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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA ITEM**  
For Meeting of: 06-25-09

June 4, 2009

**MEMORANDUM**

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

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

Neven F. Stipanovic *NFS*  
Attorney

Subject: Tally Vote Draft AO 2009-07 (Representative Randy Neugebauer)

The attached draft is being circulated for Commission approval on a 24-hour tally vote basis.

Attachment

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1 ADVISORY OPINION 2009-07

2

3 Benjamin L. Ginsberg

4 Kathryn Biber Chen

5 Patton Boggs LLP

6 2550 M Street, NW

7 Washington, D.C. 20037

8

**DRAFT**

9 Dear Mr. Ginsberg and Ms. Biber Chen:

10 We are responding to your advisory opinion request on behalf of Representative  
11 Randy Neugebauer and his principal campaign committee, Neugebauer Congressional  
12 Committee ("Committee"), concerning the application of the Federal Election Campaign  
13 Act of 1971, as amended (the "Act"), and Commission regulations to the use and rental  
14 of a recreational boat that is owned by a limited liability company ("LLC"), which in turn  
15 is partly owned by Representative Neugebauer.

16 Because the LLC would provide use of the boat to the Committee without charge,  
17 and Representative Neugebauer does not hold an undivided ownership interest in the  
18 boat, the Commission concludes that this transaction would be an in-kind contribution by  
19 the LLC. Accordingly, the LLC may contribute the rental value of the boat to the  
20 Committee up to the LLC's permissible contribution limits. The Committee must pay the  
21 LLC the usual and normal charge for any rental value of the boat that exceeds the LLC's  
22 contribution limits.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on  
25 April 8, 2009 and your telephone conversation with Commission attorneys on April 17,  
26 2009.

1 In 2008, Representative Neugebauer, and certain members of his family, formed  
2 an LLC under the laws of the State of Texas. Representative Neugebauer and his wife  
3 together own a sixty percent share of the LLC. The remaining forty percent share is held  
4 by a limited partnership, which is owned by Representative Neugebauer's son,  
5 Representative Neugebauer's daughter-in-law, and two trusts benefitting their children  
6 (Representative Neugebauer's grandchildren). Representative Neugebauer and his wife  
7 also hold a nominal ownership share in the limited partnership. The LLC has elected to  
8 be treated as a partnership for Federal income tax purposes.

9 After formation, the LLC purchased a recreational boat that will be harbored in  
10 the Washington, D.C. area. The LLC intends to rent the boat to third parties and, to that  
11 end, it has consulted with Washington, D.C.-area boat rental companies to determine the  
12 fair market value of renting a boat comparable to the one owned by the LLC. Rental fees  
13 charged by the LLC would cover use of the boat only; renters would be responsible for  
14 hiring and paying for a boat captain, staff, and any other events costs, including catering  
15 charges. The LLC intends to monitor, and change, the fees charged for renting its boat to  
16 ensure seasonal accuracy and to account for any market adjustments.

17 ***Questions Presented***

- 18 1. *May the Committee use the LLC's boat for Committee events without charge if*  
19 *such use does not exceed Representative Neugebauer's right to use the boat?*
- 20 2. *Once the Committee's uncompensated use has exceeded Representative*  
21 *Neugebauer's right to use the boat, may the Committee pay the LLC the fair-*  
22 *market-value rental charge to use the boat?*

- 1    **3.     *As an alternative to using the boat without charge, may the Committee pay the***  
2            ***LLC the fair-market-value rental charge for the right to use the boat?***
- 3    **4.     *May Representative Neugebauer, using his personal funds, pay the LLC the fair-***  
4            ***market-value rental charge for the Committee's right to use the boat?***
- 5    **5.     *If the answer to Question 4 is affirmative, how must Representative Neugebauer***  
6            ***report such an expenditure on behalf of the Committee?***
- 7    **6.     *May the LLC rent the boat to other committees, including other principal***  
8            ***campaign committees, leadership PACs, and party committees, at the fair market***  
9            ***rate?***

10    ***Legal Analysis and Conclusions***

11    ***Question 1: May the Committee use the LLC's boat for Committee events without charge***  
12    ***if such use does not exceed Representative Neugebauer's right to use the boat?***

