

January 18, 2007

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2006-37 is available for public comments under this procedure. It was requested by Barry J.C. Kissin and Kissin for Congress.

Draft Advisory Opinion 2006-37 is scheduled to be on the Commission's agenda for its public meeting of Thursday, January 25, 2007.

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 January 24, 2007.

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 2006-37, 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

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2006 JAN 18 A 9 38

January 18, 2007

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton
General Counsel *LHN*

Rosemary C. Smith *RCS*
Associate General Counsel

J. Duane Pugh *JDP*
Acting Assistant General Counsel

Anthony Buckley *Ab*
Attorney

Subject: Draft AO 2006-37

AGENDA ITEM
For Meeting of: 01-25-07

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 25, 2007.

Attachment

1 **ADVISORY OPINION 2006-37**

2

3 **Barry J.C. Kissin**
4 **Kissin for Congress**
5 **148 West Patrick Street**
6 **Frederick, MD 21701**

DRAFT

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9 **Dear Mr. Kissin:**

10 **We are responding to your advisory opinion request on behalf of yourself and**
11 **your principal campaign committee, Kissin for Congress ("the Committee"), concerning**
12 **the application of the Federal Election Campaign Act of 1971, as amended (the "Act"),**
13 **and Commission regulations to the Committee's reimbursement to you of a portion of the**
14 **funds you provided the Committee during the course of your campaign. The**
15 **Commission concludes that the Committee may disburse these funds to you.**

16 ***Background***

17 **The facts presented in this advisory opinion are based on your letter and**
18 **accompanying affidavits received on December 1, 2006.**

19 **You were a candidate in the 2006 Democratic primary election for the House of**
20 **Representatives seat from Maryland's Sixth Congressional District. This was your first**
21 **candidacy for election to political office at any level.**

22 **On March 3, 2006, you deposited \$5,000 of your personal funds into the**
23 **Committee's campaign depository. On March 21, 2006, you deposited an additional**
24 **\$20,000 of your personal funds into the Committee's campaign depository.¹ The**
25 **Committee reported each of these deposits as contributions from you. However, you**
26 **have submitted affidavits from yourself and the Committee's chairman, each dated**

¹ The \$25,000 was deposited via checks drawn on your personal checking account. These deposits do not represent bank loans, brokerage loans, or lines of credit under applicable statutory provisions. See 2 U.S.C. 4311(8)(B)(vii) and (xiv).

1 November 27, 2006, indicating that you intended to be reimbursed for the \$25,000 total
2 of both deposits to the extent funds were available after all Committee expenses were
3 paid. You have also submitted an affidavit from the Committee's treasurer, also dated
4 November 27, 2006, indicating that you intended to be reimbursed with respect to the
5 \$20,000 deposit, and this affidavit does not address the \$5,000 deposit. The Committee's
6 2006 Year-End Report shows its current cash on hand is \$15,230.34 and that it has no
7 outstanding debts or obligations.

8 ***Question Presented***

9 *May your principal campaign committee disburse \$15,230.34 to you as a partial*
10 *reimbursement of funds you provided to the Committee that the Committee reported as*
11 *contributions?*

12 ***Legal Analysis and Conclusions***

13 Yes, your principal campaign committee may disburse \$15,230.34 to you because
14 such disbursement would constitute a repayment of a loan from you to the Committee.

15 The Act provides six categories of permissible uses of contributions. *See* 2
16 U.S.C. 439a(a). Such uses are permitted provided that they do not result in campaign
17 funds being converted to personal use by any person. 2 U.S.C. 439a(b)(1). "Personal
18 use" occurs when a "contribution . . . is used to fulfill any commitment, obligation, or
19 expense of a person that would exist irrespective of the candidate's election campaign or
20 individual's duties as a holder of Federal office." 2 U.S.C. 439a(b)(2). Campaign funds
21 may be used to repay a loan from a candidate, the proceeds of which were used in
22 connection with his or her campaign, because such debt repayment is an authorized

1 expenditure in connection with that candidate's campaign for Federal office.² *See*

2 2 U.S.C. 439a(a)(1); Advisory Opinion 2003-30 (Fitzgerald).

