



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**ADVISORY OPINION 1999-2**

**CONCURRING OPINION OF**

**CHAIRMAN SCOTT E. THOMAS  
COMMISSIONER DANNY LEE MCDONALD**

Although we agree with the result reached in Advisory Opinion 1999-2, we write this concurring opinion to set out more fully our understanding of the analysis underpinning that decision. In an effort to be concise, the Commission's rationale in the Opinion is somewhat terse and abrupt. This attempt at concision, however, should not be read by the regulated community as some sort of *sub silentio* Commission abandonment of previous Advisory Opinions in this area. Those Opinions remain alive and well.

At issue in Advisory Opinion 1999-2 was whether a corporate-sponsored candidate forum on corporate premises and open to all employees would be subject to the Federal Election Campaign Act and Commission regulations. This is not a novel question. The Commission "has frequently considered whether particular activities involving the participation of a Federal candidate are *campaign-related*, and thus result in a contribution to or expenditure on behalf of such candidate under the Act." Advisory Opinion 1996-11, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6194 (emphasis added). In its treatment of these matters, the Commission has developed the following test:

The Commission has determined that financing such activities will result in a contribution to or expenditure on behalf of a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate. See Advisory Opinions 1994-15, 1992-6, 1988-27 and opinions cited therein. . . . The Commission has indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is "*campaign-related*."

Advisory Opinion 1996-11, *id.* (emphasis added).

The requester in Advisory Opinion 1999-2 indicated there would be neither express advocacy nor contribution solicitations at the proposed candidate forum. As Advisory Opinion 1996-11 and its predecessors plainly indicate, however, that is not the end of the matter. Even though an event may not contain any express advocacy or

contribution solicitations, there may be other factors which lead to a conclusion that an event is "campaign-related." This was true in Advisory Opinion 1999-2.


In the instant Opinion, the Commission noted that at least half the speakers in the proposed program would be invited to participate because their opponents for election to office had been given a similar opportunity. As such, an individual's status as a candidate was plainly a determining factor in extending invitations to participate in the corporate-sponsored forum. Significantly, the Commission previously has stated that invitations to multiple candidates for the same office, or invitations extended to candidates—as candidates—signify that the planned event is, in fact, *campaign-related*. See Advisory Opinions 1984-13 and 1986-37 at 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5759 and 5875, respectively.

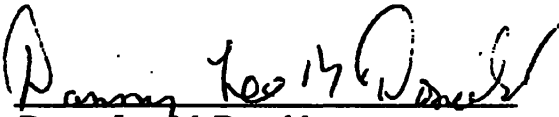
Applying the test set out most recently in Advisory Opinion 1996-11, we accordingly concluded that the corporate forums in Advisory Opinion 1999-2 were campaign-related after having first looked to see whether express advocacy or contribution solicitations were present. Unfortunately, the Commission's analysis omitted any discussion of the first part of the test, *i.e.*, was there any express advocacy or contribution solicitation, and focused entirely on whether invitations were extended "to candidates *qua* candidates." Advisory Opinion 1999-2 at 4. As a result, some may wonder whether this somehow represents a sea-change in Commission analysis to a "how-the-invitation-was-sent-test."

Nothing, however, has changed. No opinions were overturned or superseded in Advisory Opinion 1999-2, and all prior advisory opinions in this area remain standing. Having said this, we think the Commission should have laid out the applicable analysis fully as it did in Advisory Opinion 1996-11. This analysis is far more preferable than simply outlining a set of facts and concluding, in bare fashion, "that the forums you describe would be 'in connection with a Federal election.'" Advisory Opinion 1999-2 at 4. The Advisory Opinion process should provide the regulated community with a useful means for understanding the Commission's approach to election law issues. Advisory Opinion analysis which simply cuts to the most relevant issue and ignores the larger framework, does so at the expense of an informed regulated community.

3/19/99  
Date

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Scott E. Thomas  
Chairman

  
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Danny Lee McDonald  
Commissioner