

December 3, 2008

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.

Two Alternative DRAFTS of ADVISORY OPINION 2008-17 are available for public comments under this procedure. It was requested by Heather W. Grote on behalf of Missourians for Kit Bond and KITPAC.

Two alternative Drafts of Advisory Opinion 2008-17 are scheduled to be on the Commission's agenda for its public meeting of Thursday, December 4, 2008.

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 5:30pm (Eastern Time) on December 3, 2008.

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 2008-17, 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.

MAILING ADDRESSES

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Federal Election Commission
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Washington, DC 20463

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Associate General Counsel
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Washington, DC 20463

2008 DEC -3 A 10: 49

December 3, 2008

AGENDA ITEM
For Meeting of: 12-04-08

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK (by RCS)*
Assistant General Counsel

Anthony Buckley *AB*
Attorney

Subject: Draft AO 2008-17

SUBMITTED LATE

Attached are proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for December 4, 2008.

Attachments

1 ADVISORY OPINION 2008-17

2

3 Kathryn Biber Chen, Esq.

DRAFT A

4 Patton Boggs LLP

5 2550 M Street, NW

6 Washington, DC 20037

7

8 Dear Ms. Biber Chen:

9 We are responding to the advisory opinion request on behalf of Missourians for
10 Kit Bond (the "Committee") and KITPAC (collectively, "the committees") concerning
11 the application of the Federal Election Campaign Act of 1971, as amended (the "Act"),
12 and Commission regulations, to the committees' proposed payment of expenses incurred
13 by Senator Kit Bond's co-author on a book the two are writing. The Commission
14 concludes that only KITPAC may pay expenses incurred by Senator Bond's co-author.

15 ***Background***

16 The facts presented in this advisory opinion are based on a letter, received on
17 October 24, 2008.

18 Missourians for Kit Bond is the principal campaign committee of Senator
19 Christopher "Kit" Bond. KITPAC is a non-connected multicandidate committee
20 associated with Senator Bond. Both committees are registered with the Commission.

21 For three years, Senator Bond has worked with a journalist to produce a book on
22 the terrorist threat in the Far East. In 2005, Senator Bond and his co-author signed a
23 contract with a major publishing company to publish the book, for which they received
24 an advance of \$60,000. Of this amount, \$43,333 was paid to the co-author, and \$16,667
25 was paid to Senator Bond. Senator Bond paid \$15,000 of his \$16,667 to the publishing
26 agent who secured the original contract, and paid the remaining amount to his co-author.

1 The agreement with the publisher contained a clause common in the publishing
2 industry that required repayment of the advance only if the publisher declined to publish
3 and Senator Bond and his co-author could secure another publisher. The publisher did
4 decline to publish the book and Senator Bond and his co-author sought and secured a
5 second publisher, who will also pay them an advance. This advance will be used to
6 reimburse the first publisher's advance, pursuant to the clause in the first publishing
7 agreement.

8 As a result, no funds from that second advance will remain to fully compensate
9 Senator Bond's co-author for expenses, time, and effort spent in preparing the manuscript
10 for the second publisher's approval. You assert that the fair market value of such
11 services is \$25,000. Proceeds from the sale of the book will first be used to reimburse the
12 second publisher for its advance, and next to reimburse the first publisher for any
13 amounts still owed it. Any additional proceeds remaining after these two obligations are
14 met will be paid to Senator Bond's co-author. Senator Bond will not receive any profits
15 from the book.

16 Senator Bond wishes to pay his co-author \$25,000 from either Missourians for Kit
17 Bond or KITPAC to compensate the co-author for his expenses, time, and effort spent on
18 the book.

19 ***Question Presented***

20 ***May either Missourians for Kit Bond or KITPAC compensate Senator Bond's***
21 ***co-author \$25,000 for his work on the manuscript?***

1 ***Legal Analysis and Conclusions***

2 The Commission concludes that neither Missourians for Kit Bond nor KITPAC
3 may compensate Senator Bond's co-author \$25,000 for his work on the manuscript, but
4 that KITPAC may compensate him \$5,000.

