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FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 8, 1999

AGENDA ITEM

For Meeting of: 12-16-99

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1999-34

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 16, 1999.

Attachment

1 ADVISORY OPINION 1999-34

2
3 The Honorable Michael Bilirakis
4 Mike Bilirakis for Congress
5 P.O. Box 1077
6 Tarpon Springs, FL 34688-1077

DRAFT

7
8 Dear Mr. Bilirakis:

9 This responds to your letters dated October 6 and November 8, 1999, on behalf of
10 Mike Bilirakis for Congress ("the Committee"), requesting an advisory opinion
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 ("the Act"), and Commission regulations to the Committee's participation in a
13 fundraising event for school organizations.

14 ***Background***

15 The Committee is the principal campaign committee for your re-election to the
16 U.S. House of Representatives from the Ninth District of Florida. The Committee's 1999
17 midyear report, covering the last reporting period, discloses \$295,316 cash on hand and
18 no outstanding liabilities. You do not anticipate any future expenditures that would cause
19 the Committee to be a net debtor.

20 The Committee wishes to donate funds and make other payments in support of an
21 event known as the "KIDS first Family Fair." The event is an initiative by a group of
22 local citizens who are working to improve education in area elementary schools. It is
23 intended to raise money for elementary schools in the Ninth District through Parent-
24 Teacher Associations or other organizations defined under 26 U.S.C. §170(c).¹ You state
25 that these funds will be used for such purposes as enabling PTAs to assist teachers in
26 purchasing school supplies for children and to help make improvements on campus.

27 You will co-host the event with your son, State Representative Gus Bilirakis. It
28 will be held on Saturday, January 29, 2000, in Tarpon Springs, Florida, at Astro Skate.

¹ Under section 170(a) of the Internal Revenue Code, charitable contributions are tax deductible. Section 170(c) defines "charitable contribution," stating that it means "a contribution or gift to or for the use of" certain categories of organizations. Among these organizations are "a corporation, trust, or community chest, fund, or foundation" organized and operated exclusively for religious, charitable, or educational purposes, and which is not disqualified for other reasons such as use of net earnings to benefit a private shareholder or individual, or participation in political campaigns. 26 U.S.C. §170(a) and (c).

1 The owner of Astro Skate, which is a skating facility, will provide space for the event at
2 no charge. Each participating school will have the opportunity to set up a display, and
3 various games and activities for children and adults will be provided. A local celebrity
4 will be invited to make a presentation and appearance. You expect that 1,500 individuals
5 will attend.

6 You state that the event is not a campaign fundraising opportunity for the
7 Committee, and no funds will be made payable to, or accepted into, the Committee's
8 account. Individuals attending the event will not be given an opportunity to sign up for
9 volunteer work or other participation in your re-election campaign. Moreover, no
10 campaign materials will be displayed or available at the event.

11 You describe how the event will be funded. The Committee plans to make in-
12 kind donations for the event by paying printing and postage costs for promotional
13 materials, such as flyers, and will assist with other expenses. The event volunteers have
14 not yet identified all the other sponsors for event costs, but you identify other sponsors
15 and the expenses to be paid by them. These are: \$500 by the State Farm Insurance
16 regional office to print 10,000 flyers; the donation of space by Astro Skate valued at
17 \$250; \$400 for the printing of 3,000 tickets by a local sponsor to be determined; \$1,500
18 to provide pizza for all attendees by one or more local restaurants; \$750 for soft drinks
19 provided by a local grocery store; and computers valued at \$1,000 to be donated by a
20 former local mayor to the school with the highest ticket sales and the school with the
21 highest attendance at the event.

22 You state that the "minimum contribution level" to the event is the \$3 price for a
23 ticket, but there is no limit on the amount an individual can donate. The Committee
24 intends to match individual monetary donations dollar for dollar, up to a maximum of
25 \$60,000 in total donations by the Committee. It is unknown whether any person or
26 corporation will purchase a large quantity of tickets, but that is a possibility.

