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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 21, 1999

## AGENDA ITEM

For Meeting of: 10-28-99

### MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence M. Noble *L.M.N.*  
General Counsel

N. Bradley Litchfield *NBL*  
Associate General Counsel

Jonathan M. Levin *J.M.L.*  
Senior Attorney

Subject: Draft AO 1999-27

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 28, 1999.

Attachment

1 ADVISORY OPINION 1999-27

2  
3 Timothy A. McKeever  
4 Holmes Weddle & Barcott  
5 701 West Eighth Avenue  
6 Suite 700  
7 Anchorage, Alaska 99501-3408

**DRAFT**

8  
9 Dear Mr. McKeever:

10  
11 This responds to your letters dated August 4 and September 3, 1999, as  
12 supplemented by your letters dated September 14 and October 19, on behalf of the Alaska  
13 Federation of Republican Women ("the Federation"), requesting an advisory opinion  
14 concerning the application of the Federal Election Campaign Act of 1971, as amended  
15 ("the Act"), and Commission regulations to the conduct of a presidential straw poll.

16 *Background*

17 You state that the Federation is a party committee as defined under 11 CFR  
18 100.5(e)(4), maintains separate Federal and non-Federal accounts, and is registered with  
19 the Commission and the Alaska Public Offices Commission ("APOC"). According to a  
20 draft opinion written by APOC staff on the application of State law to the straw poll,  
21 which you submitted with your September 14 letter, the Federation is an umbrella  
22 organization for six local Republican women's groups, and the Republican Party of  
23 Alaska ("RPA") has recognized the Federation and its affiliates as a political  
24 subdivision.<sup>1</sup>

25 On January 24, 2000, the Federation will conduct a non-binding presidential  
26 preference straw poll, in which Alaskans will express their preference as to the  
27 Republican presidential nominee. You describe the process, stating that the straw poll  
28 will have several of the features of an election. All publicly announced candidates for the  
29 Republican presidential nomination in the year 2000 will be listed on the polling form or  
30 "ballot." All Alaska registered Republicans will be permitted to "vote,"<sup>2</sup> and the results

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<sup>1</sup> The APOC will consider the draft for approval at its November meeting.

<sup>2</sup> Your request refers to a "ballot" and individuals casting a "vote" for candidates on the straw poll ballot. The Commission preliminarily applies quotation marks to these terms to indicate that they are not the same as ballots and votes in the context of an actual election.

1 will be totaled and immediately released to the public. You note that voters can register  
2 as Republicans at the straw poll but, under Alaska law, can change their registration  
3 immediately thereafter. The Federation will conduct the straw poll simultaneously in all  
4 of the RPA's organized precincts.<sup>3</sup> The poll will be held in the same buildings and on the  
5 same evening as the Republican precinct caucuses, which will be conducted by the local  
6 or district party organizations, but participation in one event is not a prerequisite to  
7 participation in the other event. Moreover, you assert that the precinct caucus and the  
8 poll will be "physically distinct" from each other, and everyone present will be "aware of  
9 the separation of the two." In most locations, the caucus will be held in a public building  
10 and the straw poll will be held in a separate room. In some smaller communities, the  
11 straw poll will be held in a separate area of the same room. For voting in those rural  
12 areas where no precinct is organized, the Federation will set up a web site for voting by  
13 Internet.<sup>4</sup>

14 You assert that the straw poll will play no part in the election of Alaska's  
15 delegates to the national convention. The poll results are purely advisory and are not  
16 binding on the district conventions or State conventions or the delegates selected there, or  
17 on the national convention delegates. The precinct caucuses elect delegates to the district  
18 convention, and the district convention elects delegates to the State convention. The  
19 State convention, held in the spring of 2000, in turn elects delegates to the Republican  
20 National Convention. The precinct caucuses, district conventions, and the State  
21 convention also perform functions related to the operations of the State party such as  
22 electing committee members and officers, developing the State party platform, and  
23 candidate recruitment and support at all levels.

24 You describe how funds will be raised and used for the poll. To pay for the  
25 expenses for the poll, the Federation will solicit donations of money and in-kinds goods  
26 and services, and will deposit the funds in a separate bank account opened specifically to  
27 pay for the poll.<sup>5</sup> The expenses will include costs for the preparation and distribution of

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<sup>3</sup> You estimate that, of the 475 precincts in the State, approximately 350 are regularly organized.