5 ***Missourians for Kit Bond***

6 Under the Act and Commission regulations, a candidate and his or her authorized
7 committee have wide discretion in making expenditures to influence the candidate's
8 election. 2 U.S.C. 439a(a); 11 CFR 113.2. However, neither the candidate nor the
9 candidate's authorized committee may convert contributions accepted by the candidate to
10 the personal use of the candidate or any other person. 2 U.S.C. 439a(b); 11 CFR 113.1(g)
11 and 113.2(e)(5). The Act specifies that conversion to personal use occurs when a
12 "contribution or amount is used to fulfill *any commitment, obligation, or expense of a*
13 *person* that would exist irrespective of the candidate's election campaign or individual's
14 duties as a holder of Federal office." 2 U.S.C. 439a(b)(2) (emphasis added).

15 The Act and Commission regulations provide a non-exhaustive list of items that
16 would constitute personal use *per se*, none of which applies here. See 2 U.S.C.
17 439a(b)(2)(A)-(I); 11 CFR 113.1(g)(1)(i)(A)-(J). For items not on this list, the
18 Commission makes a determination, on a case-by-case basis, whether an expense would
19 fall within the definition of "personal use." 11 CFR 113.1(g)(1)(ii).

20 The Commission has recently considered similar situations. In Advisory Opinion
21 2006-07 (Hayworth), Representative J.D. Hayworth asked whether he could place
22 material promoting sales of a book he had written on his campaign website.
23 Representative Hayworth would have received royalties on any resulting sales. The

1 Commission noted that “expenses associated with marketing a book that a commercial
2 publisher has published and for which it pays royalties to the author are expenses that
3 exist irrespective of the candidate’s election campaign or duties as a holder of Federal
4 office.” Nevertheless, the Commission concluded that the material could be placed on
5 the website because the proposed use of the Committee’s website was limited to the
6 addition of a *de minimis* amount of material to an otherwise substantial website, and that
7 in light of the *de minimis* use of the Committee’s asset, the proposed additions to the
8 Committee’s website did not constitute a prohibited personal use of campaign funds.

9 A contractual obligation to write a book, even one devoted to issues of the day, is
10 a commitment or obligation that exists irrespective of a candidate’s campaign or the
11 duties of a Federal officeholder. Thus, use of campaign funds to defray costs associated
12 with preparation for publication of the Senator’s book would result in personal use of
13 those funds by Senator Bond and his co-author. Unlike in Advisory Opinion 2006-07
14 (Hayworth), the use of the Committee’s assets here, *i.e.* the \$25,000 that would be paid to
15 Senator Bond’s co-author, would not be *de minimis*. Instead, the Committee’s assets
16 would be used to compensate Senator Bond’s co-author for his efforts on the book, which
17 constitutes an impermissible personal use of those assets.

18 *KITPAC*

19 Third parties are limited in what they may pay for on behalf of Federal
20 candidates. Pursuant to 11 CFR 113.1(g)(6), if the use of funds for a particular expense
21 would be a “personal use,” then the payment of that expense by any person other than the
22 candidate or the campaign committee shall be a contribution under subpart B of part 100
23 to the candidate unless the payment would have been made “irrespective” of the

1 candidacy. Such contributions are subject to the per election limits in 2 U.S.C.
2 441a(a)(1)(A) and (2)(A).

3 The Commission's regulations contain three examples of payments considered to
4 be made irrespective of a candidacy, none of which apply here. *See* 11 CFR
5 113.1(g)(6)(i)-(iii). Accordingly, the Commission must consider the individual
6 circumstances of this case.

7 The "irrespective" test contained in the third-party payment provision at 11 CFR
8 113.1(g)(6) differs slightly from the "irrespective" test contained in the general personal-
9 use prohibition at 11 CFR 113.1(g) discussed above in the analysis with respect to
10 Missourians for Kit Bond. The third-party payment provision asks whether the payment
11 would have been made by the third party irrespective of the Federal candidate's
12 candidacy for office. In contrast, the personal-use prohibition asks whether the use of
13 campaign funds would fulfill a commitment, obligation, or expense of the Federal
14 candidate that would exist irrespective of the candidate's candidacy or duties as a Federal
15 officeholder.

