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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 4, 1999

## AGENDA ITEM

For Meeting of: 11-10-99

### MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director 

FROM: Lawrence M. Noble  
General Counsel 

N. Bradley Litchfield  
Associate General Counsel 

Michael G. Marinelli  
Staff Attorney 

SUBJECT: Draft AO 1999-29

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 10, 1999.

Attachment

1 ADVISORY OPINION 1999-29

**DRAFT**

2  
3 Robert F. Bauer  
4 Perkins Coie LLP  
5 607 14<sup>th</sup> Street, N.W.  
6 Washington, DC 20005-1690

7  
8 Dear Mr. Bauer:

9  
10 This refers to your letters dated October 14 and 12, 1999, which request an  
11 advisory opinion on behalf of Bill Bradley for President, Inc. ("the Committee")  
12 concerning the application of the Federal Election Campaign Act of 1971, as  
13 amended ("the FECA"), the Presidential Primary Matching Payment Act (the  
14 "Matching Act") and Commission regulations to certain direct mail and  
15 fundraising expenses that may be subject to State expenditure limits.

16 You state that Mr. Bradley, a Democratic candidate for the Presidency, has agreed  
17 to comply with the spending limits of the Matching Act and has, accordingly, qualified to  
18 receive public funds. You explain that the Committee expects to make expenditures on  
19 direct mail that will be sent to addresses in the State which is scheduled to hold the first  
20 primary or caucus on January 31, 2000, or perhaps earlier. You also indicate that the  
21 proposed mailings would be made more than 28 days prior to this primary or caucus.

22 You further state that certain of the Committee's direct mail expenditures will be  
23 allocable to State expenditure limits under 11 CFR 106.2, and that other direct mail  
24 expenditures may be exempt under 11 CFR 110.8(c)(2).

25 In order to comply with the Matching Act and Commission regulations, the  
26 Committee poses two questions as to the application of the fundraising exemption. You  
27 state the first question as: "The question in particular is whether these mailing expenses

1 would be subject to the 50% fundraising exemption for the State, or not count at all  
2 against any State limits and count only against the 20% aggregate national fundraising  
3 limit.” The second question relates to 11 CFR 110.8(c)(2) and asks whether the  
4 maximum amount that may be excluded from a State expenditure limit is 50% of that  
5 State’s limit, or 50% of the amount the Committee actually spends on services or items  
6 allocable to the State expenditure limit.

7 Both the FECA and the Matching Act place limits on the amount of campaign  
8 expenditures that may be made by presidential candidates who accept funding from the  
9 Treasury of the United States. 2 U.S.C. §441a(b)(1)(A) and 26 U.S.C. §9035(a). The  
10 cited provisions include both a national (or overall) expenditure limit, as well as limits for  
11 expenditures “in any one State.” 2 U.S.C. §441a(b)(1)(A). The FECA further provides,  
12 however, that costs incurred by such a presidential candidate “in connection with the  
13 solicitation of contributions on behalf of” that candidate are excluded from the  
14 expenditure limit, but only in an amount equal to 20% of the expenditure limit. 2 U.S.C.  
15 §431(9)(B)(vi).

16 Commission regulations refer to these costs as “exempt fundraising expenses.”  
17 They also clarify and interpret this fundraising exclusion, both generally and in the  
18 specific context of the State expenditure limits. 11 CFR 100.8(b)(21)(iii), 110.8(c)(2);  
19 see 11 CFR 106.2(b)(1), 9035.1(c), and 9035.1(c)(2).<sup>1</sup> The most pertinent regulations  
20 are sections 100.8(b)(21) and 110.8(c)(2) which state, respectively:

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<sup>1</sup> These cited and quoted regulations should be read and interpreted with reference to the stated purposes of the Commission when it revised them in 1991 to provide Presidential primary candidates with greater flexibility, especially when dealing with the crucial early primaries, through broadened and simplified exemptions. See the Explanation and Justification for 11 CFR 106.2 and 110.8 at 56 *Fed. Reg.* 35899 and 35901 (July 29, 1991).

1 (21)(i) Any costs incurred by a candidate or his or her authorized  
2 committee(s) in connection with the solicitation of contributions are  
3 not expenditures if incurred by a candidate who has been certified to  
4 receive Presidential Primary Matching Fund Payments. . . to the extent  
5 that the aggregate of such costs does not exceed 20 percent of the  
6 expenditure limitation applicable to the candidate. These costs shall,  
7 however, be reported as disbursements pursuant to 11 CFR part 104.

