

June 16, 2004

**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 2004-17 is available for public comments under this procedure. It was requested by Becky Armendariz Klein for U.S. Congress, Becky Armendariz Klein. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2004-17 will be on the Commission's agenda for its public meeting of Thursday June 24, 2004.

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 June 23, 2004.

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**

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

**Other inquiries:**

**To obtain copy of draft AO 2004-17 contact Public Records Office-  
Public Disclosure Division (202) 694-1120, or 800-424-9530.**

**For questions about comment submission procedure contact  
Rosemary C. Smith, 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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June 16, 2004

MEMORANDUM

**AGENDA ITEM**  
For Meeting of: 6-24-04

TO: The Commission

THROUGH: James A. Pehrkon *AK/PJP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

James A. Kahl *JK*  
Deputy General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Mai Dinh *MD*  
Assistant General Counsel

Margaret Perl *MP*  
Staff Attorney

SUBJECT: Advisory Opinion 2004-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 24, 2004.

Attachment

1 ADVISORY OPINION 2004-17

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4 Ms. Becky A. Klein  
5 Becky Armendariz Klein for U.S. Congress  
6 P.O. Box 1508  
7 Austin, TX 78767-1508

**DRAFT**

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10 Dear Ms. Klein:

11 This responds to your letters dated March 29 and April 30, 2004 requesting an  
12 advisory opinion concerning the application of the Federal Election Campaign Act of 1971,  
13 as amended ("the Act"), and Commission regulations to your part-time paid employment as  
14 a consultant with a law firm during the time that you are a Federal candidate.

15 ***Background***

16 You state that you are currently a candidate for the U.S. House of Representatives in  
17 the 25th Congressional District of Texas. You state that you have resigned from your prior  
18 employment as Chairman of the Texas Public Utility Commission, and that you would like  
19 to accept part-time employment providing consulting services to a law firm during your  
20 candidacy. These consulting services are based upon your prior experience, and would  
21 include: 1) helping the law firm identify relevant telecommunication issues addressed by  
22 state public utility commissions; 2) implementing the firm's efforts to understand positions  
23 of state and federal regulators, and members of the Administration; and 3) providing  
24 technical and policy expertise on telecommunication issues, including advising firm clients  
25 as appropriate.

26 You explain that your compensation for this consulting position will be paid on an  
27 hourly basis for services actually rendered, and that the rate of compensation will be

1 commensurate with such compensation earned by similarly qualified consultants for similar  
2 services. You state that this consulting work for the law firm is for purposes "genuinely  
3 independent" of your candidacy. You also state that you will not use the law firm's  
4 facilities for any campaign-related purposes, nor the facilities of any firm client for any  
5 campaign-related activity.

6 ***Question Presented***

7 Is the compensation from the law firm as a result of your part-time consulting  
8 services considered a "contribution" to your campaign under the Act and Commission  
9 regulations?

10 ***Legal Analysis and Conclusions***

11 No, any payments made to you by the law firm as compensation for consulting  
12 services actually rendered are excepted from the definition of "contribution" under the Act  
13 because these payments qualify as compensation made "irrespective of [your] candidacy."

14 The Act prohibits the conversion of campaign funds to any "personal use."  
15 2 U.S.C. 439a. Under the Commission regulations implementing this section of the Act, a  
16 third party's payment of a candidate's expenses that would otherwise be deemed "personal  
17 use" expenses under Section 439a(b)(2) of the Act is considered a contribution by the third  
18 party unless the payment would have been made "irrespective of the candidacy." 11 CFR  
19 113.1(g)(6). The regulations specifically state that certain types of employment-related  
20 compensation are considered payments made "irrespective of the candidacy:"

21 (iii) Payments for that expense were made by the person making the payment before  
22 the candidate became a candidate. Payments that are compensation shall be  
23 considered contributions unless –

1           (A) The compensation results from *bona fide* employment that is genuinely  
2           independent of the candidacy;

3           (B) The compensation is exclusively in consideration of services provided by  
4           the employee as a part of this employment; and

5           (C) The compensation does not exceed the amount of compensation which  
6           would be paid to any other similarly qualified person for the same work  
7           over the same period of time.

8   11 CFR 113.1(g)(6)(iii).

9           If your compensation for consulting services with the law firm satisfies the three  
10          criteria in 11 CFR 113.1(g)(6)(iii)(A), (B), and (C), then the payments would not be  
11          considered "contributions" to your campaign. This three-part test is based upon Advisory  
12          Opinion 1979-74, which you reference in your request. *See* 60 Fed. Reg. 7872 (Feb. 9,  
13          1995). Advisory Opinion 1979-74 was the culmination of a series of Commission advisory  
14          opinions reaffirming that "an individual may pursue gainful employment while a candidate  
15          for Federal office," and establishing and refining the criteria for when compensation  
16          received by a candidate would not be a "contribution" from the employer. *See e.g.*  
17          Advisory Opinion 1979-74. In this Advisory Opinion, the Commission applied the three-  
18          part test, now codified at 11 CFR 113.1(g)(6)(iii), to a request from a Federal candidate to  
19          receive compensation for lobbying and consulting services from various corporate clients  
20          during his candidacy. The candidate's compensation was based exclusively in  
21          consideration of consulting services provided by him at a rate equal to that earned by  
22          lobbyists performing similar services. Moreover, the candidate would not be using his  
23          client's facilities for any campaign related purposes. The Commission decided that the

1 compensation provided under these circumstances was payment made “irrespective of the  
2 candidacy” and was, therefore, not a “contribution” under the Act.

3       The facts presented in your request appear from your representations to be virtually  
4 indistinguishable from the situation in Advisory Opinion 1979-74. Based on your  
5 representation that your part-time consulting services arrangement is *bona fide* employment  
6 genuinely independent of your candidacy, that the hourly compensation proposed is  
7 exclusively tied to services actually rendered, and that the rate of compensation will not  
8 exceed that paid to similarly qualified consultants who perform similar services, the  
9 Commission concludes that payments made to you by the law firm, based on these rates as  
10 compensation for these consulting services rendered, meet the requirements of 11 CFR  
11 113.1(g)(6)(iii)(A) through (C) and would be payments made “irrespective of the  
12 candidacy.” Any such payments would not be “contributions” to your campaign under the  
13 Act or Commission regulations.

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

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Sincerely,

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Bradley A. Smith  
Chairman

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11 Enclosures (AO 1979-74)

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