16 As noted in the request, KITPAC is a leadership PAC associated with Senator
17 Bond. Pursuant to 11 CFR 100.5(g)(5), a leadership PAC cannot be affiliated with an
18 authorized committee. KITPAC is a "third party" for purposes of 11 CFR 113.1(g)(6).

19 As a third party, KITPAC may pay for the co-author's expenses in an amount that
20 exceeds the \$5,000 per election contribution limit for multicandidate committee
21 contributions to candidates, *see* 2 U.S.C. 441a(a)(2)(A), only if the payments would be
22 made irrespective of Senator Bond's candidacy. Any question as to whether the payment
23 at issue here would be made irrespective of Senator Bond's candidacy is answered by the

1 facts contained in the request itself. The request acknowledges that Senator Bond seeks
2 to publish the book to advance the ideas and philosophies important to his campaign.
3 Indeed, the fact that the Committee has expressed interest in paying the expenses related
4 to the book's publication confirms that the leadership PAC would not be making these
5 payments irrespective of Senator Bond's candidacy. Further, the Committee plans to
6 purchase copies of the book to distribute as gifts to potential contributors. Therefore, the
7 payment would *not* be made irrespective of Senator Bond's candidacy because advancing
8 Senator Bond's candidacy is a motivation in making the payment. Accordingly, any
9 payment by KITPAC would be a contribution to the Committee and would be subject to
10 the \$5,000 per election contribution limit for multicandidate committee contributions to
11 candidates.

12 The Commission expresses no opinion regarding the application of Federal tax
13 law, other law, or the rules of the U.S. Senate to the proposed activities, because those
14 questions are not within the Commission's jurisdiction.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a
19 conclusion presented in this advisory opinion, then the requestor may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the
22 transaction or activity with respect to which this advisory opinion is rendered may rely on
23 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the
2 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
3 All cited advisory opinions are available on the Commission's website at
4 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Donald F. McGahn II
Chairman

1 ADVISORY OPINION 2008-17

2

3 Kathryn Biber Chen, Esq.

DRAFT B

4 Patton Boggs LLP

5 2550 M Street, NW

6 Washington, DC 20037

7

8 Dear Ms. Biber Chen:

9 We are responding to the advisory opinion request on behalf of Missourians for
10 Kit Bond and KITPAC concerning the application of the Federal Election Campaign Act
11 of 1971, as amended (the "Act"), and Commission regulations, to the committees'
12 proposed payment of expenses incurred by Senator Kit Bond's co-author on a book the
13 two are writing. The Commission concludes that only KITPAC may pay expenses
14 incurred by Senator Bond's co-author.

15 ***Background***

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17 October 24, 2008.

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20 associated with Senator Bond. Both committees are registered with the Commission.

21 For three years, Senator Bond has worked with a journalist to produce a book on
22 the terrorist threat in the Far East. In 2005, Senator Bond and his co-author signed a
23 contract with a major publishing company to publish the book, for which they received
24 an advance of \$60,000. Of this amount, \$43,333 was paid to the co-author, and \$16,667
25 was paid to Senator Bond. Senator Bond paid \$15,000 of his \$16,667 to the publishing
26 agent who secured the original contract, and paid the remaining amount to his co-author.

1 The agreement with the publisher contained a clause common in the publishing
2 industry that required repayment of the advance only if the publisher declined to publish
3 and Senator Bond and his co-author could secure another publisher. The publisher did
4 decline to publish the book and Senator Bond and his co-author sought and secured a
5 second publisher, who will also pay them an advance. This advance will be used to
6 reimburse the first publisher's advance, pursuant to the clause in the first publishing
7 agreement.

