



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 10, 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2007-26

Donald F. McGahn, II, Esq.
McGahn & Associates, PLLC
509 7th Street, N.W.
Washington, D.C. 20004

Dear Mr. McGahn:

We are responding to your advisory opinion request on behalf of Illinois State Representative Aaron Schock and his State campaign committee concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to donations by a State candidate campaign committee of a current Federal candidate to section 501(c)(3) organizations, non-Federal accounts of State and local Republican party committees, and non-Federal candidates, and to refunds to the committee's donors.

The Commission concludes that Mr. Schock's State campaign committee may make donations to the section 501(c)(3) organizations in question. In addition, so long as Mr. Schock's State campaign committee uses a reasonable accounting method to identify the portion of its remaining funds that consists of funds complying with the amount limits and source prohibitions of the Act, the committee may donate such funds to the party committees' non-Federal accounts and to the non-Federal candidates. Under certain conditions, Mr. Schock's State campaign committee may make refunds to its donors.

Background

The facts presented in this advisory opinion are based on your letter received on September 25, 2007, your e-mail received on October 19, 2007, and phone conversations with Commission staff on October 22 and November 8, 2007.

Mr. Schock is currently a State Representative for the 92nd Representative District of Illinois. He had been a candidate for re-election to the State legislature in 2008 until he decided to end his re-election campaign. In August 2007, he became a candidate for the Republican nomination for election in 2008 to the U.S. House of Representatives from the 18th Congressional District of Illinois.

Mr. Schock maintained a campaign committee, Citizens for Schock (“the Schock Committee”), that raised funds to support his candidacy for State Representative. All of the funds raised by the Schock Committee were raised in connection with that candidacy. The Schock Committee has paid all of its expenses from his first campaign in 2004, and from his 2006 and 2008 re-election campaigns. Mr. Schock and the Schock Committee ceased to raise funds for his State candidacy prior to his becoming a candidate for Federal office. The Schock Committee retains a surplus consisting of funds raised for the 2006 and 2008 campaigns. Illinois law allows State and local candidates to raise funds from individuals without limits and from corporations and labor unions. *See generally* 10 Illinois Compiled Statutes 5/Article 9. Although the Schock Committee raised only funds that complied with Illinois State law, some of these funds were from sources prohibited by the Act from contributing to Federal political committees and some exceeded the Act’s amount limits. Mr. Schock wishes to donate the Schock Committee’s remaining funds to various committees and organizations and/or make refunds to the donors of those funds.

Questions Presented

1. *May the Schock Committee donate funds remaining in its account to the non-Federal accounts of State and local Republican party committees?*
2. *May the Schock Committee donate funds remaining in its account to:*
 - a. *State candidates within the 18th Congressional District, other than the candidate described in question 3?*
 - b. *Illinois State candidates outside the 18th Congressional District?*
 - c. *Candidates for local office in Illinois whose elections are not held on the dates of any Federal elections (e.g., for mayor or city council)?*
3. *May the Schock Committee donate funds remaining in its account to the “successor Republican party candidate” for election as State Representative from Illinois’ 92nd Representative District?*
4. *May the Schock Committee refund donations made by individuals and non-Federal committees?*
5. *May the Schock Committee donate funds to certain charitable organizations described in section 501(c)(3) of the Internal Revenue Code?*

6. *May the Schock Committee retain the funds in its account indefinitely?*

Legal Analysis and Conclusions

Threshold Determination Regarding Reasonable Accounting Methods

The Schock Committee proposes to make disbursements to the various types of entities described in the questions above. As explained below, only donations from permissible sources that comply with the Act's contribution limits may be used to make the disbursements the Schock Committee proposes to make to the non-Federal candidates and accounts. As a preliminary matter, however, the Commission notes that before making these disbursements, the Schock Committee must first use one reasonable accounting method to identify the donations it received that compose the remaining funds it has on hand and to identify the Federally permissible funds. *See, e.g.* Advisory Opinion 2006-38 (Casey State Committee). The Schock Committee must use the same accounting method for all of its disbursements. The Schock Committee must also make sure that funds that had been received by the Schock Committee and (according to the accounting method) used to fund one disbursement are not used to fund another disbursement.

For example, in Advisory Opinions 2006-38 (Casey State Committee), 2006-25 (Kyl), 2006-21 (Cantwell 2006), and 2006-06 (Busby), the Commission stated that the method described in 11 CFR 110.3(c)(4), which is known as the "last in, first transferred" method, is a reasonable accounting method.¹ *See also* 11 CFR 104.12. This does not preclude the Schock Committee from using a different reasonable accounting method that employs generally accepted accounting principles when identifying remaining donations in its campaign account and determining what funds are Federally permissible.

