

December 4, 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 2007-26 is available for public comments under this procedure. It was requested by Donald F. McGahn, II, Esq., on behalf of State Representative Aaron Schock and Citizens for Schock.

Draft Advisory Opinion 2007-26 is scheduled to be on the Commission's agenda for its public meeting of Thursday, December 6, 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 12:00pm noon (Eastern Time) on December 5, 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 2007-26, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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December 4, 2007

AGENDA ITEM

For Meeting of: 12-06-07

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Ron Katwan *RBK*
Assistant General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2007-26

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 6, 2007.

Attachment

1 **ADVISORY OPINION 2007-26**

DRAFT

2 Donald F. McGahn, II, Esq.
3 McGahn & Associates, PLLC
4 509 7th Street, N.W.
5 Washington, D.C. 20004

6
7 Dear Mr. McGahn:

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

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

22 ***Background***

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

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

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

21 ***Questions Presented***

22 1. *May the Schock Committee donate funds remaining in its account to the non-Federal*
23 *accounts of State and local Republican party committees?*

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

15 ***Legal Analysis and Conclusions***

16 ***Threshold Determination Regarding Reasonable Accounting Methods***

17 The Schock Committee proposes to make disbursements to the various types of
18 entities described in the questions above. As explained below, only donations from
19 permissible sources that comply with the Act's contribution limits may be used to make
20 the disbursements the Schock Committee proposes to make to the non-Federal candidates
21 and accounts. As a preliminary matter, however, the Commission notes that before
22 making these disbursements, the Schock Committee must first use one reasonable
23 accounting method to identify the donations it received that compose the remaining funds

1 it has on hand and to identify the Federally permissible funds. *See, e.g.* Advisory
2 Opinion 2006-38 (Casey State Committee). The Schock Committee must use the same
3 accounting method for all of its disbursements. The Schock Committee must also make
4 sure that funds that had been received by the Schock Committee and (according to the
5 accounting method) used to fund one disbursement are not used to fund another
6 disbursement.

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

14 *1. May the Schock Committee donate funds remaining in its account to the non-Federal*
15 *accounts of State and local Republican party committees?*

16 *2. May the Schock Committee donate funds remaining in its account to:*

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

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

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

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

1 Yes, the Schock Committee may use its Federally permissible funds remaining in
2 its account to make donations to the non-Federal accounts of the State and local party
3 committees and to the categories of non-Federal candidates listed in question 2, in
4 accordance with State law.

5 As amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Act
6 regulates certain actions of Federal candidates and officeholders, their agents, and entities
7 directly or indirectly established, financed, maintained, or controlled by, or acting on
8 behalf of, Federal candidates or officeholders when they raise or spend funds in
9 connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e); 11 CFR
10 300.60 through 300.65. In pertinent part, BCRA and the Commission regulations
11 implementing BCRA, prohibit those subject to section 441i(e) from soliciting, receiving,
12 directing, transferring, spending, or disbursing funds in connection with any election
13 other than an election for Federal office unless those funds do not exceed the amounts
14 permitted with respect to contributions to Federal candidates under 2 U.S.C. 441a(a)(1),
15 (2), and (3), and are not from sources prohibited by the Act from making contributions in
16 connection with an election for Federal office. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62;
17 *see also* 2 U.S.C. 441a, 441b, 441c, 441e, and 441f. Commission regulations also require
18 such funds to be in amounts and from sources that comply with State law. 11 CFR
19 300.62.²

20 State Representative Schock is a Federal candidate, and the Schock Committee is
21 a non-Federal campaign organization directly established, financed, maintained, or

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.

1 controlled by him. Donations by the Schock Committee to the non-Federal accounts of
2 State and local party committees and to non-Federal candidates would involve spending
3 and disbursing funds in connection with an election other than a Federal election.
4 Therefore, any funds that are donated by the Schock Committee to the non-Federal party
5 committee accounts or the non-Federal candidates described in question 2 must not have
6 been received by the Schock Committee in amounts in excess of those permitted with
7 respect to contributions to Federal candidates³ and must not be from sources prohibited
8 by the Act. *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; *see also* Advisory Opinion
9 2006-38 (Casey State Committee).⁴ As the Commission has previously observed,
10 "unlike other sections of BCRA specifically dependent upon the appearance of a Federal
11 candidate on the ballot", section 441i(e)(1)(B) applies to a Federal candidate at any time,
12 regardless of whether any Federal candidate appears on the ballot. Advisory Opinion
13 2005-02 (Corzine II).

14 The Act and Commission regulations permit the Schock Committee to use the
15 reasonable accounting method it selects to determine which of its remaining funds are
16 Federally permissible. Once the Schock Committee has made that determination, it may
17 donate any amount of such Federally permissible funds to the three types of non-Federal
18 candidates described in question 2 or to the non-Federal accounts of State and local
19 Republican party organizations, provided that such donations are consistent with Illinois

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.