<sup>4</sup> Security provisions will be incorporated to ensure voting only by "qualified persons."

<sup>5</sup> According to the description in the draft APOC opinion, contributors will make their checks payable to the Federation Straw Poll Account or designate their intent by some other means. In addition, any surplus

1 ballots; telephone, fax, and other communication charges to coordinate the poll and tally  
2 the votes; advertising costs; and rental for the rooms or areas used to conduct the straw  
3 poll. No paid staff will be involved and all of the individuals working on the poll will be  
4 volunteers. The Federation will not use the funds donated for the poll for any State or  
5 local election purposes, or to advocate a specific presidential candidate's election. Those  
6 candidates and their campaigns can be expected to advocate their candidacies, but such  
7 advocacy will be separate from any disbursements by the Federation. You state that the  
8 solicitation of funds will most likely be "limited and specifically targeted on those who  
9 are determined to be eligible to contribute," and will most likely be done through  
10 "personal communication over the telephone or in person." Potential donors will be told  
11 about the poll, and reminded that one was conducted in 1996, and that the poll can draw  
12 significant attention for Alaska and Alaska political issues.

13 You assert that the advertising will be purely informational and will not be used to  
14 obtain new Republican registrants or to advocate voting Republican. Post cards will be  
15 sent to all registered Republicans in the State advising them of the straw poll, the nature  
16 of the poll, where they can go to participate, and similar details. Advertisements in  
17 selected newspapers and on radio will encourage participation and stress that the poll will  
18 be the first held in the election year and will put Alaska and Alaska issues before the  
19 candidates and the media. A sample newspaper ad in your request states as follows:  
20 "Help generate national media attention with a turnout that shows we take choosing our  
21 next President seriously." The Federation will also issue press releases to the media  
22 announcing the poll. Both the ads and the press releases will contain a brief reference to  
23 the caucuses and a statement that participation in the caucus is not required to vote in the  
24 straw poll, in order to avoid reader confusion of the caucuses with the straw poll.<sup>6</sup>  
25 Finally, the Federation will use its new web site to promote voting by Internet.

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money remaining after the poll is conducted will be refunded to contributors on a pro rata basis or given to charity.

<sup>6</sup> You further emphasize the distinction between the straw poll and the caucuses by stating that the Federation will ask that the State, district and local parties include only a brief reference to the straw poll in their ads for the precinct caucuses, in order to avoid confusion between the two events. You note the existence of a page on the RPA web site publicizing the straw poll and stating that the precinct caucus will be held "in conjunction with the straw poll." The Federation has asked the RPA to change the page to

1           At the straw poll itself, the Federation will not advocate a vote for any particular  
2 presidential candidate. The Federation will make no general communications concerning  
3 party activities or events, or party platforms and positions, nor will it solicit contributions  
4 to the party or candidates, or encourage registration.<sup>7</sup> However, it is anticipated that  
5 individual presidential candidates, or representatives of their campaigns, may be at the  
6 buildings where the caucuses and straw polls take place and may advocate their  
7 respective candidacies.

8           You cite Article XV of the Alaska Republican Party ("RPA") rules, the only  
9 article that addresses the straw poll. This rule prescribes the voter eligibility, reporting of  
10 results, and ballot content with respect to the polls. It also authorizes candidate forums,  
11 thus indicating that the poll is part of the process for the selection of a presidential  
12 nominee. The article provides that the RPA, its district organizations, and its affiliated  
13 organizations are encouraged to provide forums for any Republican presidential candidate  
14 campaigning in Alaska, and that the RPA should try to provide a statewide forum for a  
15 debate by as many Republican presidential candidates as possible.

#### 16 *Questions Presented*

17           You state that the Federation is merely providing the opportunity for a straw poll,  
18 that it is not advocating the election of any particular candidate or candidates, and that the  
19 straw poll itself is not an election. Hence, you ask for confirmation of your conclusion  
20 that none of the proposed activity is subject to regulation under the Act; that is, that none  
21 of the donations to the Federation for the proposed activities and none of the Federation's  
22 disbursements with respect to them would constitute contributions or expenditures under  
23 the Act. In the alternative, you ask whether the straw poll expenses are subject to the  
24 allocation rules at 11 CFR 106.5.

