

April 27, 2005

**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 2005-04 is available for public comments under this procedure. It was requested by Jan Witold Baran, Esq. on behalf of Representative John Boehner and Friends of John Boehner

Proposed Advisory Opinion 2005-04 is scheduled to be on the Commission's agenda for its public meeting of Thursday, May 5, 2005.

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 May 4, 2005.

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 2005-04, 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.

**MAILING ADDRESSES**

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

Rosemary C. Smith  
Associate General Counsel  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2005 APR 27 A 10:10

April 27, 2005

**MEMORANDUM**

**AGENDA ITEM**  
For Meeting of: 05-05-05

**TO:** The Commission

**THROUGH:** James A. Pehrkon   
Staff Director

**FROM:** Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Associate General Counsel

Mai T. Dinh   
Assistant General Counsel

Michael Marinelli   
Staff Attorney

**Subject:** Draft AO 2005-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 5, 2005.

Attachment

1 **ADVISORY OPINION 2005-04**

**DRAFT**

2  
3 **Jan Witold Baran, Esq.**  
4 **Wiley, Rein & Fielding, LLP.**  
5 **1776 K Street NW**  
6 **Washington, DC 20006**

7  
8 **Dear Mr. Baran:**

9  
10 **We are responding to your advisory opinion request on behalf of Representative**  
11 **John Boehner and Friends of John Boehner ("Committee") regarding the assignment and**  
12 **reporting of the payments of a court-ordered restitution under the Federal Election**  
13 **Campaign Act of 1971, as amended ("the Act"), and Commission regulations. The**  
14 **Committee is the principal campaign committee of Representative Boehner. Mr. Russell**  
15 **E. Roberts, a former Committee treasurer, is required to pay restitution to the Committee**  
16 **as part of his sentencing for embezzling campaign funds. The Committee seeks to assign**  
17 **the restitution payments to the Community Foundation of West Chester/Liberty**  
18 **("Foundation"), a charitable organization under section 501(c)(3) of the Internal Revenue**  
19 **Code, 26 U.S.C. 501(c)(3). It also asks whether it is required to report the embezzled**  
20 **amount and the restitution payments as a debt and receipts, respectively.**

21 **The Commission concludes that the Committee must continue to treat and to**  
22 **report the restitution amount as a debt owed to the Committee and the repayment checks**  
23 **it receives as Committee receipts. However, if the court order were to be amended to**  
24 **require that the restitution payments be made to the Foundation rather than to the**  
25 **Committee, the Committee could thereafter cease to report the payments and the debt.**

26

1 **Background**

2 The facts of this request are presented in your letter dated March 15, 2005 and  
3 subsequent electronic mail messages.

4 On April 15, 2003, the Committee notified the Commission that Mr. Roberts had  
5 misappropriated campaign funds. At that time, the Committee filed amendments to all  
6 reports for calendar years 2000, 2001, and 2003 to reflect the amounts that Mr. Roberts  
7 had paid to himself. While the Committee stated that it would seek restitution, it also  
8 informed the FEC that restitution was highly unlikely. Accordingly, the Committee did  
9 not report any debt owed from Mr. Roberts.

10 On January 29, 2004, the District Court for the Southern District of Ohio ordered  
11 Mr. Roberts to pay restitution to the Committee in connection with his sentencing for the  
12 embezzlement of funds. The order states, in pertinent part,

13 The Defendant shall pay restitution of \$617,562.88. While incarcerated in  
14 the Bureau of Prisons, the Defendant shall pay at least \$25.00 per quarter  
15 toward the restitution obligation if assigned a non-UNICOR or grade 5  
16 UNICOR job; or at least 50% of his monthly pay if assigned a UNICOR  
17 grade 1-4 job. Within thirty days of the commencement of the term of  
18 supervised release, the Defendant shall pay restitution at a rate of at least  
19 \$10 per month. The Court will reassess the Defendant's ability to pay  
20 from time to time upon the probation officer's recommendation.  
21

22 Pursuant to other provisions of the order, Mr. Roberts was sentenced to imprisonment of  
23 thirty months and thereafter a term of supervised release of three years.

24 The Committee recently received a \$25 installment from Mr. Roberts through the  
25 court system. For the foreseeable future, Mr. Roberts will pay no more than \$100 per  
26 calendar year in restitution, and once released, the restitution amount will increase to

1 \$120 per year. At this rate of payment, the Committee does not anticipate that it will ever  
2 obtain full restitution from Mr. Roberts.

3       Instead of accepting restitution to the Committee, Representative Boehner wishes  
4 the funds to be redirected or assigned to the Foundation. The Committee does not plan to  
5 deposit the restitution payments into any of its accounts. Rather, it wishes to endorse any  
6 restitution payments to the Foundation. Further, the Committee is prepared to petition  
7 the court to revise the sentencing and restitution order to provide that the checks be made  
8 payable to the Foundation directly in order to avoid future reporting of the debt and  
9 receipts of restitution payments, if required by the Commission.

