

August 6, 2003

**NOTICE AO DRAFT COMMENT PROCEDURES**

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-15 is available for public comments under this procedure. It was requested by G. Scott Rafshoon, counsel on behalf of Denise Majette, a Member of the U.S. House of Representatives and the Committee to Re-Elect Congresswomen Denise Majette. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-15 will be on the Commission's agenda for its public meeting of Thursday August 14, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on August 13, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

**CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of draft AO 2003-15 contact the Public Records Office-Public Disclosure Division (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Acting Associate General Counsel, (202) 694-1650.

**MAILING ADDRESSES**

Submit single copy of written comments to:

Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2003 AUG -6 P 3:27

**AGENDA ITEM**  
For Meeting of: 08-14-03

August 6, 2003

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

James A. Kahl *JAK*  
Deputy General Counsel

Rosemary C. Smith *RCS*  
Acting Associate General Counsel

Mai T. Dinh *MD*  
Acting Assistant General Counsel

Michael Marinelli *mm*  
Staff Attorney

Subject: Draft AO 2003-15

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 14, 2003.

Attachment

# DRAFT

1 ADVISORY OPINION 2003-15

2  
3 G. Scott Rafshoon, Esq.  
4 McKenna, Long & Aldrige, LLP  
5 303 Peachtree Street, NE  
6 Suite 5300  
7 Atlanta, GA 30308

8  
9 Dear Mr. Rafshoon:

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11 This responds to your letters of April 14 and April 25, 2003, requesting an  
12 advisory opinion on behalf of United States Representative Denise Majette and the  
13 Committee to Re-Elect Congresswoman Denise Majette, her principal campaign  
14 committee ("the Committee"), concerning the application of the Federal Election  
15 Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the  
16 solicitation and use of donations to a legal expense trust fund established by  
17 Representative Majette ("the Fund").

18 ***Background***

19 You state that following Representative Majette's victory in the 2002 Democratic  
20 primary in Georgia's 4<sup>th</sup> U.S. Congressional District, five supporters of the defeated  
21 incumbent filed suit in federal court challenging Georgia's open primary election system.  
22 You also state that the initial complaint asked the court to enjoin Georgia officials from  
23 conducting the general election, and after her victory in the general election, the  
24 complaint was amended to seek a special primary and a special general election for the  
25 seat now held by Representative Majette. You explain that the plaintiffs initially named  
26 Representative Majette as a defendant, but later amended their complaint to exclude her  
27 as a defendant. She incurred legal expenses seeking her dismissal, and she continues to  
28 incur legal fees related to monitoring the ongoing litigation, which now exceed \$90,000.

1 You also explain that another amendment to the complaint remains possible. Therefore,  
2 Representative Majette believes it may be necessary to raise funds to meet this  
3 contingency.<sup>1</sup>

4 Representative Majette wishes to establish a legal expense trust fund to raise  
5 money to defray these legal expenses. You state that the Fund will be established in  
6 accordance with the Legal Expense Fund Regulations promulgated by the Committee on  
7 Standards of Official Conduct of the U.S. House of Representatives. As required, the  
8 Fund will be established as a Georgia trust, administered by an independent trustee who  
9 will oversee fundraising. Under your proposal, the Fund would accept no more than  
10 \$5,000 per year from any individual or organization. Trust funds will be used only for  
11 legal expenses, including expenses incurred in soliciting for and administering the Fund.

12 You also state that the Fund will solicit funds from individuals, labor  
13 organizations and corporations. All solicitations will be made in person or by mail and  
14 will be accompanied by a letter stating the purpose of the Fund. You explain that the  
15 "Statement of Purpose" included in any solicitation will be substantially as follows: "The  
16 purpose of this solicitation is to obtain personal funds to defray the cost of certain  
17 litigation against Representative Majette. Funds obtained by this solicitation will not be  
18 used . . . in any way to promote or maintain the official activities of any officeholder." In  
19 addition, donors will be requested to sign a card to be returned with the donation  
20 affirming the purpose of the gift. You explain that the card will read substantially as

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<sup>1</sup> Copies of the relevant court documents were submitted in a supplementary letter dated April 28, 2003, and consist of the following pleadings: (1) October 4, 2002 complaint; (2) December 5, 2002 defendant Denise Majette's motion to dismiss; (3) December 5, 2002 memorandum of law in support of her motion to dismiss; (4) December 20, 2002 notice of voluntary dismissal of defendant Denise Majette; and (5) January 8, 2003 amended complaint.