#### 25 *Legal Analysis*

26           The Act and Commission regulations define the terms "contribution" and  
27 "expenditure" to include a gift, loan or payment of money or anything of value for the

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indicate that straw poll will be separate from the caucus, that one need not participate in both, and that the straw poll is being funded by the Federation.

<sup>7</sup> Some of these activities, however, may occur during the caucuses, which, as indicated above, are not conducted by the Federation.

1 purpose of influencing a Federal election. 2 U.S.C. §431(8)(A)(i) and (9)(A)(i); 11 CFR  
2 100.7(a)(1) and 100.8(a)(1). The term "anything of value" includes in-kind contributions,  
3 and the provision of any goods or services without charge, or at a charge which is less  
4 than the usual and normal charge for such goods or services, is a contribution, unless  
5 specifically exempted under 11 CFR 100.7(b) or 100.8(b). 11 CFR 100.7(a)(1)(iii) and  
6 100.8(a)(1)(iv).

7 Commission regulations provide that party committees that make disbursements  
8 in connection with Federal and non-Federal elections shall allocate (i) administrative  
9 expenses; (ii) the direct costs of a fundraising program or event; (iii) State and local party  
10 activities exempt from the definition of contribution and expenditure under 11 CFR  
11 100.7(b)((9), (15), or (17), and 100.8(b)(10), (16), or (18); and (iv) generic voter drives  
12 including activities that urge the general public to register, vote, or support candidates of  
13 a particular party, without mentioning a specific candidate. 11 CFR 106.5(a)(2)(i)-(iv).  
14 Under the allocation regulations, disbursements for such activities must be paid for  
15 entirely from funds subject to the limitations and prohibitions of the Act or from separate  
16 Federal and non-Federal accounts established pursuant to 11 CFR 102.5(a)(1)(i). 11 CFR  
17 106.5(a)(1). Commission regulations provide that any party committee solicitation that  
18 makes reference to a Federal candidate or a Federal election shall be presumed to be for  
19 the purpose of influencing a Federal election, and contributions resulting from that  
20 solicitation shall be subject to the Act's limitations and prohibitions. The presumption  
21 may be rebutted by demonstrating to the Commission that the funds were solicited with  
22 express notice that they would not be used for Federal election purposes. 11 CFR  
23 102.5(a)(3).

24 The Commission agrees that the straw poll itself is not a Federal election; the  
25 electoral process for selecting delegates and the choices of those delegates is the process  
26 that begins with the precinct caucuses and leads up to State convention, as described  
27 above.<sup>8</sup> Nevertheless, the Federation proposes to engage in fundraising, advertising, and

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<sup>8</sup> Although the straw poll may be characterized as "for the expression of a preference" for a Republican Presidential nominee, it is specifically designated as a "straw poll." As discussed below, it is part of Alaska's presidential selection process, but does not constitute a primary election. See 2 U.S.C. §431(1)(D) and 11 CFR 100.2(c)(2).

1 organizing activities for the poll leading up to a form or ballot that contains a specific  
2 group of named Republican presidential candidates. As you state in your request, the  
3 straw poll “will encourage voters to select a Republican candidate for the presidential  
4 nomination,” and the “purpose of the straw poll is to obtain a valid expression of  
5 Alaska’s choice as the Republican nominee.” The Federation’s activities for the poll will  
6 thus be for the purpose of influencing the presidential election.<sup>9</sup>

7         The straw poll is an event that pertains entirely to a Federal election. In a mixed  
8 Federal/non-Federal context where no candidates are specifically mentioned, the  
9 activities you describe seem most similar to a generic vote drive urging support for the  
10 party, as compared to the other allocation categories. However, the straw poll and the  
11 activities pertaining to it will be devoted solely to the presidential election process. The  
12 fundraising and spending will be separated entirely from the other activities of the  
13 Federation or the State party, and fundraising appeals will focus on the presidential straw  
14 poll and presumably make clear that the funds will be used only for the poll. See 11 CFR  
15 102.5(a)(3). You particularly emphasize the separation of the straw poll from the precinct  
16 caucuses which involve a number of party activities, both Federal and non-Federal. The  
17 Federation’s advertising of the straw poll will focus solely on the straw poll and will  
18 mention the precinct caucuses only to avoid confusion. In addition, unlike allocable  
19 generic party activities, this activity will focus on a specific group of candidates and the  
20 straw poll form itself will list specific candidates. The Commission concludes therefore