13            **Under the facts presented, the Committee's use of the LLC's boat is an in-kind**  
14    **contribution by the LLC. Consequently, the LLC may contribute the rental value of the**  
15    **boat up to the LLC's permissible contribution limit. The Committee may use the LLC's**  
16    **boat for Committee events without charge up to \$2,400 in rental value of the boat, per**  
17    **election.**

18            **Candidates for Federal office, except Presidential candidates electing to accept**  
19    **public funding, may make unlimited expenditures from personal funds. 11 CFR 110.10;**  
20    ***see also, Buckley v. Valeo, 424 U.S. 1, 52, 53 (1976).* Accordingly, Representative**  
21    **Neugebauer may make unlimited expenditures deriving from any assets that he has legal**  
22    **right of access to or control over, and with respect to which he has (1) legal and rightful**  
23    **title or (2) an equitable interest. 2 U.S.C. 431(26); 11 CFR 100.33(a).**

1           The facts presented by the requestor indicate that the boat is an asset of the LLC.  
2           This determination is further affirmed by Texas law which provides, as a default, that a  
3           member of an LLC “does not have an interest in any specific property of the company,”  
4           Tex. Bus. Orgs. Code Ann. § 101.106(b), and by the fact that the materials and  
5           information furnished by the requestor do not indicate anything to the contrary regarding  
6           Representative Neugebauer’s property interest in the boat. Accordingly, the LLC holds  
7           the ownership interest in the boat, and the LLC would be providing the use of the boat to  
8           the Committee. Thus, any value deriving from the boat would not constitute “personal  
9           funds” of Representative Neugebauer under the Act.

10           The Commission therefore analyzes this transaction under the statutory  
11           framework applying to LLCs. An LLC is treated as a “person” under the Act.  
12           2 U.S.C. 431(11). Accordingly, LLCs are subject to the Act’s provisions regarding  
13           contributions and expenditures made by persons. 2 U.S.C. 431(8) and (9). The term  
14           “contribution” includes any gift, subscription, loan, advance or deposit of money or  
15           anything of value made by any person for the purpose of influencing any election for  
16           Federal office. 2 U.S.C. 431(8)(A)(i). Commission regulations provide that “anything of  
17           value” encompasses providing any goods or services without charge or at a charge that is  
18           less than the usual and normal charge for such goods or services. 11 CFR 100.52(d)(1).  
19           By allowing the Committee to use the boat for campaign events without charge, the LLC  
20           would be providing the rental value of the boat to the Committee for the purpose of  
21           influencing the election of Representative Neugebauer. The Committee’s use of the  
22           LLC’s boat without charge, therefore, would be an in-kind contribution by the LLC.

1           The Commission generally treats contributions by LLCs consistent with the tax  
2 treatment that the entities elect under the Internal Revenue Code. *See* Treatment of  
3 Limited Liability Companies Under the Federal Election Campaign Act, 64 FR 37397  
4 (Jul. 12, 1999). An LLC treated as a partnership by the Internal Revenue Service is  
5 subject to the contribution limits that apply to partnerships. 11 CFR 110.1(g)(2).  
6 Because the LLC in this case has elected to be treated as a partnership for Federal income  
7 tax purposes, it would be allowed to contribute up to \$2,400 per election.  
8 11 CFR 110.1(b) and (e). Accordingly, the Committee could use the LLC's boat without  
9 charge up to \$2,400 in rental value of the boat, per election. The Commission notes that  
10 a candidate or a political committee may not knowingly accept any contributions in  
11 excess of the statutory contribution limits. 11 CFR 110.9.

12           The rental value of the boat would be the usual and normal charge for a  
13 comparable boat rental in the Washington, D.C. area. Under Commission regulations,  
14 the usual and normal charge for goods is the price in the market from which the goods  
15 ordinarily would have been purchased at the time of contribution; the usual and normal  
16 charge for services is the charge for services at a commercially reasonable rate prevailing  
17 at the time the services were rendered. 11 CFR 100.52(d)(2). In this case, the LLC  
18 would be contributing the charge for the boat rental at a commercially reasonable rate in  
19 the Washington, D.C. area prevailing at the time the services of the boat were rendered to  
20 the Committee.