27 You describe how ticket purchases and other financial contributions will be
28 collected and accounted for. The majority of donors are expected to obtain their tickets
29 directly from an event volunteer. In that case, the donor will indicate only the name of
30 the elementary school PTA (or other 170(c) organization established by the school) to

1 which the contribution is directed. Only individuals who request tickets by mail will
2 actually provide their name and address, and no list of those individuals will be made
3 available to the Committee or used for campaign purposes. The ticket purchases and
4 other donations will be made payable to the donor's choice of school PTA. They will be
5 collected by a law firm in Palm Harbor, Florida, and deposited directly into the account
6 of the PTA or 170(c) organization. The Committee will not collect donations to the
7 event, and no ticket sale proceeds or other funds will be deposited in the Committee's
8 account. The law firm will also take messages from persons interested in the event and
9 will forward those messages to event volunteers. The law firm will also allow the
10 Committee's treasurer to tally donation receipts to enable the Committee to determine the
11 matchable donation it will make. The disbursements of the proceeds will be controlled
12 by each benefiting PTA or other 170(c) organization.

13 The Committee will not purchase any media advertising, such as newspaper or
14 broadcast ads, for the event. Event volunteers will publicize the event by word of mouth
15 through the local elementary schools. Then, promotional flyers will be distributed by
16 hand or mail. These will include a form to register to attend, purchase tickets, and
17 designate a donation amount.

18 You enclose a copy of a draft, initial flyer that will be printed at the expense of the
19 State Farm Insurance regional office. The front of the flyer states the title of the event
20 and that it will be hosted by Congressman Mike Bilirakis and State Representative Gus
21 Bilirakis. The flyer describes the "ABCs of the event;" that is, the list of activities, the
22 benefits for the school by earning matching funds, and the computers awarded to the
23 schools. The flyer describes the purpose of the event as "to help put dollars into local
24 elementary school classrooms." It states that "parents, students, neighbors, and local
25 businesses will have the opportunity to donate money to the school of their choice," and
26 that individual donations will be matched "dollar for dollar" by the Committee up to
27 \$60,000. The flyer describes forms of participation other than buying tickets. These
28 entail persons selling tickets, schools setting up display tables and games, and
29 sponsorship of the event by companies. The phone number of the above-mentioned law
30 firm is provided for those interested in additional information. Finally, the flyer contains

1 a detachable form to mail to the law firm. The form provides boxes for volunteers to
2 indicate how they wish to help, and for persons to purchase tickets or to otherwise
3 contribute financially; space is provided for name, address, and phone number. The form
4 asks the purchaser or contributor to indicate which elementary school PTA would benefit
5 and make checks payable to that PTA. The form also contains a statement in small print
6 that the Committee will match the individual contributions up to \$60,000.

7 You indicate that the Committee may pay for a follow-up flyer that will include a
8 disclaimer stating, "Paid for by Mike Bilirakis for Congress. Not at Government
9 Expense."

10 ***Question Presented***

11 You ask whether the Committee's proposed activities are permissible under the
12 Act and regulations. Specifically, you ask whether the Committee's matching donations
13 and in-kind donations with respect to the fair are a permissible use of excess campaign
14 funds, pursuant to 2 U.S.C. §439a.

15 ***Legal Analysis***

16 The analysis of the proposed activity depends in large part upon how the event is
17 characterized. If the event and the activities surrounding it are, in reality, for the purpose
18 of influencing Mr. Bilirakis' re-election to Congress, then donations for the event from
19 individuals and businesses, both money and in-kind, may be contributions under the Act
20 and subject to its limitations and prohibitions. If the fair is not a campaign event and is,
21 instead, a charitable event, then the Committee's disbursements would be subject to the
22 provisions of 2 U.S.C. §439a, and the donations in support of the event by others, which
23 are made to entities other than the Committee, would not be contributions subject to the
24 Act's provisions.

25 The Act provides that amounts "received by a candidate as contributions that are
26 in excess of any amount necessary to defray his expenditures . . . may be contributed to
27 any organization described in section 170(c) of title 26," except that such amounts may
28 not be converted by any person to any personal use. 2 U.S.C. §439a; 11 CFR 113.2(b)

1 and (d).² The Act also permits the use of campaign funds to defray any ordinary and
2 necessary expenses incurred by an individual or candidate in connection with his duties
3 as a holder of Federal office. 2 U.S.C. §439a; 11 CFR 113.2(a).