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<sup>9</sup> You cite Advisory Opinion 1988-10 for the position that the straw poll is not an election and, hence, the Federation’s activities are not for the purpose of influencing an election. In that opinion, the Commission concluded that the election of precinct committee persons was not in itself an election or a “level” of a delegate selection process, and that activities by committee person candidates solely to achieve that office would not be subject to the Act. The election of the committee persons would occur simultaneously with a presidential preference primary that would determine the apportionment of delegates among the presidential candidates. The committee persons would select the actual delegates to the state and national nominating conventions. The Commission noted that the committee persons were party officials elected for two-year terms, and that, while one of their duties was the selection of delegates, the apportionment of delegates was determined by the preference primary and the preferences of the candidates for committee persons were not indicated on the ballot. Here, however, your request and the rules of the State party make it clear that this straw poll is a part of the presidential election process, that the candidates will be listed by name on the straw poll form, and that this activity is devoted solely to the presidential election process and not for the selection of party officers who perform other duties for the party as well. The fact that the straw poll itself is not an election does not negate the fact that the Federation’s activities are for the purpose of influencing the presidential election.

1 that the Federation may only raise and use funds subject to the limitations and  
2 prohibitions of the Act for its activities in connection with the straw poll. See 2 U.S.C.  
3 §§441a(a)(1)(C), 441b, 441c, 441e, and 441f.

4 The Federation's proposed straw poll activities and related communications do  
5 not appear to entail acting in cooperation or with the prior consent of, or in consultation  
6 with, or at the request or suggestion of any candidate or agents or authorized committee  
7 of a candidate. See 2 U.S.C. §§431(17) and 441a(a)(7)(B)(i); 11 CFR 109.1(a). Thus,  
8 these activities would not entail contributions to any candidate. The expenses for the  
9 activities would, however, be operating expenditures of the Federation, reportable on line  
10 21b as "Other Federal Operating Expenditures," i.e., outside the allocation formula.  
11 Although the Commission has noted that the activity at issue occurs with respect to a  
12 specific group of Federal candidates and includes reference to specific candidates on the  
13 straw poll form, the Federation is not participating in activity specifically on behalf of  
14 these candidates or in a way that can be directly attributed to each candidate. Hence, the  
15 disbursements of the Federation need not be specifically allocated to the presidential  
16 candidates in accordance with 11 CFR 106.1(a) or (c)(2).<sup>10</sup>

17 You have represented that the solicitation of funds for the Federation's straw poll  
18 activities will most likely be done in person or by telephone. Assuming that the  
19 Federation will not raise funds for the poll through any form of general public  
20 advertising, the solicitations of funds need not include a disclaimer. Moreover, if the  
21 public media advertising for participation in the poll does not contain any message

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<sup>10</sup> Section 106.1(a) provides that expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. Section 106.1(c)(2) provides that expenditures for registration or get-out-the-vote drives need not be attributed to individual candidates unless the expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate.

This non-attribution approach is consistent with the Commission's response in Advisory Opinion 1988-22 to a political organization established to help elect more Republicans but not officially tied to the Republican Party. In discussing a newsletter published by the organization, the Commission stated that, if statements or references regarding clearly identified candidates appear in the newsletter and do not expressly advocate their election or defeat, nor solicit contributions on their behalf, and such communications are not made in coordination with the candidates, the payments for the allocable newsletter costs incurred in making these types of communications would "constitute operating expenses generally allocable to federal political activity," and not specifically attributable to candidates.



1 expressly advocating the election or defeat of a candidate, the advertisements need not  
2 include a disclaimer. See 2 U.S.C. §441d(a); 11 CFR 110.11(a)(1).

3 This response constitutes an advisory opinion concerning application of the Act  
4 and Commission regulations to the specific transaction or activity set forth in your  
5 request. 2 U.S.C. §437f.

6 Sincerely,

7  
8 Scott E. Thomas  
9 Chairman

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11 Enclosures (AOs 1988-22 and 1988-10)

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