8 As a result, no funds from that second advance will remain to fully compensate
9 Senator Bond's co-author for expenses, time, and effort spent in preparing the manuscript
10 for the second publisher's approval. You assert that the fair market value of such
11 services is \$25,000. Proceeds from the sale of the book will first be used to reimburse the
12 second publisher for its advance, and next to reimburse the first publisher for any
13 amounts still owed it. Any additional proceeds remaining after these two obligations are
14 met will be paid to Senator Bond's co-author. Senator Bond will not receive any profits
15 from the book.

16 Senator Bond wishes to pay his co-author \$25,000 from either Missourians for Kit
17 Bond or KITPAC to compensate the co-author for his expenses, time, and effort spent on
18 the book.

19 ***Question Presented***

20 *May either Missourians for Kit Bond or KITPAC compensate Senator Bond's*
21 *co-author \$25,000 for his work on the manuscript?*

1 ***Legal Analysis and Conclusions***

2 The Commission concludes that Missourians for Kit Bond may not compensate
3 Senator Bond's co-author \$25,000 for his work on the manuscript, but that KITPAC may.

4 ***Missourians for Kit Bond***

5 Under the Act and Commission regulations, a candidate and his or her authorized
6 committee have wide discretion in making expenditures to influence the candidate's
7 election. 2 U.S.C. 439a(a); 11 CFR 113.2. However, neither the candidate nor the
8 candidate's authorized committee may convert contributions accepted by the candidate to
9 the personal use of the candidate or any other person. 2 U.S.C. 439a(b); 11 CFR 113.1(g)
10 and 113.2(e)(5). The Act specifies that conversion to personal use occurs when a
11 "contribution or amount is used to fulfill *any commitment, obligation, or expense of a*
12 *person* that would exist irrespective of the candidate's election campaign or individual's
13 duties as a holder of Federal office." 2 U.S.C. 439a(b)(2) (emphasis added).

14 The Act and Commission regulations provide a non-exhaustive list of items that
15 would constitute personal use *per se*, none of which applies here. See 2 U.S.C.
16 439a(b)(2)(A)-(I); 11 CFR 113.1(g)(1)(i)(A)-(J). For items not on this list, the
17 Commission makes a determination on a case-by-case basis whether an expense would
18 fall within the definition of "personal use." 11 CFR 113.1(g)(1)(ii).

19 Under the circumstances presented, the Commission concludes that the campaign
20 committee's proposed payment to the co-author would constitute personal use.
21 Notwithstanding that Senator Bond personally will not retain any financial profit or
22 royalties whatsoever, the fact remains that he received a \$16,667 advance on royalties
23 from the first publisher, from which he paid approximately \$15,000 to the publishing

1 agent and the remainder to the co-author. The Senator also will receive an advance from
2 the second publisher, some portion of which presumably will be used to repay the
3 advance from the first publisher pursuant to the first publishing agreement.¹

4 As the Commission concluded in Advisory Opinion 2006-07 (Hayworth),
5 “expenses associated with marketing a book that a commercial publisher has published
6 and for which it pays royalties to the author are expenses that exist irrespective of the
7 candidate’s election campaign or duties as a holder of Federal office.”² In this case,
8 although Senator Bond’s book has yet to be published, the book has been written and two
9 publishers already have decided to publish it (although the first one reversed its decision),
10 the first publisher has paid (and the second publisher has agreed to pay) an advance on
11 royalties to the Senator, and the proposed payment from the campaign committee is a
12 cost of publication or pre-publication marketing expense. Thus, applying the principle in
13 Advisory Opinion 2006-07, whether Senator Bond personally retains the advance on
14 royalties or uses them to pay expenses associated with preparing the book for publication
15 (i.e., the payments to the publishing agent and co-author), these transactions indicate the
16 costs of promoting and publishing the book are not campaign expenditures³ and likely
17 would arise irrespective of Senator Bond’s reelection campaign or his duties as a Federal

¹ The request does not specify the amount of the second publisher’s advance.

