

October 28, 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 2003-26 is available for public comments under this procedure. It was requested by William L. Curlis, Treasurer on behalf of the Voinovich for Senate. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-26 will be on the Commission's agenda for its public meeting of Thursday November 6, 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 November 5, 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: Ron Harris (202) 694-1220

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

Other inquiries:

To obtain copy of draft AO 2003-26 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

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

ADDRESSES

Submit single copy of written comments to:

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



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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SECRETARIAT

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October 28, 2003

AGENDA ITEM

For Meeting of: 11-06-03

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

James A. Kahl
Deputy General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

Mai T. Dinh *MAD*
Acting Assistant General Counsel

Michael Marinelli *mmh*
Staff Attorney

Subject: Draft AO 2003-26

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 6, 2003.

Attachment

DRAFT

1 **ADVISORY OPINION 2003-26**

2
3
4 **William L. Curllis, Treasurer**
5 **Voinovich for Senate**
6 **865 Macon Alley**
7 **Columbus, Ohio 43206**

8
9 **Dear Mr. Curllis:**

10 **This responds to your letter dated August 25, 2003, requesting an advisory opinion**
11 **on behalf of Voinovich for Senate, concerning the application of the Federal Election**
12 **Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the**
13 **proposed use of campaign funds received by Voinovich for Senate to refund contributions**
14 **received by Voinovich for Governor.**

15 ***Background***

16 **Voinovich for Senate ("the Senate Committee") is the principal campaign committee**
17 **of Senator George V. Voinovich. Senator Voinovich is a candidate for the U.S. Senate in**
18 **2004.¹ Voinovich for Governor ("the State Campaign Committee") was the principal**
19 **campaign committee authorized under the laws of Ohio for then Governor (now Senator)**
20 **Voinovich. In 1998, the State Campaign Committee concluded its activities, filed all of its**
21 **required reports and terminated its existence with a zero balance.**

22 **You explain that an investigation by the United States Attorney for the Northern**
23 **District of Ohio revealed improper or illegal campaign contributions from a corporation, PIE**

24

¹ On March 20, 2002, Senator George Voinovich filed a statement of candidacy for re-election to the U.S. Senate.

1 Mutual Insurance, its officers and employees.² You state that the United States Attorney
2 specifically found that, "no wrongdoing [had] . . . been found on the part of any recipient
3 political candidate or political committee." The United States Attorney, nonetheless,
4 identified the contributions that were improper and identified the campaign committees that
5 had received the contributions and the amount of those contributions. The request does not
6 present any facts indicating that any State or Federal authorities have demanded that the
7 Senate Committee make the refunds on behalf of the State Campaign Committee, or that the
8 Senate Committee is otherwise legally obligated to do so.³ You also state that any refunds
9 that would be made by the Senate Committee would be made to the PIE liquidation fund
10 established subsequent to the corporation's bankruptcy.⁴

11 *Legal Analysis and Conclusion*

12 *Question: May the candidate's principal campaign committee use its Federal campaign*
13 *funds to refund contributions received by that candidate's now non-existent State campaign*
14 *committee?*

15 No, the Senate Committee may not use its Federal campaign funds to refund the
16 illegal contributions received by the State Campaign Committee. As explained below, this

² A September 2, 2003 *Columbus Dispatch* article identifies the corporation as PIE Mutual Insurance and provides more details. According to the article, PIE Mutual Insurance, which was Ohio's largest medical-malpractice insurer, failed in 1998. The article states that former chief executive, Larry E. Rogers, gave \$1.5 million in illegal contributions to 75 politicians or campaign committees in Ohio and three other States between 1990 and 1997. Mr. Rogers is serving a 40-month prison term for fraud and improper contributions. Returned contributions from PIE are placed in the PIE liquidation fund being maintained by the Ohio Department of Insurance. According to the article, PIE has unpaid insurance claims worth \$150 million.

³ According to a conversation with the PIE liquidation fund administrator, the PIE liquidation fund has never asked either the Senate Committee or Senator Voimovich to make these refunds.

⁴ In your October 12, 2003 email to the Commission staff, you indicated that the Senate Committee had refunded \$15,450 in contributions to the PIE liquidation fund. The 2002 Year-End Report filed by the Senate Committee confirms this July 2, 2002 disbursement. Also, in a September 24, 2003 conversation with Commission staff you stated that the amount of similar improper contributions made to the State Campaign Committee was \$85,000.

1 purpose is not one of the permissible uses of campaign funds under the Act and Commission
2 regulations.