4 The Act and Commission regulations define the terms "contribution" and
5 "expenditure" to include gifts or payments of money or anything of value made for the
6 purpose of influencing the election of any person to Federal office. 2 U.S.C.
7 §431(8)(A)(i), 431(9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1); see 2 U.S.C.
8 §441b(b)(2) and 114.1(a)(1). The phrase "anything of value" includes goods or services
9 provided without charge or at less than the usual and normal charge. 11 CFR
10 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A). Any contribution or expenditure is required to
11 be disclosed by the receiving and disbursing committee. 2 U.S.C. §434(b); 11 CFR
12 104.3(a) and (b), 104.13. Contributions are subject to the limitations of the Act at 2
13 U.S.C. §441a(a) and prohibitions at 2 U.S.C. §§441b, 441c, 441e, and 441f.

14 In determining whether particular activities or events involving the participation
15 of a Federal candidate result in contributions or expenditures by or on behalf of the
16 candidate, the Commission has examined the stated purpose of the activities and whether
17 the facts and circumstances presented comport with the stated purpose. See Advisory
18 Opinion 1999-11. The Commission has concluded that events in which Federal
19 officeholders participate in their capacity as officeholders are not for the purpose of
20 influencing a Federal election simply because the officeholders may be candidates for
21 election to Federal office.³ Payments associated with such an event would not be
22 contributions to the officeholder's campaign or expenditures by the campaign, absent any

² Commission regulations define the term "excess campaign funds" to mean "amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures." 11 CFR 113.1(e).

³ See Advisory Opinions 1994-15 and 1992-5 (Members of Congress hosting public affairs cable program), and Advisory Opinion 1991-17 (Member's participation in a voter education video program) where the Commission found that the activities were not for the purpose of influencing a Federal election. In contrast, the Commission determined in Advisory Opinion 1999-2 that a Member's participation in an event where he was invited because he was a candidate would cause the Commission to determine that the event was in connection with a Federal election.

1 campaign activity at the event or with respect to the promotion and other arrangements
2 for the event. See Advisory Opinion 1999-11.⁴

3 From your description of the event and the materials enclosed, the stated purpose
4 of the fair is to improve the facilities at elementary schools in your Congressional
5 District. The question of whether the event or your participation in the event is also for
6 the purpose of promoting your candidacy may be answered by considering the various
7 features of the event and its promotion, and the role of the Committee.

8 You state that, at the event, no individual may sign up to volunteer for or
9 participate in your re-election campaign, and that no campaign material will be available
10 at the fair. You also make clear that no funds will be made payable to the campaign or
11 accepted by the campaign and that the disbursements of the proceeds will be controlled
12 by each benefiting PTA or other 170(c) organization. The ticket purchases and other
13 donations will be collected by a law firm and, although the Committee will be able to review
14 and tally such donations, this will be for the purpose of determining the matching
15 payments that the Committee will make to the 170(c) organizations.

16 The flyer indicates that the fair is for the purpose of benefiting local elementary
17 schools. The only references to the campaign or Committee are the statements that the
18 Committee will match individual donations to the school organizations. This statement
19 does not appear to be for a campaign purpose. Instead, it informs potential donors that
20 their donations will be matched by the Committee, and it does so as an incentive for
21 others to donate in support of the school programs. Moreover, the election influencing
22 aspect of the Committee reference is further abated by the fact that the flyers will be
23 distributed in December 1999 or January 2000, while the primary election is not until
24 September 5, 2000. The Commission assumes that the information and event advocacy

⁴ In Advisory Opinion 1999-11, the Commission concluded that the State Senate campaign committee of a State Senator running for Federal office could continue to fund billboards advertising coffees to discuss items of State interest with her State legislative constituents. The Commission noted that the scope of the billboard advertising for, the frequency of, and scope of discussion at, the events would be unchanged from previous years; no advertising would occur outside the State Senate district, and no express advocacy or other Federal campaign activity would occur with respect to the events.