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a. State candidates within the 18th Congressional District, other than the candidate described in question 3?

b. Illinois State candidates outside the 18th Congressional District?

c. Candidates for local office in Illinois whose elections are not held on the dates of any Federal elections (e.g., for mayor or city council)?

Yes, the Schock Committee may use its Federally permissible funds remaining in its account to make donations to the non-Federal accounts of the State and local party

¹ In view of your description of the remaining funds, this method appears to be suitable for the Schock Committee's situation.

committees and to the categories of non-Federal candidates listed in question 2, in accordance with State law.

As amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), the Act regulates certain actions of Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, Federal candidates or officeholders when they raise or spend funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e); 11 CFR 300.60 through 300.65. In pertinent part, BCRA and the Commission regulations implementing BCRA, prohibit those subject to section 441i(e) from soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with any election other than an election for Federal office unless those funds do not exceed the amounts permitted with respect to contributions to Federal candidates under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources prohibited by the Act from making contributions in connection with an election for Federal office. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; *see also* 2 U.S.C. 441a, 441b, 441c, 441e, and 441f. Commission regulations also require such funds to be in amounts and from sources that comply with State law. 11 CFR 300.62.²

State Representative Schock is a Federal candidate, and the Schock Committee is a non-Federal campaign organization directly established, financed, maintained, or controlled by him. Donations by the Schock Committee to the non-Federal accounts of State and local party committees and to non-Federal candidates would involve spending and disbursing funds in connection with an election other than a Federal election. Therefore, any funds that are donated by the Schock Committee to the non-Federal party committee accounts or the non-Federal candidates described in question 2 must not have been received by the Schock Committee in amounts in excess of those permitted with respect to contributions to Federal candidates³ and must not be from sources prohibited by the Act. *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; *see also* Advisory Opinion 2006-38 (Casey State Committee).⁴ As the Commission has previously observed, “[u]nlike other sections of BCRA specifically dependent upon the appearance of a Federal candidate on the ballot,” section 441i(e)(1)(B) applies to a Federal candidate at any time, regardless of whether any Federal candidate appears on the ballot. Advisory Opinion 2005-02 (Corzine II).

² The Act and Commission regulations prohibit those subject to 2 U.S.C. 441i(e) from soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with any Federal election unless such funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.

³ As currently adjusted for inflation, the limits would be the \$2,300 limit on contributions to a Federal candidate from individuals and non-multicandidate committees, and the \$5,000 limit on contributions from multicandidate committees to Federal candidates. *See* 2 U.S.C. 441a(a)(1)(A) and (2)(A); *see also* Advisory Opinion 2006-38 (Casey State Committee) (which applied the limits in effect at the time of the advisory opinion’s issuance in the 2007-2008 two-year cycle to the disbursement to other non-Federal committees of funds received by the Federal officeholder’s State campaign committee prior to that cycle).

⁴ As you have indicated, all of the Schock Committee’s funds are in amounts and from sources that comply with Illinois law. *See* 11 CFR 300.62.

The Act and Commission regulations permit the Schock Committee to use the reasonable accounting method it selects to determine which of its remaining funds are Federally permissible. Once the Schock Committee has made that determination, it may donate any amount of such Federally permissible funds to the three types of non-Federal candidates described in question 2 or to the non-Federal accounts of State and local Republican party organizations, provided that such donations are consistent with Illinois law. Thus, because Illinois law permits unlimited donations from one State or local candidate committee to another, and from a State candidate committee to a political party organization, the Schock Committee may donate any amount of Federally permissible funds remaining in its account to non-Federal candidates within and outside the 18th Congressional District and to candidates for local offices such as mayor or city council, regardless of whether their elections occur on the same dates as any Federal elections.

3. May the Schock Committee donate funds remaining in its account to the “successor Republican party candidate” for election as State Representative from Illinois’ 92nd Representative District?

Yes, the Schock Committee may donate Federally permissible funds remaining in its account to Mr. Schock’s “successor Republican party candidate,” in accordance with the answer to question 2 above.

The Commission assumes that this question refers to a candidate who entered the race for the Republican nomination for State Representative in the 92nd Representative District after Mr. Shock’s withdrawal from that race. According to the website of the Illinois State Board of Elections, Mr. Schock will not be on the ballot in the February 5, 2008, primary election for that office. *See* <http://www.elections.illinois.gov/ElectionInformation/CandList.aspx>.⁵

The Act provides a limited exception to 2 U.S.C. 441i(e)(1)(B) for Federal candidates and officeholders who also seek State or local office. Specifically, 2 U.S.C. 441i(e)(2) provides that the restrictions of section 441i(e)(1)(B) do not apply to any Federal candidate or officeholder who is or was also a candidate for State or local office so long as the solicitation, receipt, or spending of funds: (1) is "solely in connection with such election for State or local office"; (2) “refers only” to him or her, to other candidates for that same State or local office, or both;⁶ and (3) is permitted under State law. 2 U.S.C. 441i(e)(2); 11 CFR 300.63; *see also* Advisory Opinions 2007-01 (McCaskill), 2005-02 (Corzine II), and 2003-32 (Tenenbaum).