1 *Question 2: Once the Committee's uncompensated use has exceeded Representative*  
2 *Neugebauer's right to use the boat, may the Committee pay the LLC the fair-market-*  
3 *value rental charge to use the boat?*

4 When the Committee's use of the boat exceeds \$2,400 per election, the  
5 Committee may continue using the boat if it pays the LLC the usual and normal charge  
6 for a comparable boat rental in the Washington, D.C. area. The payment for the use of  
7 the boat at the usual and normal charge would not be treated as an in-kind contribution  
8 from the LLC to the Committee. 11 CFR 100.52(d)(1) and (d)(2).

9

10 *Question 3: As an alternative to using the boat without charge, may the Committee pay*  
11 *the LLC the fair-market-value rental charge for the right to use the boat?*

12 Yes, as the Commission concluded in Questions 1 and 2 above, the Committee  
13 may pay the LLC the usual and normal rental charge for the Committee's use of the boat.

14

15 *Question 4: May Representative Neugebauer, using his personal funds, pay the LLC the*  
16 *fair-market-value rental charge for the Committee's use of the boat?*

17 Yes, Representative Neugebauer may use his personal funds to pay the LLC the  
18 usual and normal rental charge for the Committee's use of the boat.

19 As the Commission noted in Question 1 above, candidates for Federal office may  
20 make unlimited expenditures from personal funds. 11 CFR 110.10. A payment by  
21 Representative Neugebauer to the LLC for the benefit of the Committee would be an in-  
22 kind contribution from Representative Neugebauer to the Committee, and such payment  
23 would not be subject to Act's contribution limits. Accordingly, Representative

1 Neugebauer may pay the LLC for the Committee's use of the boat in unlimited amounts  
2 at the usual and normal charge for a comparable boat rental. The Commission notes,  
3 however, that were Representative Neugebauer to pay the LLC for the Committee's use  
4 of the boat at less than the usual and normal charge, the difference between the actual rate  
5 charged and the usual and normal charge would be considered an in-kind contribution by  
6 the LLC. For proper treatment of an LLC contribution to the Committee, see discussion  
7 in Question 1 above.

8

9 *Question 5: If the answer to Question 4 is affirmative, how must Representative*  
10 *Neugebauer report such an expenditure on behalf of the Committee?*

11 The personal funds expended by Representative Neugebauer must be reported by  
12 the Committee as in-kind contributions from Representative Neugebauer. 2 U.S.C. 434;  
13 11 CFR 100.52(d)(1), 104.13. Such contributions must be reported as both contributions  
14 and expenditures of the Committee and, assuming they aggregate in excess of \$200 in a  
15 calendar year, must be reported on Schedules A and B. 11 CFR 104.13(a)(1),  
16 104.13(a)(2), and 104.3(b)(4)(i).

17

18 *Question 6: May the LLC rent the boat to other committees, including other principal*  
19 *campaign committees, leadership PACs, and party committees, at the fair market rate?*

20 Yes, the LLC may rent the boat to other committees at the usual and normal  
21 charge. As the Commission concluded in Questions 1 and 2 above, payments to the LLC  
22 for the use of the boat at the usual and normal charge would not be treated as an in-kind  
23 contribution by the LLC. 11 CFR 100.52(d)(1) and (d)(2). Accordingly, the LLC may



1 rent the boat to other committees if the LLC charges for the boat rental at a commercially  
2 reasonable rate in the Washington, D.C. area prevailing at the time the services of the  
3 boat were rendered. *Id.* For further guidance, *see* Commission's response to Questions 1  
4 and 2 above.

5 This response constitutes an advisory opinion concerning the application of the  
6 Act and Commission regulations to the specific transaction or activity set forth in your  
7 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
8 of the facts or assumptions presented, and such facts or assumptions are material to a  
9 conclusion presented in this advisory opinion, then the requestor may not rely on that  
10 conclusion as support for its proposed activity. Any person involved in any specific  
11 transaction or activity which is indistinguishable in all its material aspects from the  
12 transaction or activity with respect to which this advisory opinion is rendered may rely on  
13 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or  
14 conclusions in this advisory opinion may be affected by subsequent developments in the  
15 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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On behalf of the Commission,

Steven T. Walther  
Chairman

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