1 law. Thus, because Illinois law permits unlimited donations from one State or local
2 candidate committee to another, and from a State candidate committee to a political party
3 organization, the Schock Committee may donate any amount of Federally permissible
4 funds remaining in its account to non-Federal candidates within and outside the 18th
5 Congressional District and to candidates for local offices such as mayor or city council,
6 regardless of whether their elections occur on the same dates as any Federal elections.

7 *3. May the Schock Committee donate funds remaining in its account to the "successor*
8 *Republican party candidate" for election as State Representative from Illinois' 92nd*
9 *Representative District?*

10 Yes, the Schock Committee may donate Federally permissible funds remaining in
11 its account to Mr. Schock's "successor Republican party candidate," in accordance with
12 the answer to question 2 above.

13 The Commission assumes that this question refers to a candidate who entered the
14 race for the Republican nomination for State Representative in the 92nd Representative
15 District after Mr. Shock's withdrawal from that race. According to the website of the
16 Illinois State Board of Elections, Mr. Schock will not be on the ballot in the February 5,
17 2008, primary election for that office. See

18 <http://www.elections.il.gov/ElectionInformation/CandList.aspx>.⁵

19 The Act provides a limited exception to 2 U.S.C. 441i(e)(1)(B) for Federal
20 candidates and officeholders who also seek State or local office. Specifically, 2 U.S.C.

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.il.gov/ElectionInformation/CandList.aspx>.

1 441i(e)(2) provides that the restrictions of section 441i(e)(1)(B) do not apply to any
2 Federal candidate or officeholder who is or was also a candidate for State or local office
3 so long as the solicitation, receipt, or spending of funds: (1) is "solely in connection with
4 such election for State or local office"; (2) "refers only" to him or her, to other candidates
5 for that same State or local office, or both;⁶ and (3) is permitted under State law.
6 2 U.S.C. 441i(e)(2); 11 CFR 300.63; *see also* Advisory Opinions 2007-01 (McCaskill),
7 2005-02 (Corzine II), and 2003-32 (Tenenbaum).

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

15 The purpose of this exception, however, is to provide an equitable basis for a
16 Federal officeholder or candidate to conduct his or her campaign for non-Federal office
17 so that he or she is not financially disadvantaged when competing with a non-Federal
18 opponent who may raise and spend funds without the same restrictions that section
19 441i(e) imposes on Federal candidates and officeholders. This rationale does not apply
20 when, as here, a Federal candidate wishes to spend non-Federal funds in connection with
21 an election in which he is no longer a candidate and where he is no longer raising or

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 consists only of funds so raised.

1 spending funds for his former non-Federal campaign. The extension of the exception to
2 solicitations or disbursements that refer to other candidates running for the same State or
3 local office merely recognizes that, as a matter of course, a State candidate will refer not
4 only to himself or herself but also to his or her opponents in the State race. Thus, the
5 exception at 2 U.S.C. 441i(e)(2) and 11 CFR 300.63 is meant to apply only to the raising
6 and spending of funds with respect to the Federal candidate's own State or local
7 campaign. Accordingly, the *Explanation and Justification for Prohibited and Excessive*
8 *Contributions; Non-Federal Funds or Soft Money; Final Rule ("Soft Money Final*
9 *Rules")*, 67 Fed. Reg. 49064, 49107 (July 29, 2002) describes the exception as applying
10 to the candidate's "State campaign." Similarly, in Advisory Opinions 2007-01
11 (McCaskill), 2005-12 (Fattah), and 2005-05,n.2 (LaHood) the Commission described the
12 exception as applying "solely in connection with [the candidate's'] State or local
13 campaign."

14 Therefore, the Schock Committee does not come within the exception at 2 U.S.C.
15 441i(e)(2) and 11 CFR 300.63. Accordingly, all donations Schock Committee wishes to
16 make to the "successor Republican party candidate" are treated the same as donations to
17 any other non-Federal candidate, and are covered by the answer to question two above.

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

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

22 As discussed above, 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62 require that funds
23 spent by a non-Federal committee controlled by a Federal candidate must consist of

1 donations that comply with the Act's amount limits and source prohibitions. Under the
2 facts presented here, however, the Schock Committee would be refunding the donations
3 to the donors that provided them. The Commission determines that the Schock
4 Committee may refund donations of any amount to the donors to the extent permitted by
5 State law. The Schock Committee must use the reasonable accounting method adopted
6 for its other disbursements to identify the funds that are to be refunded. The funds
7 identified to be refunded may not also form the basis to fund another disbursement under
8 the proposals outlined in questions 1, 2, 3, and 5.

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

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

13 You state that the recipient charitable organizations will be in the nature of such
14 non-political organizations as the American Red Cross, and that they do not engage in
15 activities in connection with any Federal or non-Federal election, including Federal
16 election activity. Hence, the provisions of 2 U.S.C. 441i(e)(1) and 11 CFR 300.61 and
17 300.62 restricting Federal candidates in spending funds that do not comply with the
18 amount limits and source prohibitions of the Act would not apply to donations by the
19 Schock Committee to these section 501(c)(3) charitable organizations.

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

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

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

8

Sincerely,

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10
11

Robert D. Lenhard
Chairman