

September 14, 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 2005-12 is available for public comments under this procedure. It was requested by counsel, Neil Reiff, Esq. on behalf of Representative Chaka Fattah.

Proposed Advisory Opinion 2005-12 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 22, 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 September 21, 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 2005-12, 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**



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2005 SEP 14 P 3 22

September 14, 2005

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Richard Ewell *RE*
Attorney

Subject: Draft AO 2005-12

AGENDA ITEM
For Meeting of: 09-22-05

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 22, 2005.

Attachment

1 **ADVISORY OPINION 2005-12**

2 **Mr. Neil Reiff**
3 **Sandler, Reiff & Young, P.C.**
4 **50 E Street, S.E., Suite 300**
5 **Washington, D.C. 20003**

DRAFT

6
7 **Dear Mr. Reiff:**

8 **We are responding to your advisory opinion request dated August 4, 2005, on**
9 **behalf of U.S. Representative Chaka Fattah, concerning the application of the Federal**
10 **Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to**
11 **fundraising and spending by Representative Fattah and his exploratory committee for the**
12 **2007 Philadelphia mayoral election.**

13 **For the reasons set forth below, Representative Fattah and his exploratory**
14 **committee may raise and spend funds that are in excess of the amount limits contained in**
15 **the Act in connection with his candidacy for mayor of Philadelphia, so long as their**
16 **activities refer only to Representative Fattah as a candidate for mayor of Philadelphia, to**
17 **other candidates for that same office, or both, and so long as the amounts and sources of**
18 **the funds are consistent with State law.**

19 ***Background***

20 **The facts of this request are presented in your letter received on August 4, 2005.**

21 **Representative Fattah represents the Second Congressional District of**
22 **Pennsylvania and intends to seek re-election to that office in November 2006. Following**
23 **the Congressional election, Representative Fattah may decide to announce his candidacy**
24 **for the Democratic nomination for mayor of Philadelphia. The primary election for the**
25 **mayoral office is scheduled to take place on May 15, 2007.**

1 Although Representative Fattah does not plan to formally announce his candidacy
2 for Philadelphia mayor until after the November 2006 Congressional election, he does
3 intend to establish an exploratory committee for the mayoral election prior to that time.
4 Moreover, he intends to raise and spend funds that are in excess of the amount limits
5 contained in the Act for his exploratory committee. You state that these funds would be
6 raised and spent "exclusively in connection with his potential candidacy for mayor and
7 would not, in any way, be used in connection with any candidacy for Federal office" nor
8 used "in any way to influence any election other than that of Representative Fattah's
9 potential candidacy for mayor of Philadelphia." Additionally, you state that by
10 establishing the exploratory committee, Representative Fattah will meet the definition of
11 a "candidate" under Pennsylvania state law.¹

12 ***Question Presented***

13 ***May Representative Fattah and his exploratory committee raise and spend funds***
14 ***in excess of the amount limits contained in the Act exclusively in connection with his***
15 ***candidacy for mayor of Philadelphia?***

16 ***Legal Analysis and Conclusion***

17 Yes, Representative Fattah and his exploratory committee may raise and spend
18 funds in excess of the amount limits contained in the Act so long as their activities refer
19 only to Representative Fattah as a candidate for mayor of Philadelphia, to other
20 candidates for that same office, or both, and so long as the amounts and sources of the
21 funds are consistent with State law.

¹ Under the Pennsylvania Election Code, a "candidate" includes "any individual who . . . has given his consent for any other person or committee to receive a contribution or make an expenditure . . . whether or not the individual has made known the specific office for which he or she will seek nomination or election at the time the contribution is received or the expenditure is made." 25 P.S. § 3241(a)(1).

1 Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002,
2 Public Law 107-155, 116 Stat. 81 (2002), Federal candidates and officeholders may not
3 raise or spend funds in connection with an election for Federal office, unless the funds are
4 subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 2
5 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. Additionally, Federal candidates and
6 officeholders may not raise or spend funds in connection with an election other than an
7 election for Federal office, unless the funds do not exceed the amounts permitted with
8 respect to contributions to candidates and political committees under 2 U.S.C. 441a(a)(1),
9 (2), and (3), and do not come from sources prohibited under the Act. *See* 2 U.S.C.
10 441i(e)(1)(B); 11 CFR 300.62. With respect to non-Federal elections, Commission
11 regulations also require that such funds be in amounts and from sources that are
12 consistent with State law. 11 CFR 300.62.

13 However, a limited exception applies to Federal candidates and officeholders who
14 also seek State or local office. Specifically, the restrictions of 2 U.S.C. 441i(e)(1) do not
15 apply to any Federal candidate or officeholder who is also a candidate for a State or local
16 office so long as the solicitation, receipt or spending of funds: (1) is solely in connection
17 with his State or local campaign; (2) refers only to him as a State or local candidate, to
18 other candidates for that same office, or both, and (3) is permitted under State law.
19 2 U.S.C. 441i(e)(2), 11 CFR 300.63; *see also* Advisory Opinions 2005-05 and 2005-02.²

20 Representative Fattah is both a Federal candidate and a Federal officeholder.
21 Additionally, Representative Fattah's mayoral exploratory committee will be an entity

² Although the exception in 2 U.S.C. 441i(e)(2) permits Federal candidates and officeholders who are also candidates for State or local office to raise and spend funds outside the restrictions of 2 U.S.C. 441i(e)(1), these candidates are still prohibited from soliciting or receiving funds from national banks, corporations organized by authority of Congress, and foreign nationals. 2 U.S.C. 441b and 441e.

1 that is directly established, financed, maintained, and controlled by him. However, under
2 the facts posited in the request, he also will be a candidate for local office. Thus, his and
3 his exploratory committee's fundraising activities would be covered by the exception
4 contained in 2 U.S.C. 441i(e)(2).³ Accordingly, once his mayoral exploratory committee
5 is established, Representative Fattah and his exploratory committee may raise and spend
6 funds in excess of the amount limits contained in the Act exclusively in connection with
7 his candidacy for mayor of Philadelphia, so long as their activities refer only to
8 Representative Fattah as a candidate for mayor of Philadelphia, to other candidates for
9 that same office, or both, and so long as the amounts and sources of the funds are
10 consistent with State law.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a

³Although neither 2 U.S.C. 441i(e)(2) nor 11 CFR 300.63 contains an express allowance for fundraising or spending by a committee established by a Federal officeholder or candidate, the Commission has previously concluded that, in view of the kinds of activities that all campaigns normally engage in, the exception described in 2 U.S.C. 441i(e)(2) and 11 CFR 300.63 applies to all individuals described in 2 U.S.C. 441i(e)(1) and 11 CFR 300.60, and hence applies to the activities of agents and to entities established, financed, maintained, or controlled by, or acting on behalf of, the Federal officeholder or candidate. *See* Advisory Opinion 2005-2, footnote 3.

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

3

4

Sincerely,

5

6

7

8

Scott E. Thomas

9

Chairman

10

11 Enclosures (Advisory Opinions 2005-05 and 2005-02)