



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: COMMISSION SECRETARY *MSD*

DATE: OCTOBER 7, 2008

**SUBJECT: COMMENT ON DRAFT AO 2008-11
Lawrence Martin E. Brown**

Transmitted herewith is a timely submitted comment from Jan Miller, regarding the above-captioned matter.

Proposed Advisory Opinion 2008-11 is on the agenda for Wednesday, October 8, 2008.

Attachment

FAX to the Federal Election Commission

October 7, 2008

**Commission Secretary 202-208-3333
Office of General Counsel 202-219-3923**

Comments on Draft Advisory Opinion 2008-11

1. I am a Federal employee employed under a personal services contract with the U.S. Agency for International Development (USAID) (commonly referred to in USAID as a "PSC").

2. My principal comment is that the Draft Advisory Opinion does not consider the following issue.

Whether the 1993 amendments to the Hatch Act repealed by implication section 441c's ban on political contributions by Federal employees who are employed under personal services.

Given that USAID's Office of General Counsel has advised PSCs that they are subject to the Hatch Act because they are employees for purposes of the Hatch Act, I believe that there is a reasonable argument to be made that the 1993 amendments to the Hatch Act repealed by implication section 441c, which was enacted in 1976, as it applies to federal employees who are employed under personal services contracts.

The 1993 amendments represent a comprehensive scheme governing all political activities of federal employees and the right of federal employees to make political contributions was carefully and fully considered and not prohibited. To allow the form of employment, i.e., a contract under section 441c, to override the substance of the contract, i.e. that the PSC is an employee of the U.S. government under the Hatch Act would not be consistent with the Hatch Act's protection of an employee's right to make political contributions. There is a conflict between section 441c and the Hatch act when it comes to PSCs and the latter-enacted hatch act amendments should prevail.

I have submitted a request to the Office of Special Counsel on the above issue and for the OSC to confirm that USAID's personal services contractors are employees for purposes of the Hatch Act.

I would respectfully submit to the Commission that the Commission

Consider the above issue in the Advisory Opinion

Coordinate with the Office of Special Counsel (OSC) on whether PSCs are employees for purposes of the Hatch Act and the above issue of repeal by implication.

2008 OCT 10 10:01 AM

FEDERAL ELECTION COMMISSION SECRETARIAT

If it is determined that the repeal by implication issue is not within the Commission's jurisdiction, refer the issue to the OSC, Office of Legal Counsel or other authority that is authorized to issue a decision binding on the FEC with regard to section 441c.

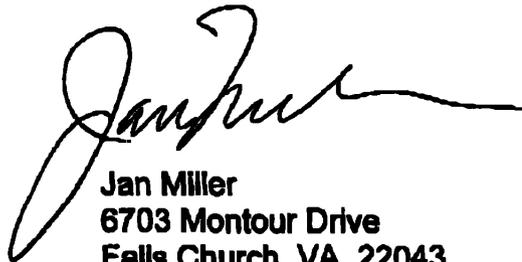
3. My other comment has to do with advisory opinion's emphasis of the term "personal services" in 2 USC 441c.

I question whether section 441c's reference to "personal services" is a specific reference to only personal services contractors as that term is used in the context of federal contracting. The Federal Acquisition Regulations (FAR) makes a distinction between personal services and non-personal services contractors.

By emphasizing "personal services" the opinion could be read as implying that a federal contractor that supplies non-personal services would not be a federal contractor under section 441c. That seems highly improbable given that almost all federal service contracts are non-personal services or institutional contacts, e.g. all contracts on the GSA schedule are for non-personal services. It also conflicts with the cited 1984-53 opinion that concludes that services for leases by non-personal services contractors are contracts for personal services under section 441.

I would submit that the reference to personal services in section 441 is not the same personal services as used in the FAR. Rather, it is a reference to "services" generally and includes both personal and non-personal services contracts as those terms are used in the FAR. I suggest that the advisory opinion clarify that a federal contractor covers both personal and non-personal services as those terms are used in the FAR.

Thank you for your consideration. Please feel free to contact me if there are questions or concerns.



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