distinguish the
11 Ohio statute in question from the Act, which applies only to candidate elections.
12 *McIntyre* at 356, citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). In this regard, the
13 Commission notes that 2 U.S.C §441d is more narrowly written to address only
14 communications expressly advocating the election or defeat of a Federal candidate or
15 those soliciting contributions using public media.⁸ Your web site concerns candidate
16 related material for a Federal election. Moreover, your web site also contains a
17 solicitation for contributions to a Federal candidate. Your situation is therefore factually

⁸ Shortly after *McIntyre* was decided, the Supreme Court declined to review a decision of the California Supreme Court that upheld the constitutionality of a California disclaimer requirement that is very similar to that contained in section 441d. *Griset v. Fair Political Practices Commission*, 884 P.2d 116 (Cal. 1994), cert. denied 514 U.S. 1083 (1995). *Griset* had challenged a requirement in section 84305 of the California Government Code that candidates and their controlled committees include the candidate’s name and address on each piece of mail in a mass mailing. The denial of petition of certiorari does not import as to the merits of a lower court decision. See *Griffon v. United States*, 336 U.S. 704, 176 (1949). Nonetheless, the fact that the Court failed to consider the case or remand it for reconsideration consistent with the *McIntyre* decision could be read as an indication that a majority of the Court does not believe the reasoning in *McIntyre* applies to the *Griset* situation (or would, by extension, apply to section 441d).

1 distinguishable from the circumstances in *McIntyre* which concerned the distributions of
2 anonymous leaflets expressing opposition to a proposed referendum.

3 Lower courts have been careful to note differences similar to these when
4 examining the reach of the *McIntyre* opinion. For example, in *Kentucky Right to Life,*
5 *Inc. v. Terry*, 108 F.3d 637 (6th Cir.,1997), *cert denied*, 118 S.Ct. 162 (1997), the Sixth
6 Circuit distinguished *McIntyre* citing the difference between candidate-based and issue-
7 based elections and sustained a State disclaimer provision, similar to 2 U.S.C. §441d, as
8 it applied to independent expenditures. The Second Circuit declined to apply *McIntyre*
9 when it sustained the application of section 441d, to a communication that solicited
10 contributions. See *FEC v. Survival Education Fund*, 65 F. 3d 285 (2nd Cir., 1995).

11 *Possible reporting obligations*

12 Given the conclusion that your web site is an expenditure and requires a
13 disclaimer, it becomes necessary to determine whether there are any reporting obligations
14 connected to your expenditure under 11 CFR 109.2. It would also be necessary to
15 determine whether the expenditure is independent or whether it is an in-kind contribution.
16 If the expenditure lacked independence, it would be an in-kind contribution which the
17 Koskoff Committee would be required to itemize on its reports, provided the contribution
18 has a value exceeding \$200 in a calendar year. See 2 U.S.C. §434(b)(3) and 11 CFR
19 104.3(a)(4)(i). However, if the expenditure were independent, not coordinated with the
20 Koskoff campaign, then you would incur a reporting obligation if the expenditure meets
21 the \$250 threshold found in 11 CFR 109.2 which requires the filing of a signed statement
22 or report on FEC Form 5.

1 Valuation issues

2 Whether viewed as an independent expenditure to be reported by you, or as an in-
3 kind contribution to be reported by the Koskoff Committee, the question of attaching a
4 value to the expenditure is raised. You assert that the creation of the web site is without
5 cost to you. The Commission, however, cannot agree with this characterization.⁹ The
6 Commission notes that there are minimal costs associated with creating the web site.
7 Some portion of the previous expenses described in your request could be apportioned to
8 each and every web site that you construct as part of your business. These overhead costs
9 would include, for example, the fee to secure the registration of domain name, the
10 amounts you invested in your hardware, and the utility costs to create the site.¹⁰

11 Coordination issues

12 The information received by the Commission indicates a dispute concerning the
13 content and context of your communications with the Koskoff campaign. Again,
14 according to the Koskoff Committee, you were requested to remove the web site. You

⁹ The Commission notes that a claim that political advertisement directed to the general public entails no cost to the maker would seem to run counter to the perception of the Supreme Court in *Buckley* at 635. The Court observed:

virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

¹⁰ Looking at this from a slightly different perspective, the Commission notes that you have created web sites for various non-profit organizations as part of your business. Presumably, part of the fee you would charge your clients would consist of costs incurred in the preparation of these websites. This valuation would be relevant to a determination of the amount of the expenditure for your Koskoff website. Of course, you may exclude from the valuation, the amount representing only your personal services since you could volunteer your uncompensated services to a campaign without any contribution resulting. See 2 U.S.C. §431(8)(B)(ii).

1 maintain that all you were requested to do was correct the spelling of Ms. Koskoff's name
2 and remove information facilitating credit card contributions to the campaign; you say
3 that you agreed to these requests. The Commission notes that the differing accounts of
4 the contacts between you and the candidate committee could produce likewise different
5 conclusions regarding the independence of the web site expenditures since they focus on
6 the level of cooperation or coordination between you and the Koskoff Committee. This
7 factual dispute cannot be resolved, nor is it required to be resolved, in the advisory
8 opinion process. Therefore, this opinion expresses no conclusion as to whether the
9 expenditures for the web site are independent expenditures or whether they are in-kind
10 contributions to the Koskoff Committee.

11 This response constitutes an advisory opinion concerning the application of the
12 Act, or regulations prescribed by the Commission, to the specific transaction or activity
13 set forth in your request. See 2 U.S.C. §437f.

14 Sincerely,

15

16 Scott E. Thomas
17 Acting Chairman

18

19 Enclosures (AOs 1997-16, 1996-16, 1995-35, 1995-33, and 1995-9)