

September 2, 2004

AO DRAFT COMMENT PROCEDURES

The Commission 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 2004-27 is available for public comments under this procedure. It was requested by Quayle 2000, Inc.

Proposed Advisory Opinion 2004-27 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 9, 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 (Eastern Time) on September 8, 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 timely received comments 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 Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-27, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

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

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Washington, DC 20463

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September 2, 2004

MEMORANDUM

AGENDA ITEM
For Meeting of: 9-9-04

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

Mai T. Dinh *MTD*
Assistant General Counsel

Albert J. Kiss *AK*
Attorney

Subject: Draft AO 2004-27

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 9, 2004.

Attachment

2
3 William R. Neale
4 Treasurer
5 Quayle 2000, Inc.
6 c/o Krieg DeVault LLP
7 12800 North Meridian St., Suite 300
8 Carmel, IN 46032

9
10 Dear Mr. Neale:

11
12 This responds to your letter dated June 17, 2004, and facsimile transmission dated July
13 13, 2004, requesting an advisory opinion concerning the application of the Federal Election
14 Campaign Act of 1971 ("the Act"), as amended by the Bipartisan Campaign Reform Act of 2002,
15 Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), and Commission regulations, to Quayle
16 2000, Inc.'s ("the Committee") proposed use of campaign funds to reimburse two former
17 employees for unpaid salary dating back to 1999.¹

18 ***Background***

19 In 1999, the Committee received matching funds and subsequently was audited, pursuant
20 to the Presidential Primary Matching Payment Account Act ("the Matching Payment Act"), 26
21 U.S.C. 9031-9042. In 2002, the Commission approved the Audit Report and determined that no
22 repayment of Federal matching funds was required. After the audit, the Committee had
23 campaign funds remaining in its account.

24 You state that two employees of the Committee, in order to permit the Committee to
25 preserve funds, volunteered their services from March 1 to March 31, 1999, when the Committee
26 was low on funds. Each employee signed an undated statement entitled "Statement of Volunteer

¹ Quayle 2000 Exploratory Committee, Inc., registered with the Commission on February 3, 1999, as the principal campaign committee of former Vice President Dan Quayle when he ran for President in the 2000 election cycle. In an amended Statement of Organization dated May 27, 1999, Quayle 2000 Exploratory Committee, Inc. changed its name to Quayle 2000, Inc.

1 Services” foregoing payment of salary for March 1999 pursuant to 11 CFR 116.6.² The
2 Committee would now like to pay these former employees \$2,125 and \$5,667, respectively, in
3 recognition of the fact that but for their volunteering services, they would have received these
4 funds as compensation. Because the Committee’s account no longer contains Federal matching
5 funds and the Committee does not owe a repayment, the analysis below focuses on the Act rather
6 than on the Matching Payment Act. *See generally* 11 CFR 9038.2.

7

8 ***Question Presented***

9 *May the Committee pay two former employees for the amount of salary they would have*
10 *received for campaign work performed in March 1999, where the employees chose at the time to*
11 *forego their salaries and to work as volunteers?*

12

13 ***Legal Analysis and Conclusions***

14 No, the Committee may not use its Federal campaign funds for payments in 2004 of
15 amounts related to 1999 volunteer services. As explained below, these payments are not
16 permissible uses of campaign funds under the Act and Commission regulations because of the
17 Act’s restrictions on permissible uses of campaign funds, and because of the Act’s provisions
18 requiring the prompt disclosure of outstanding debts and obligations.

19

² During March 1999, one individual would have been paid \$6,250, but was actually paid \$4,125, leaving an unpaid amount of salary of \$2,125. The second individual would have been paid \$5,667, but was not paid any of this amount. Thus, although both employees signed “Statements of Volunteer Services” for March 1999, one employee was actually paid for approximately two-thirds of his services for this month. The Commission does not address this payment of \$4,125 because this payment is a past action that is outside the scope of this advisory opinion. *See* 11 CFR 112.1(b).

1 Under the Act, as amended by BCRA, there are four categories of permissible uses of
2 contributions accepted by a Federal candidate: (1) otherwise authorized expenditures in
3 connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses
4 incurred in connection with the duties of the individual as a holder of Federal office; (3)
5 contributions to organizations described in 26 U.S.C. 170(c); and (4) transfers, without
6 limitation, to national, State or local political party committees. 2 U.S.C. 439a(a); *see also*
7 11 CFR 113.2. Such uses must not, however, result in the conversion of the campaign funds to
8 "personal use" by any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2. Since 1995, the
9 Commission's regulations have defined "personal use" as "any use of funds in a campaign
10 account of a present or former candidate to fulfill a commitment, obligation or expense of any
11 person that would exist irrespective of the candidate's campaign or duties as a Federal
12 officeholder." 11 CFR 113.1(g); *see* 2 U.S.C. 439a(b)(2).