8 \* \* \* \*

9 (iii) For a candidate who has been certified to receive Presidential  
10 Primary Matching Fund Payments, the costs that may be exempted as  
11 fundraising expenses under this section shall not exceed 20% of the  
12 overall expenditure limitation under 11 CFR 9035.1, and shall equal the  
13 total of:

14 (A) All amounts excluded from the state expenditure limitations for  
15 exempt fundraising activities under 11 CFR 110.8(c)(2), plus

16 (B) An amount of costs that would otherwise be chargeable to the  
17 overall expenditure limitation but that are not chargeable to any state  
18 expenditure limitation, such as salary and travel expenses. ....

19 *11 CFR 100.8(b)(21)*

20 \_\_\_\_\_  
21  
22 (c) For the State limitations in paragraph (a)(1) of this section--

23 \* \* \* \*

24 (2) The candidate may treat an amount that does not exceed 50% of  
25 the candidate's total expenditures allocable to a particular State under  
26 11 CFR 106.2 as exempt fundraising expenses, and may exclude this amount  
27 from the candidate's total expenditures attributable to the expenditure  
28 limitations for that State. The candidate may treat 100% of the cost of  
29 mass mailings as exempt fundraising expenses, unless the mass mailings  
30 were mailed within 28 days before the state's primary election,  
31 convention or caucus. The total of all amounts excluded for exempt  
32 fundraising expenses shall not exceed 20% of the overall expenditure  
33 limitation under 11 CFR 9035.1.

34 *11 CFR 110.8(c)(2)*

35  
36 In summary, these quoted provisions when read together, and with reference to  
37 other regulations cited therein, mean that a covered presidential candidate need not count  
38 exempt fundraising costs against any State limit, but they must be counted against the

1 national (overall) expenditure limit. This limit is, however, adjusted upwards by 20%.<sup>2</sup>  
2 More specifically, with respect to application of the State limits, the regulations require  
3 that certain specified categories of expenditures be allocated to each relevant State limit.  
4 11 CFR 106.2(b)(1), (b)(2)(i)—(v), (b)(3) [print and broadcast media expenses, mass  
5 mailings and other campaign materials, overhead expenses for State and regional  
6 campaign offices, special telephone programs, public opinion polls]. An exception from  
7 all these categories is made for exempt fundraising expenses which, but for the exception,  
8 would be allocated to a given State. 11 CFR 106.2(b)(1) [last sentence] citing to 11 CFR  
9 110.8(c)(2) as the most directly applicable regulation. Section 110.8(c)(2) means, in  
10 essence, that so long as a mass mailing is mailed more than 28 days before a State's  
11 primary election (or convention or caucus), the associated costs qualify as fundraising  
12 expenses that are 100% exempt from the State expenditure limit. As indicated above,  
13 they are still subject to the overall (or national) expenditure limit.

14 Accordingly, in response to your first question regarding mass mailings sent to  
15 addresses in a given State more than 28 days prior to a primary or caucus in that State, the  
16 Commission concludes that the expenses for such mailings would be counted against the  
17 aggregate or overall national limit, as increased by 20% for exempt fundraising expenses.  
18 These expenses would, however, not count against any State limit.

19 Similarly, in response to question two, the Commission concludes that the 50%  
20 exemption for fundraising expenses applies to the actual amount of expenditures that are

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<sup>2</sup> According to the most recent information released by the Commission, the base national spending limit for the 2000 presidential primary campaign period is \$33,060,000 plus the 20% fundraising exemption which raises the effective total limit to \$39,672,000.

1 made by the Committee and allocable to the relevant State's limit. The following  
2 example may illustrate the operation of the exemption.

3 Assume a State has a limit of \$1,000,000, and that the Committee proposes to  
4 spend \$2,000,000 on broadcast media expenditures that are required to be allocated to  
5 that State's limit. See 11 CFR 106.2(b)(2)(i)(B). Assume further that the Committee  
6 proposes to spend an additional \$3,000,000 for a mass mailing that will be sent to  
7 addresses in that State more than 28 days before its presidential primary. Only 50% (or  
8 \$1,000,000) of the allocable broadcast media expenditures must be attributed to the State  
9 limit and, of course, to the overall expenditure limit. This is also the result whether the  
10 State limit is greater or less than \$1,000,000. By contrast, the full \$3,000,000 for the  
11 described mass mailing would be exempt fundraising expenses and need not attributed to  
12 the State limit; this amount would, of course, be attributed to the overall expenditure  
13 limit.<sup>3</sup>

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

17 Sincerely,

18

19 Scott E. Thomas  
20 Chairman

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<sup>3</sup> The Commission notes that this example is also predicated on the Committee's using "the available fundraising exemption selectively to assure that the 20% overall exemption is not exhausted before particular primaries where the State spending limitation is of the greatest concern." *FEC, Financial Control and Compliance Manual* at 39 (January 1996).