3 The Act further requires that the reports filed by a candidate's principal campaign
4 committee disclose, among other transactions, all loans made by or guaranteed by the
5 candidate, as well as contributions from the candidate. 2 U.S.C. 434(b)(2)(B), (G) and
6 434(b)(8); *see also* 11 CFR 104.3(a)(4)(iv) and 104.3(d). Debts and obligations owed by
7 or to a political committee that remain outstanding shall be continuously reported until
8 extinguished. 11 CFR 104.11(a).

9 When determining the nature of a transaction between a candidate and the
10 candidate's authorized committee, the Commission has taken into account not only the
11 way in which the transaction was reported, but also affidavits evidencing the intent of the
12 parties involved in the transactions. For example, in Advisory Opinion 1997-21
13 (Firebaugh), the candidate had forgiven advances of personal funds so that the committee
14 could terminate. The committee reported this forgiveness as an "in-kind contribution."
15 Subsequently, the committee received an unanticipated refund of \$46,131 from a media
16 vendor. The committee sought the Commission's permission to reimburse the candidate
17 the amount of the refund to repay a portion of the previous advances. The candidate and
18 the committee's treasurer both submitted affidavits stating that the transactions should
19 have been reported as advances, rather than in-kind contributions. The Commission
20 accepted the affidavits as proof that the transactions should have been reported as

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² If the candidate loan is in excess of \$250,000, the amount in excess may not be repaid with proceeds from contributions received after the date of the election in which the candidate was running. *See* 2 U.S.C. 441a(j).

1 advances, and it allowed the refund to be made by the committee to the candidate. *See*
2 *also Statement of Reasons-Final Repayment Determination of Buchanan for President,*
3 *Inc.* (Aug. 1, 1995) (affidavits submitted by a presidential primary candidate and the
4 chairman of his principal campaign committee stating that receipts of candidate funds
5 should have been reported as loans rather than contributions were sufficient to
6 demonstrate the true nature of the transactions and allow repayment to the candidate).

7 The affidavits by you, your campaign chairman and the Committee's treasurer
8 support a determination that you and the Committee intended that \$20,000 of the personal
9 funds you deposited into the Committee's account would be reimbursed to you if
10 feasible. Further, the affidavits from you and your campaign chairman support a
11 determination that the additional \$5,000 of the personal funds you deposited into the
12 Committee's account would be reimbursed to you if feasible, and the affidavit of the
13 Committee's treasurer presents no contrary information. Based on these affidavits, the
14 Commission concludes that both the \$20,000 and \$5,000 deposits were loans from you to
15 the Committee that were mistakenly reported as contributions. Accordingly, the
16 Commission determines that the \$15,230.34 remaining in the Committee's accounts (or
17 any other Committee funds up to a total of \$25,000) may be paid to you as partial
18 repayment for your loans to the Committee.

19 In addition, the Committee must amend its April 2006 Quarterly Report and all
20 subsequent reports to reflect the debts owed by the Committee to you, and the Committee
21 should reference this Advisory Opinion in a memo entry. Furthermore, to the extent the
22 loans by you to the Committee remain unpaid, the Committee must either continue to
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1 report the obligations or report your forgiveness of those obligations, as appropriate. *See*
2 11 CFR 104.11(a). The amended reports should be filed within 30 days of the receipt of
3 this opinion. *See Advisory Opinion 1997-21 (Firebaugh).*

4 The Commission expresses no opinion regarding the application of Federal tax
5 law to the proposed activities because that question is not within the Commission's
6 jurisdiction.

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

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Sincerely,

Robert D. Lenhard
Chairman

Enclosures (Advisory Opinions 2003-30 and 1997-21)