13 In BCRA, Congress deleted "any other lawful purpose" from the list of permissible uses
14 of campaign funds in section 439a. The Explanation and Justification for 11 CFR 113.2
15 discussed the significance of this deletion:

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

22
23 Explanation and Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and

24

1 Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76,970, 76,975 (Dec. 13, 2002)
2 (emphasis added).³

3 Commission regulations provide that if a political committee does not pay an employee
4 for services rendered to the political committee in accordance with an employment contract or a
5 formal or informal agreement to do so, the unpaid amount either may be treated either as a debt
6 owed by the political committee to the employee, or, provided that the employee signs a written
7 statement agreeing to be considered a volunteer, converted to a volunteer services arrangement.
8 11 CFR 116.6(a); *see also* Explanation and Justification for Debts Owed by Candidates and
9 Political Committees; Final Rule, 55 Fed. Reg. 26,378, 26,383 (June 27, 1990). In the situation
10 you describe, two employees agreed to treat their salaries for March 1999 as volunteer services
11 rather than paid services pursuant to 11 CFR 116.6(a), and the employees signed statements to
12 that effect.

13 The Act and Commission regulations require that the amount and nature of outstanding
14 debts and obligations owed by a political committee be disclosed. 2 U.S.C. 434(b)(8); 11 CFR
15 104.3(d). Further, debts and obligations must be initially disclosed in a timely manner, and must
16 be continuously reported thereafter until extinguished. 11 CFR 104.11(a) and (b); *see also*
17 Advisory Opinions 1997-21, 1991-9, and 1977-58. The Committee has not ever reported the
18 unpaid amounts of salaries as debts or obligations and therefore there are no debts or obligations
19

³ *See also* FEDERAL ELECTION COMMISSION ANNUAL REPORT 2003 at 41, addressing section 439a in a legislative recommendation submitted to the Congress ("Section 439a, as amended by BCRA, lists four explicitly permitted uses of campaign funds ... However, unlike the pre-BCRA version of section 439a and unlike the pre-BCRA regulations ... the use of campaign funds for "any other lawful purpose" ... is no longer listed as a statutorily permitted use. In post-BCRA rulemakings and advisory opinions, the Commission has had no choice but to interpret this statutory deletion as meaning that the list of permissible uses in section 439a(a) is exhaustive.").

1 that could give rise to an authorized expenditure at this time.⁴ By initially treating these two
2 persons' services as volunteer services in 1999, and not reporting salary obligations as debts
3 owed by the Committee at any time thereafter, the Committee has never treated the amounts in
4 question as an authorized expenditure. As such, payment at this time for services that had been
5 deemed volunteer services since 1999 cannot now be treated as an authorized expenditure of the
6 Committee.

7 Thus, in the situation you describe, payment of the unpaid salary amounts in 2004 is not
8 an "otherwise authorized expenditure" in connection with former Vice President Quayle's 2000
9 campaign because the Committee properly treated the amounts involved as volunteer services
10 and not as debts or obligations of the Committee. 2 U.S.C. 439a(a)(1). In addition, the proposed
11 payments would not comply with the other three permissible uses set forth in 2 U.S.C. 439a.
12 They are not ordinary and necessary expenses incurred in connection with duties of an individual
13 as a holder of Federal office because former Vice President Quayle is not a Federal officeholder.
14 The payments are also not contributions to an organization described in 26 U.S.C. 170(c).
15 Lastly, they are not transfers to a national, State or local committee of a political party. 2 U.S.C.
16 439a(a)(2), (3) and (4). Consequently, because the payments to these two former employees of
17 the Committee would not be one of the permitted uses of contributions, the payments are
18 impermissible under 2 U.S.C. 439a and 11 CFR 113.2.

19 This response constitutes an advisory opinion concerning the application of the Act and
20 Commission regulations to the specific transaction or activity set forth in your request. *See*

⁴ In addition, allowing the Committee to pay these amounts in 2004 would mean that, contrary to the volunteer services arrangements in the situation you describe, unreported debts or obligations did exist. Because these amounts were neither initially disclosed in a timely manner nor continuously reported thereafter until extinguished, permitting payment would result in reporting violations by the Committee.

1 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or
2 assumptions presented and such facts or assumptions are material to a conclusion presented in
3 this advisory opinion, then the requester may not rely on that conclusion as support for its
4 proposed activity.

5 Sincerely,

6
7
8
9 Bradley A. Smith
10 Chairman
11
12

13 Enclosures (AOs 1997-21, 1991-9, and 1977-58)