² On the facts presented in Advisory Opinion 2006-07 (Hayworth), the Commission concluded that Representative J.D. Hayworth’s campaign committee’s website nonetheless could promote the book because the proposed use of the website was limited to the addition of a *de minimis* amount of material to an otherwise substantial website. In contrast, the use of the Committee’s assets here, *i.e.*, the \$25,000 that would be paid to Senator Bond’s co-author, would not be *de minimis*.

³ The Commission notes that, generally, campaign committees may pay commercial vendors for producing and disseminating any campaign communications, including books, so long as such expenditures are part of transactions in the ordinary course of business and do not convert committee resources to personal use by enriching the candidate personally.

1 officeholder.⁴ Accordingly, these expenses would constitute personal use if the
2 campaign committee were to pay for them, notwithstanding that the book may, as the
3 request asserts, “advance the ideas and philosophies important to [Senator Bond’s]
4 campaign and leadership PAC.”

5 *KITPAC*

6 KITPAC may pay Senator Bond’s co-author because neither the Act nor the
7 Commission’s regulations contains a personal use prohibition for non-authorized
8 committees or non-connected multicandidate committees. KITPAC’s payment to the
9 co-author also would not be subject to its contribution limit with respect to the campaign
10 committee.

11 Generally, “notwithstanding that use of funds for a particular expense would be a
12 personal use . . . payment of that expense by any person other than the candidate or the
13 campaign committee shall be a contribution under subpart B of part 100 to the candidate
14 unless the payment would have been made irrespective of the candidacy.” 11 CFR
15 113.1(g)(6). Such contributions are subject to the per election limits in 2 U.S.C.
16 441a(a)(1)(A) and (2)(A).

17 The “irrespective” test contained in the third-party payment provision at 11 CFR
18 113.1(g)(6) differs slightly from the “irrespective” test contained in the general

⁴ Although the Commission lacks sufficient information to determine the issue, it also may be that the campaign committee’s proposed payment to the co-author would impermissibly settle the Senator’s personal obligation to the co-author. The request states that Senator Bond paid a portion of his own advance from the first publisher to the co-author, which was in addition to the advance that the co-author received directly. This suggests that Senator Bond and the co-author may have an agreement whereby the Senator will compensate the co-author for any difference between what the co-author actually receives from the publishers and what the parties believe is fair compensation for the co-author’s efforts. Because Senator Bond proposes to pay the co-author an additional \$25,000 above and beyond what the second publisher is paying directly to the co-author, this suggests that the \$25,000 is the Senator’s personal obligation, and which obligation would exist irrespective of the Senator’s candidacy for reelection or his status as a Federal officeholder.

1 personal-use prohibition at 11 CFR 113.1(g) discussed above in the analysis with respect
2 to Missourians for Kit Bond. The third-party payment provision asks whether the
3 payment would have been made by the third party irrespective of the Federal candidate's
4 candidacy for office. In contrast, the personal-use prohibition asks whether the use of
5 campaign funds would fulfill a commitment, obligation, or expense of the Federal
6 candidate that would exist irrespective of the candidate's candidacy or duties as a Federal
7 officeholder.

8 As the Commission explained in its Explanation and Justification for 11 CFR
9 113.1(g)(6), "If a third party pays for the candidate's personal expenses, but would not
10 ordinarily have done so if that candidate were not running for office, the third party is
11 effectively making the payment for the purpose of assisting that candidacy."

12 *Explanation and Justification, Contribution and Expenditure Limitations and*
13 *Prohibitions: Personal Use of Campaign Funds*; 60 Fed. Reg. 7862, 7871 (Feb. 9, 1995).

14 The request asserts that Senator Bond "seeks to publish the book purely to
15 advance the ideas and philosophies important to his campaign and leadership PAC, and
16 not to benefit himself personally." With regards to the leadership PAC, the test is
17 whether the payment to the co-author would exist irrespective of Senator Bond's
18 candidacy for reelection or his duties as a Federal officeholder. As a result, because the
19 book would advance the leadership PAC's goals, the leadership PAC would pay for the
20 book and the co-author's expenses irrespective of the campaign. Thus, the \$25,000
21 payment to the co-author would not constitute a contribution under 11 CFR 113.1(g)(6).