1 follows: "I, the undersigned, hereby, confirm the donation of \$ \_\_\_\_\_ to the Trust for  
2 the purpose of funding certain litigation defense-related activity. This donation is not  
3 given for the purpose of influencing any election or as a campaign contribution or for the  
4 purpose of promoting or maintaining the official activities of any officeholder."  
5 Solicitations for the Fund will be conducted completely separate from any solicitations  
6 for, or on behalf of, the Committee.

7 ***Question Presented***

8 *Are the amounts raised and spent by Representative Majette to defray certain*  
9 *legal defense expenses "contributions" or "expenditures" or otherwise subject to the*  
10 *provisions of the Act?*

11 ***Legal Analysis and Conclusions***

12 They are not, for the reasons discussed below. On November 6, 2002, the  
13 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002)  
14 ("BCRA"), took effect. *See* BCRA, § 402(a)(1), 116 Stat. 81, at 112 (2002).<sup>2</sup> As  
15 amended by BCRA, the Act regulates certain activities of Federal candidates and  
16 officeholders, their agents, and entities directly or indirectly established, financed,  
17 maintained, or controlled by them. Relevant to this request, 2 U.S.C. § 441i(e)(1)(A)  
18 prohibits these persons from soliciting, receiving, directing, transferring, or spending  
19 "funds in connection with an election for Federal office, including funds for any Federal  
20 election activity, unless the funds are subject to the limitations, prohibitions, and

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<sup>2</sup> BCRA's effective date provision includes a specific exception for runoff elections, recounts, or election contests resulting from elections held prior to November 6, 2002. This exception only applies to the provisions listed in section 402(a)(4), and the provision of BCRA related to Federal candidates, FECA section 323(e), codified at 2 U.S.C. § 441i(e), is not listed. BCRA, § 402(a)(4), 116 Stat. at 112.

1 reporting requirements of this Act.” *See also* 11 CFR 300.61.

2           The question under 2 U.S.C. § 441i(e)(1)(A) is whether amounts received and  
3 spent by the Fund to defray Representative Majette’s legal expenses as a defendant in this  
4 lawsuit are funds “in connection with an election for Federal office.” FECA’s corporate  
5 and labor organization prohibition, 2 U.S.C. § 441b, employs a related concept of  
6 “payment, distribution, loan, advance, deposit, or gift of money, . . . or anything of value .  
7 . . to any candidate [or] campaign committee . . . in connection with a [Federal] election.”  
8 2 U.S.C. § 441b(b)(2).<sup>3</sup>

9           In prior advisory opinions, the Commission has concluded that the limits and  
10 prohibitions of the Act do not apply to monies given to a candidate’s legal defense fund.<sup>4</sup>  
11 *See* Advisory Opinions 1996-39, 1983-21 and 1981-13. Advisory Opinion 1996-39 is of  
12 particular relevance to this situation because it concerned expenses for a lawsuit  
13 challenging the legality of a Federal election ballot. The Commission addressed whether  
14 monies raised and spent to defend against that litigation were subject to the corporate and  
15 labor organization prohibition of 2 U.S.C. § 441b(b)(2). Specifically, the Commission  
16 considered whether a candidate may establish a separate account to pay legal expenses  
17 related to a pre-election challenge before State ballot officials and subsequent State court  
18 litigation concerning the sufficiency of the candidate’s nominating petitions to qualify for

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<sup>3</sup> Although BCRA amended 2 U.S.C. § 441b(b)(2), it did not amend the words quoted above. Your request does not ask about national committees of political parties or related entities, so this opinion does not address 2 U.S.C. § 441i(a), which does not include an “in connection with an election” standard.

<sup>4</sup> This longstanding policy is consistent with Commission regulations that explicitly recognize the role of legal expense funds. These personal use regulations at 11 CFR 113.1(g)(6)(i) provide that a donation to a legal expense trust fund established in accordance with the rules of the United States Senate or the United States House of Representatives is not considered a contribution by a third party to pay an expense that might otherwise be considered to be personal use of campaign funds.