⁵ According to that website, there is one candidate who filed a petition for qualification on the Republican primary ballot for State Representative from the 92nd Representative District by the November 5, 2007, deadline, Ms. Cindy Ardis Jenkins. Mr. Schock filed for qualification for the ballot on the February 5, 2008, Republican primary ballot for the U.S. House of Representatives for the 18th Congressional District and did not file a petition for his State legislative seat. *See* <http://www.elections.illinois.gov/ElectionInformation/CandList.aspx>.

⁶ You state that the solicitations made by the Schock Committee referred only to Mr. Schock or his opponent in the election at that time, thus indicating that the committee's remaining funds consist only of funds so raised.

In literal terms, the successor Republican candidate would be a candidate for the same office in the same election in which Mr. Schock had participated at one time. Based on that fact, Mr. Schock wishes to avail himself of the limited exception at 2 U.S.C. 441i(e)(2) and 11 CFR 300.63 to donate funds that do not comply with the amount limits and source prohibitions to Mr. Schock's Republican successor because such donations would be solely in connection with the 2008 election for the 92nd district seat, refer to another candidate for that same State office, and comply with State law.

The purpose of this exception, however, is to provide an equitable basis for a Federal officeholder or candidate to conduct his or her campaign for non-Federal office so that he or she is not financially disadvantaged when competing with a non-Federal opponent who may raise and spend funds without the same restrictions that section 441i(e) imposes on Federal candidates and officeholders. This rationale does not apply when, as here, a Federal candidate wishes to spend non-Federal funds in connection with an election in which he is no longer a candidate and where he is no longer raising or spending funds for his former non-Federal campaign. The extension of the exception to solicitations or disbursements that refer to other candidates running for the same State or local office merely recognizes that, as a matter of course, a State candidate will refer not only to himself or herself but also to his or her opponents in the State race. Thus, the exception at 2 U.S.C. 441i(e)(2) and 11 CFR 300.63 is meant to apply only to the raising and spending of funds with respect to the Federal candidate's own State or local campaign. Accordingly, the *Explanation and Justification for Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule*, 67 Fed. Reg. 49064, 49107 (July 29, 2002) describes the exception as applying to the candidate's "State campaign." Similarly, in Advisory Opinions 2007-01 (McCaskill), 2005-12 (Fattah), and 2005-05, n.2 (LaHood), the Commission described the exception as applying "solely in connection with [the candidate's] State or local campaign."

Therefore, the Schock Committee does not come within the exception at 2 U.S.C. 441i(e)(2) and 11 CFR 300.63. Accordingly, all donations that the Schock Committee wishes to make to the "successor Republican party candidate" are treated the same as donations to any other non-Federal candidate, and are covered by the answer to question two above.

4. May the Schock Committee refund donations made by individuals and non-Federal committees?

Yes, the Schock Committee may refund donations of any amount to its donors to the extent permitted by State law.

As discussed above, 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62 require that funds spent by a non-Federal committee controlled by a Federal candidate must consist of donations that comply with the Act's amount limits and source prohibitions. Under the facts presented here, however, the Schock Committee would be refunding the donations to the donors that provided them. The Commission determines that the Schock Committee may refund donations of any amount to the donors to the extent permitted by

State law. The funds identified to be refunded may not also form the basis to fund another disbursement under the proposals outlined in questions 1, 2, and 3.

5. *May the Schock Committee donate funds to certain charitable organizations described in section 501(c)(3) of the Internal Revenue Code?*

Yes, the Schock Committee may donate funds remaining in its account to certain section 501(c)(3) charitable organizations, if permitted by State law.

You state that the recipient charitable organizations will be in the nature of such non-political organizations as the American Red Cross, and that they do not engage in activities in connection with any Federal or non-Federal election, including Federal election activity. Hence, the provisions of 2 U.S.C. 441i(e)(1) and 11 CFR 300.61 and 300.62 restricting Federal candidates in spending funds that do not comply with the amount limits and source prohibitions of the Act would not apply to donations by the Schock Committee to these section 501(c)(3) charitable organizations.

6. *May the Schock Committee retain the funds in its account indefinitely?*

Yes, if State law permits, the Schock Committee may do so because nothing in the Act or Commission regulations bars the Schock Committee from retaining its remaining funds indefinitely.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

Sincerely,

(signed)
Robert D. Lenhard
Chairman