

April 13, 2006

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 2006-07 is available for public comments under this procedure. It was requested by, Rep. J.D. Hayworth, on behalf of J.D. Hayworth for Congress.

Proposed Advisory Opinion 2006-07 is scheduled to be on the Commission's agenda for its public meeting of Thursday, April 20, 2006.

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 April 19, 2006.

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 2006-07, 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

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Washington, DC 20463

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AGENDA ITEM
For Meeting of: 4-20-06

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *RJC*
Acting Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

Mai T. Dinh *MTD by JLP*
Assistant General Counsel

J. Duane Pugh *JDP*
Senior Attorney

Subject: Draft AO 2006-07

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 20, 2006.

Attachment

1 **ADVISORY OPINION 2006-7**

2 **The Hon. J.D. Hayworth**
3 **Member of Congress**
4 **J. D. Hayworth for Congress**
5 **14300 N. Northsight Blvd., Suite 105**
6 **Scottsdale, Arizona 85260**

DRAFT

7 **Dear Congressman Hayworth:**

8 **We are responding to your advisory opinion request on behalf of J.D. Hayworth for**
9 **Congress (the "Committee"), concerning the application of the Federal Election Campaign Act**
10 **of 1971, as amended (the "Act"), and Commission regulations to placing material promoting**
11 **sales of a book you wrote entitled *Whatever It Takes* on the Committee's website. The**
12 **Commission concludes that the Committee may place the promotional material on its website**
13 **because the *de minimis* cost of adding this material to the Committee's website does not**
14 **constitute a prohibited personal use of contributions accepted by a candidate under**
15 **2 U.S.C. 439a(b).**

16 ***Background***

17 **The facts presented in this advisory opinion are based on your letter received**
18 **February 9, 2006, as supplemented by an e-mail dated February 17, 2006.**

19 **The Committee is your principal campaign committee in your candidacy for reelection**
20 **to the House of Representatives. You wrote a book entitled *Whatever It Takes* that was recently**
21 **published by Regnery Publishing, Inc. The Committee has a website, www.jdhayworth.com,**
22 **that includes a substantial amount of campaign material, including a brief biography of the**
23 **candidate, discussion of various issues, endorsements, news archives, schedules of upcoming**
24 **campaign events, and similar material. The Committee proposes to offer on its campaign**
25 **website information along the lines of the following:**

1 Also, please keep an eye on this space for upcoming information on book
2 signings (if you don't want to make a contribution, books are available at most
3 bookstores and at Amazon.com and other online bookstores).

4
5 The Committee also proposes the following as a possible alternative:

6 Order your autographed copy of J.D.'s newest book *Whatever It Takes* for
7 a donation of \$50. Or, [click here](#) to order your copy direct from Amazon.com.

8
9 You would receive royalties on any resulting book sales (other than books the Committee
10 purchases to offer to those who contribute \$50). You also confirmed that the costs of adding
11 the proposed material to the existing Committee website are *de minimis*.

12 ***Questions Presented***

13 *May the Committee's website inform its viewers that they may purchase a copy of*
14 *Whatever It Takes "at most bookstores and at Amazon.com and other online bookstores" when*
15 *the candidate would earn royalties from sales through those retailers? Alternatively, may the*
16 *Committee's website include a link to Amazon.com that would enable viewers to purchase the*
17 *book?*

18 ***Legal Analysis and Conclusions***

19 Yes, the Committee may do so because the *de minimis* cost of adding promotional
20 material to the Committee's website does not constitute a prohibited personal use of campaign
21 funds.

22 Under the Act and Commission regulations, a candidate and the candidate's authorized
23 committee have wide discretion in making expenditures to influence the candidate's election.
24 2 U.S.C. 439a(a); 11 CFR 113.2. However, neither the candidate nor the candidate's
25 authorized committee may convert contributions accepted by the candidate to the personal use
26 of the candidate or any other person. 2 U.S.C. 439a(b); 11 CFR 113.1(g) and 113.2(e)(5). The

1 Act specifies that conversion to personal use occurs when a "contribution or amount is used to
2 fulfill any commitment, obligation, or expense of a person that would exist irrespective of the
3 candidate's election campaign or individual's duties as a holder of Federal office."

4 2 U.S.C. 439a(b)(2). The Act and Commission regulations provide a non-exhaustive list of
5 items that would constitute personal use *per se*. See 2 U.S.C. 439a(b)(2);

6 11 CFR 113.1(g)(1)(i). For items not on this list, the Commission makes a determination, on a
7 case-by-case basis, whether an expense would fall within the definition of "personal use."

8 11 CFR 113.1(g)(1)(ii).

9 The expenses associated with marketing a book that a commercial publisher has
10 published and for which it pays royalties to the author are expenses that exist irrespective of the
11 candidate's election campaign or duties as a holder of Federal office. Therefore, under
12 2 U.S.C. 439a(b)(2) and 11 CFR 113.2(e)(5), contributions accepted by a candidate may not be
13 used to fulfill these expenses. Thus, use of a Committee asset, like the Committee's website, to
14 promote your book would ordinarily constitute a prohibited personal use of the contributions
15 that paid for the asset. However, the proposed use of the Committee's website is limited to the
16 addition of a *de minimis* amount of material to an otherwise substantial website. Cf.

17 11 CFR 113.2(g)(1)(ii)(D) (permitting *de minimis* vehicle expenses for personal activities). In
18 light of the *de minimis* use of the Committee's asset, the Commission determines that your
19 proposed additions to the Committee's website do not constitute a prohibited personal use of
20 campaign funds.

21 The Commission expresses no opinion regarding the application of any rules of the U.S.
22 House of Representatives or any tax ramifications of the proposed activity, because those issues
23 are not within its jurisdiction.