1 a primary election ballot. The Commission determined that funds received and spent to  
2 pay these litigation expenses would not be treated as contributions or expenditures for  
3 purpose of the FECA, provided they are raised and spent by an entity other than a  
4 political committee. Because the funds were not considered contributions, they were not  
5 subject to the limitation of 2 U.S.C. § 441a(a). The Commission also concluded that:  
6 “As a result, corporate funds may be accepted by another entity for this purpose.”  
7 Advisory Opinion 1996-39. The Commission has reached the same conclusion in earlier  
8 advisory opinions concerning legal expense funds that were established to defend or  
9 undertake legal challenges to party rules (Advisory Opinions 1983-37 and 1982-35) and  
10 state constitutional provisions (Advisory Opinions 1983-30) that impacted the elections  
11 in question. In each of these Advisory Opinions, the Commission concluded that to the  
12 extent the legal expenses were used exclusively for the purposes of defraying legal costs,  
13 donations to, and disbursements, from the fund would not constitute contributions or  
14 expenditures.

15 The litigation involving Representative Majette is substantially similar to the  
16 litigation considered in Advisory Opinion 1996-39 in that both lawsuits challenge the  
17 lawfulness of the conduct of the election. Consequently, this lawsuit is no more “in  
18 connection with a Federal election” than the primary ballot challenge at issue in Advisory  
19 Opinion 1996-39 was in connection with that election. Therefore, donations to, and  
20 disbursements by, the Fund for the sole purpose of defending against this lawsuit are not  
21 subject to the limitations or prohibitions of 2 U.S.C. §§ 441a or 441b. Nor are they  
22 subject to reporting requirements under 2 U.S.C. § 434 if they will not be deposited in  
23 Representative Majette’s campaign depository.

1           The Commission concludes that 2 U.S.C. § 441i(e)(1)(A) does not change this  
2 result. There is no indication in the legislative history of BCRA that Congress intended  
3 section 441i(e)(1)(A) to change an area that is both well—familiar to members of  
4 Congress and subject of longstanding interpretation through statements of Congressional  
5 policy and Commission Advisory Opinions. Furthermore, after it enacted BCRA, the  
6 U.S. House of Representatives adopted House Rule XXV(5)(a)(3)(E) which permits  
7 Members to accept contributions for their legal expense funds subject to certain  
8 restrictions. H.R. Res. 5, 108<sup>th</sup> Cong. (2003). This supports the conclusion that Congress  
9 did not intend 2 U.S.C. § 441i(e)(1)(A) to bar Federal officeholders from accepting non-  
10 Federal funds for their legal expense funds.

11           Therefore, because this lawsuit is not “in connection with” a Federal election for  
12 purposes of section 441b, it should not be considered “in connection with” a Federal  
13 election for purposes of 2 U.S.C. § 441i(e)(1)(A). Therefore, donations to, and  
14 disbursements by, the Fund for the sole purpose of defending against this lawsuit are not  
15 subject to the restrictions of 2 U.S.C. § 441i(e)(1)(A).<sup>5</sup>

16           The solicitation methods and separate account described in your request are  
17 sufficient because they are similar to those approved in Advisory Opinion 1996-39.

18           The Commission expresses no opinion regarding the possible applicability of any  
19 other Federal or State tax laws or other laws, or the rules of the House of Representatives,  
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<sup>5</sup> Your request does not ask about legal expense funds established by national committees of political parties or related entities, which are subject to a different legal standard under 2 U.S.C. § 441i(a). See Explanation and Justification for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49088-89 (July 29, 2002).

1           to the matters presented in your request, because these issues are not within its  
2 jurisdiction.

3           This response constitutes an advisory opinion concerning the application of the  
4 Act and Commission regulations to the specific transaction or activity set forth in your  
5 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in  
6 any of the facts or assumptions presented, and such facts or assumptions are material to a  
7 conclusion presented in this opinion, then the requestor may not rely on that conclusion as  
8 support for its proposed activity.

9           The Commission notes that this advisory opinion analyzes the Act, as amended by  
10 BCRA, and Commission regulations, including those promulgated to implement the  
11 BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-  
12 judge panel of the United States District Court for the District of Columbia ruled that a  
13 number of BCRA provisions are unconstitutional and issued an order enjoining the  
14 enforcement, execution, or other application of those provisions. *McConnell v. FEC*, 251  
15 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S.Ct. 2268 (U.S. 2003).  
16 Subsequently, the district court stayed its order and injunction in *McConnell v. FEC*, 253  
17 F. Supp. 2d 18 (D.D.C. 2003). The Commission has determined that your request for  
18 advice is not affected by the district court's ruling. The Commission cautions that the

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1 legal analysis in this advisory opinion may be affected by the eventual decision of the  
2 Supreme Court.

3 Sincerely,  
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8 Ellen L. Weintraub  
9 Chair

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11 Enclosures (AOs 1996-39, 1983-37, 1983-30, 1983-21, 1982-35 and 1981-13)  
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