10 ***Question Presented***

11       *If the Committee assigns the restitution payments to the Foundation, must the full*  
12 *restitution amount be reported continuously as a debt and each restitution payment be*  
13 *reported as a receipt?*

14 ***Legal Analysis and Conclusion***

15       Given that Mr. Roberts is obligated under the court order to make restitution  
16 payments to the Committee, the Committee must continuously report the debt owed by  
17 Mr. Roberts until the debt is extinguished. Furthermore, the Committee would be  
18 required to report the restitution payments as receipts.<sup>1</sup> However, if the court order is  
19 amended so that Mr. Roberts is required to pay restitution to the Foundation and the  
20 restitution payments are paid directly to the Foundation, the Committee would no longer  
21 need to report the debt and receipt of the restitution payments.

22

---

<sup>1</sup> If the Committee were to terminate, the analysis of its obligation to report continuously the debt may change.

1

2 Political committees must report all debts owed to them until the debt is  
3 extinguished. 2 U.S.C. 434(b)(8); 11 CFR 104.11(a). Mr. Roberts is required by the  
4 court order to pay the entire restitution amount to the Committee and thus owes a debt to  
5 the Committee that is subject to the reporting requirements of the Act and Commission  
6 regulations. See Advisory Opinion 1991-38 (the Commission concluded that a court  
7 order requiring restitution payment to an authorized committee gave rise to a debt owed  
8 to the authorized committee that must be reported). The use of the restitution payments  
9 to make a charitable donation, though permissible, does not change the underlying legal  
10 obligations that created the debt.<sup>2</sup>

11 Political committees must also deposit and report all their receipts except  
12 contributions that are returned. 2 U.S.C. 432(h) and 434(b)(2); 11 CFR 103.3(a) and  
13 104.3(a)(2). Because Mr. Roberts is obligated to make restitution payments to the  
14 Committee, the payment checks are receipts of the Committee. See Advisory Opinion  
15 1991-38 (the Commission also concluded that restitution payments are receipts that must  
16 be reported). Endorsing the payment checks to the Foundation does not alter the fact that  
17 the checks are made payable to the Committee and thus are a receipt of the Committee.

18 Consequently, the entire amount of the restitution is a reportable debt owed to the  
19 Committee. Similarly, each restitution payment is a receipt of the Committee that must  
20 be included in the Committee's reports. The reporting requirements for the Committee  
21 are similar to those set forth in Advisory Opinion 1991-38. The Committee is required to

---

<sup>2</sup> Under 2 U.S.C. 439a(a)(3), candidates and Federal office holders may use contributed amounts for contributions to an organization described in section 170(c) of Title 26. Thus, the proposed donation of funds to the Foundation, a section 501(c)(3) organization, is explicitly permitted by 2 U.S.C. 439a(a) because such organizations are described in 26 U.S.C. 170(c).

1 report the total amount owed by Mr. Roberts as a debt owed to it and must record the  
2 subsequent reductions of debt.<sup>3</sup> See 2 U.S.C. 434(b)(8) and 11 CFR 104.3(d). Payment  
3 checks from Mr. Roberts must be reported as "other receipts" under 11 CFR  
4 104.3(a)(3)(x). Donations to the Foundation must be reported as "other disbursements"  
5 under 11 CFR 104.3(b)(2)(vi). If the payments from Mr. Roberts or the Committee's  
6 subsequent donations to the Foundation during an election cycle exceed \$200, they must  
7 be itemized under 11 CFR 104.3(a)(4)(vi) and 104.3(b)(4)(vi).

8 Further, because political committee disbursements must be made by checks or  
9 similar drafts drawn on the political committee's accounts at its campaign depository, the  
10 Committee cannot simply endorse the restitution payment checks to the Foundation as  
11 you suggest. See 2 U.S.C. 432(h)(1) and 11 CFR 103.3(a). Section 432(h) and  
12 Commission regulations require that the Committee deposit the funds first into its  
13 account and then draw the check through which the donation is made.

14 However, if the Committee were to petition and obtain from the court an  
15 amended court order so that Mr. Roberts was obligated to make restitution payments to  
16 the Foundation rather than the Committee, then the debt owed to the Committee would be  
17 extinguished. In that circumstance, the Committee would report that the debt was  
18 extinguished. The Committee would then no longer need to report the debt or receipt of  
19 the restitution payments.

20 This response constitutes an advisory opinion concerning the application of the  
21 Act and Commission regulations to the specific transaction or activity set forth in your  
22 request. See 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any

---

<sup>3</sup> The amount of the reported debt would be reduced by each restitution payment made with each payment reported as an "other receipt" under 11 CFR 104.3(a)(3)(x).

1 of the facts or assumptions presented, and such facts or assumptions are material to a  
2 conclusion presented in this advisory opinion, then the requestor may not rely on that  
3 conclusion as support for its proposed activity.

4

5

6

7

8

9

10

11

12

13

14

Sincerely,

Scott E. Thomas  
Chairman

Enclosure (Advisory Opinion 1991-38)