1 presented in the follow-up flyer, which will be financed by the Committee, will not
2 differ.⁵

3 In order to conclude that the event and the surrounding activities are not for the
4 purpose of influencing your re-election, the Commission relies upon your representations
5 and also makes certain additional assumptions. One assumption is that any persons
6 invited to speak, or to make a presentation at, the event will not make reference to the
7 campaign or Committee. The Commission further assumes that neither you nor any
8 agents of your Committee or campaign will use the event as an opportunity to discuss the
9 campaign, to campaign for re-election, or to conduct discussions about issues in your
10 campaign.⁶ In addition, the Commission assumes that, in publicizing the event or
11 soliciting donations to the event, the Committee and its agents will not refer to the
12 campaign or Committee, although they may disclose your co-hosting of the event and
13 that the Committee will match the donations. Likewise, the Committee should inform
14 those who direct or coordinate the activity of the individuals who will promote the event
15 that those conditions apply. Finally, the Commission notes your statement that the
16 Committee will not obtain any list of donors to the event and will not use such a list for
17 campaign purposes.⁷

18 Based on the foregoing information, conditions, and assumptions, the
19 Commission concludes that the event and the related activities will not be for the purpose
20 of influencing your election. The event is instead a charitable event, and the
21 disbursements by the Committee fit within one of the allowable uses of excess campaign
22 funds under 2 U.S.C. §439a and 11 CFR 113.2. This conclusion pertains both to the

⁵ You explain that the Committee intends to use a disclaimer statement in the follow-up flyer which identifies the Committee and also states that the flyer was not printed at government expense. The Commission notes that only general public political advertising (as described in the Act and regulations) expressly advocating a Federal candidate's election or defeat or soliciting contributions to influence a Federal election is required to include a disclaimer. 2 U.S.C. §441d(a); 11 CFR 110.11(a).

⁶ The Commission recognizes the possibility that attendees and constituents might ask you questions about campaign issues in your conversations with them at the event. These conversations would not, by themselves, change the nature of the event.

⁷ The Commission notes that the Committee may solicit campaign contributions from the same persons whose names are included on the event's donor list, but it may not obtain the names of potential contributors from the list or use other list information to determine whether any specific person should be solicited by the Committee. In addition, Commission regulations would not prohibit the Committee from

1 matching donations by the Committee and to the Committee's purchases and other
2 payments (or in-kind donations) to advertise and facilitate the event; the matching
3 donations will go directly to the 170(c) organizations and the other payments or donations
4 will likewise be for their benefit. Thus, the Committee may engage in the above-
5 described activities subject to the conditions and assumptions discussed, and the
6 purchases and donations by individuals, corporations or other entities will not be
7 contributions to the Committee or your campaign.⁸

8 Because the Committee's disbursements will not be for the purpose of influencing
9 a Federal election, they should be reported within the category of "other disbursements."
10 2 U.S.C. §434(b)(4); 11 CFR 104.3(b)(2). The recipient of the disbursement (such as
11 PTA donees, or vendors paid by the Committee for their services to the event), the
12 purpose and other information must be disclosed for disbursements that aggregate in
13 excess of \$200 to the same payee within the calendar year. 2 U.S.C. §434(b)(6)(A); 11
14 CFR 104.3(b)(4)(vi). The ticket purchases, money donations, and in-kind donations
15 made by others for the event should not be reported since they are not receipts of the
16 Committee.

17 The Commission expresses no opinion regarding the tax ramifications of your
18 proposed activity, nor as to the application of any rules of the U.S. House of
19 Representatives, because those issues are not within its jurisdiction. The Commission
20 also expresses no opinion as to the possible application of Florida State law to the
21 described activity, except to note that applicable State law may not be preempted by the
22 Act or Commission regulations in these circumstances. See 2 U.S.C. §453 and 11 CFR
23 108.7 [Act and Commission regulations "supersede and preempt any provision of State
24 law with respect to election to Federal office."]

purchasing use of the list if the amount paid was not less than "usual and normal charge." See 11 CFR 100.7(a)(1)(iii) [membership lists and mailing lists are things of value].

⁸ In view of your intent to benefit the elementary schools of your Congressional district, the Committee's sponsorship of, and disbursements for, the event might also be characterized as a constituent service by you and, thus, the disbursements may also be permissible under another portion of 2 U.S.C. §439a. Because of the above conclusion, however, the Commission need not answer whether the spending for the event would be an ordinary and necessary expense incurred in connection with your duties as a Federal officeholder.