3 Under the Act, there are four categories of permissible uses of campaign funds: (1)
4 otherwise authorized expenditures in connection with the candidate's campaign for Federal
5 office; (2) ordinary and necessary expenses incurred in connection with the duties of the
6 individual as a holder of Federal office; (3) contributions to organizations described in 26
7 U.S.C. 170(c); and (4) transfers, without limitation, to national, State or local political party
8 committees. 2 U.S.C. 439a(a); *see also* 11 CFR 113.2. Before 2002, section 439a also
9 included "any other lawful purpose" within the list of permissible uses. Congress in the
10 Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81
11 (2002), deleted this phrase when it amended section 439a. The Commission in the
12 Explanation and Justification for 11 CFR 113.2 discussed the significance of this deletion:

13 The Commission ... is removing and reserving paragraph (d) of former section
14 113.2, which referred to "any other lawful purpose." With this revision, it is now
15 clear that in addition to defraying expenses in connection with a campaign for
16 federal office, campaign funds may be used only for the enumerated non-campaign
17 purposes identified in paragraphs (a), (b) and (c) of section 113.2, and that *this*
18 *listing of permissible non-campaign purposes is exhaustive.*

19
20 *Explanation and Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and*
21 *Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76970, 76975 (Dec. 13, 2002)*
22 *(emphasis added).*⁵

23 You propose to use the Senate Committee's campaign funds to refund improper
24 contributions originally made to the State Campaign Committee in prior campaigns. Your

⁵ However, the Commission noted in the Explanation and Justification for section 113.2 that 2 U.S.C. 432(e)(3)(B) still permits authorized Federal candidate committees to make contributions of \$1,000 or less to other authorized Federal candidate committees. This provision was not amended by BCRA. *Id.*

1 proposed refunds are linked to contributions made to Senator Voinovich's past State
2 campaigns for Governor, campaigns that occurred well before Senator Voinovich's Federal
3 candidacy for the 1998 or 2004 elections.⁶ Further, as noted above, your request does not
4 indicate that the Senate Committee or Senator Voinovich is under any legal obligation to
5 make these refunds. The facts before the Commission in this advisory opinion do not
6 support a conclusion that a refund of the impermissible State contributions would be in
7 connection with either of Senator Voinovich's campaigns for Federal office. The original
8 contributions were not made in connection with Senator Voinovich's campaign for Federal
9 office in 1998 or his current campaign for election in 2004 and thus would not be covered by
10 2 U.S.C. 439a(a)(1).

11 The proposed refunds also would not comply with the other three permissible uses
12 set forth in 2 U.S.C. 439a in that they are not ordinary and necessary expenses incurred in
13 connection with Senator Voinovich's duties as a U.S. Senator; they are not contributions to
14 an organization described in section 170(c) of the Internal Revenue Code of 1986; and they
15 are not transfers to a national, State or local committee of a political party.⁷ Therefore, the
16 Commission concludes that your proposal would not comply with 2 U.S.C. 439a(a) and 11
17 CFR 113.2.

18 Prior advisory opinions permitted Federal candidates to transfer or use their Federal
19 campaign funds to assist their current or future State campaigns. See Advisory Opinions
20 1996-52, 1993-10, and 1986-5. However, these advisory opinions are not relevant to your

⁶ Senator Voinovich's campaigns for Governor occurred in 1990 and 1994.

⁷ A conversation with the P.I.E. liquidation fund administrator confirms that the fund is not a section 170(c) organization. Furthermore, the PIE liquidation fund is not making payments to any section 170(c) organization.

1 situation because they interpreted the pre-BCRA version of 2 U.S.C. 439a and because they
2 dealt with transfers to current or future State campaigns.⁸ Your proposal does not involve a
3 transfer to Senator Voinovich's State Campaign Committee because that committee ceased
4 operations in 1998 and no longer exists.

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

11 The Commission notes that this advisory opinion analyzes the Act, as amended by
12 the Bipartisan Campaign Reform Act of 2002, and Commission regulations, including those
13 promulgated to implement the BCRA amendments, as they pertain to your proposed
14 activities. On May 2, 2003, a three-judge panel of the United States District Court for the
15 District of Columbia ruled that a number of BCRA provisions are unconstitutional and
16 issued an order enjoining the enforcement, execution, or other application of those
17 provisions. *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123
18 S.Ct. 2268 (U.S. argued Sept. 8, 2003). Subsequently, the district court stayed its order and
19 injunction in *McConnell v. FEC*, 253 F. Supp. 2d 18 (D.D.C. 2003), pending review by the
20 Supreme Court. The Commission has determined that your request for advice is not affected

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⁸ This advisory opinion does not address or prohibit contributions or transfers to existing or future State campaign committees.

1 by *McConnell v. FEC* because the provisions of the Act underlying this advisory opinion are
2 not challenged in that litigation.

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Sincerely,

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Ellen L. Weintraub
Chair

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11 Enclosures (AOs 1996-52, 1993-10, and 1986-5)